SUPREME COURT OF QUEENSLAND

CITATION:	*Hoveydai v Mak & Anor* [2021] QSC 16
PARTIES:	**SHAHNAZ HOVEYDAI** (plaintiff) v **MAN CHEOK VINCENT MAK** (first defendant) **AAI LIMITED T/AS SUNCORP INSURANCE** ABN 48 005 297 807 (second defendant)
FILE NO/S:	BS 322 of 2020
DIVISION:	Trial Division
PROCEEDING:	Claim
DELIVERED ON:	12 February 2021
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2020; 1 September 2020; 2 September 2020
JUDGE:	Bond J
ORDER:	**The orders of the Court are that:** **1. The parties are directed to bring in minutes of a judgment in favour of the plaintiff reflecting the Court's reasons for judgment by 4:00pm on 19 February 2021.** **2. The proceeding will be listed before Bond J on a date to be fixed in the week commencing 22 February 2021 for the making of formal orders reflecting the agreed position or, in default of agreement, for the resolution of any remaining disputes.** **3. The parties will be heard as to the orders which should be made as to costs at the hearing referred to in order 2.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – GENERALLY – where the plaintiff suffered physical and psychological injuries in a motor vehicle accident – where liability admitted – where the plaintiff's pre-existing physical injuries had fully resolved prior to the accident –

where the plaintiff claims damages for personal injuries from the second defendant as the insurer of the car driven by the first defendant – where damages are assessed under the *Civil Liability Act* 2003 (Qld)

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – PARTICULAR CIRCUMSTANCES – where the plaintiff was working as a registered nurse on a permanent part-time basis prior to the accident – where the plaintiff was unable physically to cope with the duties required of her in her previous role after the accident – where the plaintiff has continued to seek employment – whether the plaintiff has proven economic loss to the requisite standard – whether and to what extent the plaintiff's psychological injuries impact her employment prospects

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – PERSONAL INJURIES – OTHER PECUNIARY DAMAGES – where the plaintiff received and continues to receive care and assistance from her husband following the accident – where the plaintiff expressed estimates of the time spent by her husband on various tasks in the absence of a diary or written record – whether care and assistance meets the threshold in s 59 of the *Civil Liability Act* 2003 (Qld) – where the parties agreed as to the award for special damages

Civil Liability Act 2003 (Qld), s 59, s 60, s 61
Civil Liability Regulation 2014 (Qld)

Beavan v Wagner Industrial Services Pty Ltd [2017] QCA 246, distinguished
Qantas Airways Limited v Fisher [2014] QCA 329, considered
Shaw v Menzies [2011] QCA 197, considered

COUNSEL: J N Sorbello for the plaintiff
G C O'Driscoll for the second defendants

SOLICITORS: Slater + Gordon for the plaintiff
Bray Lawyers for the second defendants

Introduction

[1] On 21 February 2016, the plaintiff was travelling in the front seat of a vehicle driven by her husband at highway speed on the Gold Coast Highway heading to the Gold Coast. The vehicle in front of her car came to a halt. The plaintiff's husband brought their car to a halt without incident. Unfortunately, their car was then hit from behind at speed by a vehicle being driven by the first defendant. It was not in dispute that this occurred because of the first defendant's negligence.

[2] As a result of the accident caused by the first defendant's negligence, the plaintiff suffered both physical and psychiatric injuries. The plaintiff sued to recover damages for negligence. The second defendant was the insurer of the car driven by the first defendant pursuant to a policy issued under and in accordance with the *Motor Accident Insurance Act* 1994 (Qld). The active parties in the proceeding and at trial were the plaintiff and the second defendant.

[3] With commendable efficiency, the active parties' legal advisers narrowed the issues which needed to be resolved. By the end of the trial, the parties had agreed that causation was no longer in issue and the plaintiff was entitled to a money judgment in her favour, but they were in dispute as to the quantum of that judgment.

[4] Many of the integers which should go into the final amount of that judgment were agreed between the parties. The four matters which remained to be resolved were:

(a) the amount which should be assessed for general damages;

(b) the amount which should be assessed for past and future gratuitous care;

(c) the amount which should be assessed for past economic loss; and

(d) the amount which should be assessed for future economic loss.

[5] Before turning to address those matters, it is necessary to make findings as to the effect which the first defendant's negligence had on the plaintiff. I will address that topic first and generally and then will return to make more specific findings when I come to each of the matters for decision identified in the previous paragraph.

The physical injuries caused by the accident

[6] The principal evidence of the nature of the physical injuries suffered by the plaintiff appeared in three medical reports by her orthopaedic surgeon Dr Gillett, respectively dated 30 January 2017, 13 March 2017 and 22 November 2017. All three reports were addressed to the Court and recorded that they had been prepared pursuant to r 428 of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**). Dr Gillett was not required for cross-examination. I accept his evidence.

[7] In the first report, Dr Gillett recorded that the plaintiff had suffered injuries prior to the accident in these terms:

> Some 8 to 9 years ago she injured her neck and left arm when a patient pulled on her left arm. This occurred at work. She lost a short time from work and recovered without any ongoing issues.
>
> Some 7 years ago she was involved in a motor vehicle accident on her way to work where her neck was injured. She had recovered in 4 to 6 weeks with physio and she had no ongoing issues.
>
> With regards her lower back, some 12 months prior to this accident she had hurt her lower back at work. She was doing night duty at the time. She bent down at work. She was treated with physio. She stopped work for 2 months and recovered returning to full duties without any issues.

> She denies any problems with the right shoulder and denies any instability issues with either shoulder before the accident.

[8] I interpolate that the plaintiff's unchallenged evidence before me was that the previous injuries had resolved and that immediately before the 2016 accident, she was able to perform the tasks involved in her work without suffering any ongoing difficulties. I accept that evidence.

[9] Dr Gillett examined the plaintiff in January 2017. He identified that the 2016 accident had caused injuries to the plaintiff's cervical spine, lumbar spine, and to both her shoulders. He reported that there was persistent pain and disability associated with her injured areas and his clinical findings were consistent with ongoing pain and disability from those areas. He thought further diagnostic studies in the form of MRI arthrograms were required in relation to the plaintiff's shoulders.

[10] Dr Gillett recorded the plaintiff's then current symptoms in these terms:

> She uses Nurofen a few times per week for pain and uses a regular heat pack.
>
> She has issues with her neck with general stiffness and discomfort on the left side. Movement seems restricted. There is some radiation of pain to her left forearm and her left arm feels weak. She has difficulty doing things with her left arm. She doesn't have any instability of her left shoulder. Use of her left arm is associated with pain and discomfort in the shoulder using it away from the body above shoulder height associated with paravertebral neck pain to anterior shoulder pain.
>
> On the right shoulder she has a sensation that something moves in the shoulder and she feels it will dislocate. It hasn't dislocated. She is apprehensive about using it. She has a better range of motion on the right side. Lying on either shoulder is a problem.
>
> She has lower back pain. There was a lot of pain the first month. This has improved but she still has issues with standing, sitting and walking. Anything from half an hour to an hour all cause issues. Sleeping is a problem with the lower back. She had leg pain at the start but now it is irregular. She avoids heavy lifting and bending activities. Walking is an issue. Sitting for any length of time is an issue. She gets numbness in her hip and lower back region. Sleep is disturbed.

[11] Dr Gillett had been briefed to assess whether the plaintiff was suffering from a whole person impairment, and if so, whether that impairment arose from the injury sustained in the accident as opposed to any pre-existing impairment. He expressed his conclusion in these terms (emphasis added):

> In relation to the cervical spine she is assessed as a DRE category II impairment based on asymmetric range of motion measure as a 5% impairment of whole person function with reference to Table 15-5.
>
> With regards her lumbar spine she is assessed as a DRE II impairment measured at 5% reflecting asymmetric range of motion of the lumbar spine with reference to Table 15-3.
>
> In each category I would apportion 1% of her current impairment due to pre-existing pathological process and injuries involving the cervical and lumbar spine. **That is overall I regard the cervical spine due to this accident as a 4% impairment of whole person function and the lumbar spine due to this accident as a 4% impairment of whole person function.**
>
> **Further assessment of the shoulders can be made based on the MRI arthrograms**.

[12] Dr Gillett's second report was prepared after he had been put in receipt of a relevant MRI scan and a report on both of the plaintiff's shoulders. On the right shoulder there was an undisplaced SLAP lesion and on the left shoulder there was an incomplete partial tear of the infraspinatus. Dr Gillett proceeded to express his clinical judgment in these terms (emphasis added):

> Without [surgical treatment which he recommended], I would regard the [plaintiff's] condition as stable and stationary and has a **measured impairment of the right shoulder of 2% which equates to a 1% loss of whole person function with reference to Figures 16-40, 16-43 and 16-46 and with regards the left shoulder an 8% impairment of upper extremity function which is a 5% loss of whole person function**.
>
> With successful outcome of surgery I would anticipate the impairment to reduce to approximately 1% in each shoulder.

[13] Unlike his first report, the second report did not specifically address the question whether any part of the whole person impairment attributable to the shoulders should be apportioned to pre-existing conditions. However, the second report was expressed to be a report prepared "further to" the first report and it also stated that it contained reference "to all matters I consider significant and I understand my duty to the court and I have complied with the duty to the best of my ability". Dr Gillett must be taken to have known that the report was prepared to answer a particular question, the answer to which had been postponed by the previous report. He must also be taken to have known that he was being asked to identify the impairment that arose from the injuries sustained in the accident as opposed to any pre-existing conditions, for the purpose of litigation in which damages were sought for the injuries sustained in the accident.

[14] Accordingly, I would infer that the report intended to convey that the whole person impairments that he identified as existing in relation to the shoulder injuries were attributable to the injuries sustained in the accident as opposed to any pre-existing conditions. If it were otherwise, and Dr Gillett had in fact been doing that which his report said he was doing, that would have been something which Dr Gillett would have stated. I find it easier to draw that inference because the second defendant has neither sought to cross-examine Dr Gillett to suggest that he had not in fact discharged his task properly, nor has it sought to adduce any evidence to suggest that the whole person impairments identified by Dr Gillett were in fact either wholly or partially attributable to pre-existing conditions.

[15] Dr Gillett's final report was dated 22 November 2017. By that time, he had been instructed that the plaintiff did not intend to undergo the shoulder surgery that he had recommended and he was asked to confirm whether this altered his opinion in relation to the assessment of the impairment as well as the plaintiff's likely future employment prospects.

[16] His answer was in these terms (emphasis added):

> Impairment regarding the right shoulder would remain based on this information and my examination as a 2% impairment of upper extremity function which is a 1% loss of whole person function with reference to Figures 16-40, 16-43 and 16-46.
>
> The left shoulder would be assessed using the same methodology as an 8% impairment of upper extremity function which is a 5% loss of whole person function.
>
> **In relation to her ability to work she is best suited to not undertake employment in nursing where heavy lifting would be required or activities using her arms away from the body above shoulder height.**
>
> **In nursing she would need to adhere to a strict no lifting policy regarding her shoulders and overall injury. She has capacity to work in lighter wards, outpatients facilities and in general nursing if there was a strict adherence to the no lifting policy.**
>
> This relates to restrictions physically regarding untreated shoulder pathology and the issues associated with her neck and lumbar spine.

[17] For the reasons I have expressed in relation to his second report, I would infer that the third report also intended to convey that the whole person impairments that he identified as

existing in relation to the shoulder injuries were assessed as attributable to the injuries sustained in the 2016 accident as opposed to any pre-existing conditions.

The psychiatric injuries caused by the accident

[18] The plaintiff also suffered psychiatric injuries as a result of the 2016 accident in the form of:

(a) a major depressive disorder with melancholic features; and

(b) an adjustment disorder with anxious mood.

[19] The principal evidence of the nature of those injuries appeared in three reports by Dr Mathew, an independent psychiatrist, dated 23 May 2017, 26 June 2020 and 26 August 2020. All three reports were addressed to the Court and recorded that they had been prepared pursuant to r 428 of the UCPR. As had been the case with Dr Gillett, Dr Mathew was not required for cross-examination. I accept his evidence.

[20] In his first report, Dr Mathew recorded that the plaintiff had struggled to negotiate her pain and had been distressed about the impact of her injuries upon her work. She had not then been able to return to work. Dr Mathew diagnosed the plaintiff as suffering a major depressive disorder with severe melancholic features and an adjustment disorder with anxious mood. He evaluated her as having a current whole person impairment of 22% as determined in accordance with the Psychiatric Impairment Rating Scale (**PIRS**). He attached his worksheet explaining how he arrived at that outcome and he noted that improvements were possible if she was able to engage in treatment. Amongst other things he thought that, as a consequence of her state of mind, she was at that stage unfit for any form of work. He thought it was imperative that she received psychiatric treatment to address her depressive illness and Cognitive Behavioural Therapy to target her post-traumatic symptoms. He identified some evidence of suicidal ideation which he recommended being monitored and treated.

[21] By June 2020, Dr Mathew reported the plaintiff's psychiatric state to be much improved. He noted his previous diagnosis and that he had assessed her impairment to be 22%. He noted the significant improvement in her depression and anxiety over the three years since his first assessment in these terms:

> There had been a significant improvement in [the plaintiff's] depression and anxiety over the three years since my first assessment.
>
> [The plaintiff] continued to suffer significant depressive symptoms with ongoing poor motivation and social withdrawal. She was no longer teary. There had been a partial reduction in her irritability and there had been some improvement in her relationship. She had regained some libido. [The plaintiff] was now caring for herself well. Despite these reported improvements, [the plaintiff] presented as markedly depressed. My impression was that [the plaintiff] was very motivated and was functioning well, despite a high level of depression.
>
> There had also been improvements in her post-traumatic driving anxiety. She was sleeping well and not suffering nightmares. [The plaintiff] was able to manage the 15-minute drive to work. She was anxious, particularly on highways and at speed. She was vigilant. [The plaintiff] did not drive into her appointment today, relying on her husband. She avoided unfamiliar roads.

[22] He added that she had met with a psychologist subsequent to his previous assessment and had attended several times but did not find it helpful. She had received no further psychological treatment and was firmly opposed to medication. As to diagnosis, Dr Mathew stated she was suffering a major depressive disorder (in partial remission) and an adjustment disorder with anxious mood. As to prognosis he stated:

> [The plaintiff's] condition is now stable. She is suffering from ongoing depressive and anxiety symptoms, more than four years after the accident. [The plaintiff] had trialled psychological treatment but had not found this to be helpful. She was firmly opposed to the use of antidepressant medication. [The plaintiff's] mood disorder is perpetuated by her physical state. If the latter improved, a resolution of her psychological conditions would be likely.

[23] Dr Mathew opined that her psychological injuries were the result of the motor vehicle accident and assessed that she had suffered a permanent whole person impairment of 4% as determined in accordance with the PIRS. He thought that there were no ongoing occupational limitations arising from her psychiatric illness. Although she remained depressed, he opined that she was highly motivated. He further noted that it was outside the scope of his speciality to assess any physical limitations.

[24] Dr Mathew's third report clarified that the psychiatric injuries which the plaintiff had suffered had an ongoing impact on her employment prospects. He was asked whether her mental state would have had, or would continue to have, an impact on her performance at job interviews. He explained that her depressive illness would have the consequence that she would not present as an attractive candidate at job interviews. Because of her depressive state, she would present as someone numb and shut down and with whom an interviewer would find it difficult to connect at an interpersonal level. He attributed the fact that she had continued to try to return to work as somewhat surprising, but thought it was a tribute to her motivation and tenacity.

The impact of the accident on the plaintiff's need for care and on her ability to work

[25] At the time of the accident, the plaintiff was a Registered Nurse at the Royal Brisbane Women's Hospital (**RBWH**). She had been working as a Registered Nurse since 2008. She worked in an Acute General Medical Ward. She was employed on a permanent part-time basis comprising three eight hour shifts per week (about 0.6 FTE[1]).

[26] The nature of the impact of the accident on the plaintiff was canvassed in these aspects of the evidence:

(a) expert opinion evidence in the form of reports obtained during the plaintiff's post-accident rehabilitation;

(b) the oral evidence of the plaintiff for the purposes of this trial; and

(c) independent expert opinion evidence prepared for the purposes of this trial.

The expert opinion obtained for the plaintiff's post-accident rehabilitation

[27] The following reports were obtained:

(a) reports dated 23 March, 1 May and 31 August 2018, from Ms Meggiorin, an occupational therapist;

(b) reports dated 28 March 2018 and 23 January 2019 from Mr Fraser, an occupational therapist; and

(c) a report dated 28 May 2019 from Dr Douglas, an occupational physician.

[28] All the foregoing reports were tendered jointly by the parties to be "admitted for all purposes". None of the authors were required for cross examination.

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[1] Full Time Equivalent.

[29] It suffices to record the views expressed by Mr Fraser and Dr Douglas, which I accept.

[30] In March 2018, Mr Fraser reported that the plaintiff had described to him her duties in her substantive position as a Registered Nurse in the Acute General Medical Ward at the RBWH. Patients in that ward commonly had multiple comorbidities and the plaintiff's duties involved her giving medications; performing observations; dressings; assisting patients with personal care (showering, dressing, grooming, feeding and toileting); assisting patients with transfers (including use of slide sheets, pat slides and hoists); pushing and pulling wheelchairs, beds and trolleys; and completing documentation. He recorded that he was very familiar with the duties which were required of the plaintiff in her substantive position. He formed the following views:

(a) The plaintiff was not physically capable of performing the duties required of her substantive position as a Registered Nurse at the RBWH on a safe, productive and sustainable basis.

(b) She would require significant improvement in the functional capacities demonstrated at assessment on 28 March 2018 to be successful in returning to her substantive position as a Registered Nurse.

(c) She would be restricted to performing sedentary/light nursing duties including the following:

  (i) giving medications;

  (ii) performing observations;

  (iii) simple dressings with the bed at an appropriate height;

  (iv) assisting patients with lighter personal care activities (i.e. feeding and grooming); and

  (v) completing documentation.

(d) The plaintiff would not be physically capable of performing duties including the following:

  (i) assisting patients with personal care activities (i.e. showering, dressing, and toileting);

  (ii) assisting with patient transfers (including the use of slide sheets, pat slides and hoists); and

  (iii) pushing and pulling wheelchairs, beds and trolleys.

[31] As at June 2018,[2] Dr Douglas had formed the view that the plaintiff was fit to return to sedentary duties only and was unable to perform CPR, manual handling, any patient transfers, lift heavy linen bags or perform overhead reaching activities, particularly with the

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[2] In his 2019 report referred to below, Dr Douglas recorded that he had prepared a 21 June 2018 report, but during the trial I was told that it could not be found. The source of what I have recorded is Mr Fraser's January 2019 report. *Beavan v Wagner Industrial Services Pty Ltd* [2017] QCA 246 would suggest that ordinarily I should regard Mr Fraser's record of the contents of another practitioner's report as inadmissible hearsay in the same way as I would regard a record by him of what someone else had told him (indeed all the more so as it was double hearsay). In this case because there was a joint tender of Mr Fraser's report to be "admitted for all purposes", I think *Beavan* is distinguishable and it is permissible to take the course I have taken.

left arm. His opinion, based on her then presentation and the uncertainty regarding her possible frozen shoulder, was that she was unable to resume the full range of duties of her substantive position and that this was likely to be permanent.

[32] In 2019, both Mr Fraser and Dr Douglas saw some improvement in the plaintiff's position, albeit not improvement which permitted them to express the view that she was fit to perform the full range of duties of her previous role.

[33] In his 23 January 2019 report, Mr Fraser summarised his views in this way:

> 24. Whilst her clinical and functional presentation at assessment on 21 January 2019 had improved when compared with her initial assessment on 28 March 2018, [the plaintiff] presented with ongoing restrictions with activities involving the following:
>
> • Prolonged sitting and static standing without the opportunity for postural variation;
>
> • Prolonged or repetitive bending and/or twisting;
>
> • Reaching above shoulder level with the left upper limb, particularly whilst handling load;
>
> • Forceful grasping and/or turning with the left hand;
>
> • Medium to heavy manual handling (i.e. lifting, carrying, pushing or pulling).
>
> 25. Considering her self-report of ongoing symptoms/restrictions and presentation at assessment on 21 January 2019, [the plaintiff] is currently capable of employment of a SEDENTARY to LIGHT nature only (as detailed by the Dictionary of Occupational Titles) allowing a level of flexibility for postural variation.
>
> 26. Based on her clinical and functional presentation at assessment on 22 January 2019, I am of the opinion that [the plaintiff] is not physically capable of performing all duties (and inherent requirements) of her substantive position as a Registered Nurse in IMS on a safe, productive and sustainable basis. She is likely to experience aggravation of symptoms associated with her left shoulder and left sided neck, lower back and left hip as a result of the cumulative effect of the occupational demands of work as a Registered Nurse in IMS.
>
> 27. Whilst it is accepted that [the plaintiff] will have become deconditioned to work as a Registered Nurse having not worked in the same capacity since February 2016 (period of almost three years), she would require further improvement in her functional capacities to be successful in returning to all duties required of her substantive position as a Registered Nurse in IMS and fulfilling the duty of care that extends to her work colleagues and patients.
>
> 28. [The plaintiff] would be at high risk of further aggravation of her symptoms (and identified the same would be of ongoing concern) when required to be performed the following duties, particularly on a repetitive basis:
>
> • Assisting heavier/dependant patients with personal care activities (i.e. showering, dressing, and toileting);
>
> • Assisting heavier/dependant patients with transfers and positioning in bed (including the use of slide sheets, pat slides and hoists);
>
> • Pushing and pulling wheelchairs, beds and trolleys and moving furniture;
>
> • Striping and making multiple beds;
>
> • Attending to complex dressings.

[34] In his 28 May 2019 report, Dr Douglas expressed the view that the plaintiff's symptoms had much improved since he had last seen her in June 2018. He summarised his view in this way:

> In my opinion, [the plaintiff] is fit to attempt a graduated return to work. She has not worked in clinical nursing since February 2016. She last worked in November 2018. She spent two months working with the Lung Foundation Australia three eight-hour shifts per week and had no difficulties doing sedentary work

> using a computer and answering telephone enquiries and emails as well as being involved in webinars. On this basis she should be offered a graduated return to work.
>
> In my opinion she would cope with medical nursing in an outpatient environment initially before attempting any return to clinical nursing. Her restrictions are lifting overhead up to 2 kg but not repetitively i.e., can put items away on shelving. She can lift up to 10 kg between neck and bench height and 7½ kg from floor to bench height. She can undertake these tasks occasionally but not repetitively. At this stage she should still avoid patient transfer activities but in my opinion she could attend to complex dressings; she explained that she was able to put pillows under the legs of diabetics who required dressings and raise the bed to the appropriate level to avoid prolonged stooping forward. She can also undertake usual patient observations and all administrative tasks. Her restrictions are compatible with working in an outpatient role using her clinical skills or in a clinical auditing/quality assurance role.
>
> As she has not worked regularly since November 2018, [the plaintiff] could commence one day a week in an outpatient setting for two weeks followed by two days a week being the Monday and a Friday for two weeks followed by four weeks Monday, Wednesday and Friday. If she is coping with this, she could attempt one day a week on the wards and two days a week in an outpatients' department. She should have the usual breaks that all staff get for morning tea and lunch and her shifts should be the usual 8 hours a day. [The plaintiff] proved that she could cope with working in a clinical administrative role when volunteering at Lung Foundation Australia. Provided there is a proper ergonomic environment, should she be doing any administrative tasks such as on a computer, she should have no difficulties in regards to her neck.

<u>The plaintiff's evidence</u>

[35] The plaintiff gave evidence on her own behalf. I found her to be a credible witness whose evidence I should accept.

[36] She came to Australia as a refugee from Iran as a teenager. She went to High School in Brisbane completing her senior year in 1990. After school she commenced studying an engineering degree at Griffith University, later changing to a double degree in engineering and information technology. However, she did not complete her studies because she had married and became pregnant with her first child.

[37] Her children were born in 1995 and 1997. Although she had initially planned to go back to complete her university studies, she found the burden of looking after her children without much support prevented her doing so. Whilst the children were young, she worked with her husband in his IT company. In that position she performed mainly an administrative role.

[38] When her children were a little older, she returned to study for a degree in medical science. After 18 months she changed her focus to a degree in nursing. She obtained her degree in nursing in February 2008. She commenced permanent employment with Queensland Health at the RBWH as a Registered Nurse, initially for 4 days per week (0.8 FTE). She later reduced her hours to 0.6 FTE because she felt she needed to spend more time with her young teenage children.

[39] I interpolate that the documentary evidence revealed that the plaintiff was well-regarded by her employer:

(a) A performance appraisal on 7 February 2013 stated:

> Over the last 12 months Shahnaz has committed to deliver a high standard of care in the acute medical ward setting. Shahnaz continues to update her knowledge and skill ensure 'best practise' delivery.
>
> Shahnaz has a strong work ethic and calm personality which contributes to a pleasant work environment for her peers. Shahnaz supports her peers and acts as a resource for new starters and new graduate nurses. Her role as preceptor is favourably received.

> Shahnaz is proactive in her role of Hand hygiene champion providing education to ward staff resulting in increased compliance. Well done!
>
> Shahnaz's leadership skills are continuing to develop with the shift coordinator role…

(b) A performance appraisal on 14 April 2015 stated:

> Shahnaz has continued to provide a high standard of nursing care over the past 12 months. She continues to update her practice and skills.
>
> Shahnaz has attended in-service and education sessions as part of [indecipherable] group, but needs to disseminate this information to other staff members, and conduct her [indecipherable] in-services.
>
> Shahnaz has gained some experience in working as the shift leader/co-ordinator and has done this in a calm, professional, competent manner.
>
> Shahnaz has provided preceptorship to EEN new grads, and provided ongoing support.
>
> Shahnaz is a competent, confident, member of the team, an asset for [the ward].

[40] By the time of the 2016 accident, she was still working at 0.6 FTE. Her children were themselves at university and she and her husband had bought a house at St Lucia. In order to meet the increased mortgage commitment of that purchase, she formed the intention to move to a full-time position i.e. 1.0 FTE. She had made enquiries about full time roles at the RBWH and had made an unsuccessful application for a full-time clinical nursing role.

[41] The plaintiff described the more physically demanding parts of her duties in her role as a Registered Nurse at the RBWH. As a general proposition, she had no difficulty in doing those duties. There had been an incident which resulted in a WorkCover claim when a patient injured her by pulling on her arm, but that had resolved and she was able to perform her duties. She had also been in a previous car accident, but again and after some treatment, she recovered and was able to return to work and perform her duties. As at the time immediately prior to the 2016 accident she had no problems with performing those duties.

[42] She described the circumstances of the accident and its aftermath. She had been in contact with her employer and provided them with medical certificates explaining why she could not work. After about 4 or 5 months after the accident, her doctor recommended that she could go back to light duties. However, the RBWH did not allow her to return to work to perform light duties. The first occasion she was able to return to work at the RBWH was in August 2019.

[43] Between the time of the accident and August 2019, she received income protection benefits through QSuper and received assistance from that body with a view to seeking to return to work. Her case worker was Ms Meggiorin. During this period she was able to do the volunteer work described in Dr Douglas' report. She did this because she thought it might assist her in getting back to work. She also applied for a few nursing positions but was not successful. She still sought to get reemployed with the RBWH, hoping to be able to do light duties. Engagement with the hospital resulted in her being assessed by Mr Fraser and Dr Douglas and the production of the reports to which I have earlier referred.

[44] The RBWH was resistant to the plaintiff's efforts to return to work and, it seems, was seeking to have the plaintiff retire due to ill health. I observe the hospital's attitude appears to be consistent with the generally pessimistic views expressed by Mr Fraser and Dr Douglas in 2018. Indeed, in November 2018, and in response to a notification submitted on behalf of the RBWH by the Director of Nursing, the Australian Health Practitioner Regulation Agency (**AHPRA**) commenced an inquiry into whether the plaintiff had an impairment that detrimentally affected her ability to safely practice her profession. The plaintiff resisted that

conclusion, going so far as to engage solicitors to present submissions to AHPRA, and in December 2018 AHPRA determined not to take any further action in relation to the inquiry.

[45] The plaintiff described the circumstances of her return to work in August 2019. Consistently with the more positive views which Dr Douglas expressed in May 2019, she started a gradual return to work. Initially she worked at an outpatient unit for one day a week. Then her hours increased to two days a week, and after three months, she was back to three days a week or 0.6 FTE. The tasks involved in that job were more manageable than those in her old job at the Acute General Medical Ward and she had no difficulties performing them.

[46] She was unable to secure a position in the outpatient unit, and by late 2019, she returned to her old job in the Acute General Medical Ward. Again, she started out at one day per week and then her hours increased gradually and by the middle of 2020 she was back at three days per week (or 0.6 FTE). She found that she was unable to cope with the hours or the physical demands of the role working at 0.6 FTE. She suffered pain in her shoulders and back throughout and after the shifts. When she was rostered to do 0.6 FTE, she found her pain was just about constant. The result was that she took a lot of paid and unpaid sick leave and recreational leave.

[47] It was evident that the plaintiff could not cope with the burdens required by a 0.6 FTE performance in her old job, and this despite the fact that the hospital formally adhered to a so-called "no lift policy" for its staff. The physical demands were too difficult for her and she could not respond adequately to the rostering flexibility which was required of her. She could not, for example, cope with being rostered to work for two or three consecutive days because that would give her insufficient time for recovery. In her view, she could cope with a part-time role in a less physically demanding sector of nursing. She has sought such roles, albeit unsuccessfully to date. Indeed, in 2018 and 2019 she made in excess of 20 unsuccessful job applications. I interpolate the observation that her lack of success is consistent with the observations made by Dr Matthew in his August 2020 report.

[48] She has sought to have the RBWH accommodate her by offering a reduced number of shifts, but the hospital has not been prepared to do so and has communicated to her its expectation that she perform her duties at 0.6 FTE.

[49] The plaintiff's counsel elicited the following evidence from the plaintiff concerning the need which she had for gratuitous services because of the injuries which she suffered.

[50] Prior to the accident:

(a) she was responsible for the cooking and cleaning of the kitchen;

(b) she was responsible for the grocery shopping;

(c) the vacuuming of the floors was shared in that her husband would vacuum the floors "maybe once a fortnight" whilst she would vacuum the floors a few times a week;

(d) mopping of the floors was shared – she and her husband each mopped the floors once or twice a week;

(e) the bathrooms she used were cleaned once a fortnight by her and once a fortnight by her husband;

(f) she washed and ironed her own clothes; and

(g) she performed the majority of the gardening tasks in her family's big backyard.

[51] Following the accident, she found she was unable to perform many of those tasks because of the pain which she suffered. Instead:

(a) her husband had to do the cooking for quite a while after the accident when she found she couldn't cope with standing in one position, but she now finds that she had returned to doing the cooking most of the time;

(b) her husband had to do the grocery shopping immediately after the accident and for a couple of years, but she and her husband share the grocery shopping now most of the time;

(c) her husband commenced performing the vacuuming immediately after the accident and he continued to do so;

(d) her husband now mops the floors in her house; and

(e) most of the time her husband does the laundry, although sometimes she does it.

[52] The plaintiff expressed certain estimates as the time spent by her husband in various tasks which he has taken over since the accident. The following table identifies what I would find that she intended to convey were estimates applicable to the time spent by her husband doing those tasks during the first year after the accident.

Task	Time taken per week
Laundry:	15 – 30 minutes
Ironing:	1 hr
Vacuuming and mopping:	2 – 3 hrs
Bed changing:	10 – 15 mins
Grocery shopping:	2 hrs
Cleaning kitchen:	30 – 45 minutes per day: therefore 3.5 hrs – 5.25 hrs
Cooking:	7 – 10.5 hrs
Driving:	2 hrs
TOTAL	15.91 hrs – 24.5 hours

[53] Although I would accept that the plaintiff was doing her best to identify accurate estimates in relation to the issues canvassed, I could not attribute 100% accuracy to her present recollection. She had not kept any diary and her estimates were expressed to me some time after the event. Of course, that does not mean that they are without any evidentiary value. I will return to the question of whether there should be an award of damages in respect of the need for help.

Independent expert opinion prepared for the purposes of this trial

Surgical and psychiatric evidence

[54] Two aspects of the evidence I have already mentioned should be recapitulated.

[55] First, as at 22 November 2017, the plaintiff's surgeon opined that as a result of her physical injuries, the plaintiff was best suited to not undertake employment in nursing where heavy lifting would be required or activities using her arms away from the body above shoulder height. He thought that in nursing she would need to adhere to a strict no lifting policy regarding her shoulders and overall injury. He thought she had capacity to work in lighter wards, outpatient facilities and in general nursing if there was a strict adherence to the no lifting policy.

[56] Second, as at August 2020, Dr Mathew had opined that the extent of the plaintiff's depressive illness was such that she would not present as an attractive candidate in employment interviews.

Occupational therapist evidence at trial

[57] It remains to address the expert opinion evidence adduced from the plaintiff's occupational therapist Mr Siebel and from the second defendant's occupational therapist Ms Zeman. Both appeared before me and were cross-examined. Their evidence was relevant to the question of the extent of the plaintiff's need for past and future gratuitous care and also the question of the plaintiff's ongoing capacity to work.

[58] Mr Siebel provided a report dated 24 November 2017 and an updated report dated 6 August 2020. Both reports were addressed to the Court and contained the confirmations contemplated by r 428 of the UCPR.

[59] The following table summarises the opinions expressed in Mr Siebel's reports.

Item	Report dated 24 November 2017	Report dated 6 August 2020
1	Mr Siebel found that the plaintiff could walk, climb stairs, grasp and perform fine motor tasks without specific limitations. However, he opined that the plaintiff had the following functional restrictions: - Occasional lifting and carrying capacity of less than 3kg - Lessened tolerances for standing, sitting and driving - Must avoid performing tasks requiring high levels of dynamic balance - Reduced abilities with activities requiring stooping, kneeling and crouching to handle items at ground level - Unable to bear weight fully through left arm to adopt crawling and pushing positions - Needs to limit activities requiring repetitive or sustained reaching forward and to overhead height with the left arm. Mr Siebel assessed the plaintiff's current functional capacities by reference to the Dictionary of Occupational Titles (**DOT**). He assessed her to be suited to sedentary work, namely work involving - - exerting up to 4.5kg of force occasionally; and/or - exerting a negligible amount of force frequently, to lift, carry, push, pull, or otherwise move objects, including the human body.	Mr Siebel found that the plaintiff could walk, climb, grasp and perform fine motor tasks without specific limitations. However, he opined that the plaintiff had the following functional restrictions: - Occasional lifting and carrying capacity of less than 5kg - Lessened tolerances for prolonged standing, sitting and driving - Unable to perform tasks requiring high levels of dynamic balance - Reduced abilities with activities requiring stooping, crouching and kneeling to handle items at ground height - Poor abilities with tasks requiring full weight bearing through upper limbs to adopt crawling and pushing positions - Needs to limit tasks requiring repetitive or sustained reaching forward and to overhead height. Mr Siebel continued to assess the plaintiff's current functional capacities to be suited to sedentary work, in the manner previously defined. Mr Siebel compared the plaintiff's presentation in October 2017 and in August 2020 in these terms: - She was no longer receiving psychological counselling. She continued to rely on regular over the counter medication to manage her persistent pain.

Item	Report dated 24 November 2017	Report dated 6 August 2020
	In the terminology he used "occasionally" to mean the activity or condition which exists up to 1/3 of the time and "frequently" meant the activity or condition which exists from 1/3 to 2/3 of the time. Sedentary work involved sitting most of the time, but could involve walking or standing for brief periods of time. Jobs were sedentary if walking and standing were required only occasionally and all other sedentary criteria were met.	- She had participated in vocational rehabilitation and was presently working three days a week in her substantive role, as a registered nurse in the Medical Ward at the Royal Brisbane & Women's Hospital, although with considerable reported pain and difficulties. - She remained limited with many of her activities of daily living and continued to rely on help from her family with same. Her recreational participation was unchanged. - Her weight was the same. Her pain distribution and pain intensity reporting had increased. Her cervical and lumbar spine and shoulder movements were relatively unchanged. Her perception of disability was very slightly improved. - Her lifting and carrying capacity had slightly improved. She was presently able to bear some weight (although very tentatively) through her upper limbs to adopt crawling and pushing positions. She continued to have restrictions with standing, sitting and driving, balancing, stooping, crouching and kneeling and with reaching. She now had reaching restrictions with her right arm (as well as her left).
2	Mr Siebel opined that the plaintiff's assessed functional capacity meant she was commercially unable to cope with the physical demands of being a registered nurse in a medical ward. With difficulties she had the functional capacity to work in a call centre as an informational technology support technician. He thought that, having regard to the plaintiff's psychological state, she was currently commercially unemployable and further significant improvement in her mental health state would be necessary before she could begin to contemplate a durable return to work. He thought she would need vocational rehabilitation to assist her return to appropriate employment if/when her mental health state improved. He thought that, with adequate improvement in her psychological state, the plaintiff's theoretical longer-term employment direction could be as a registered nurse in a call centre setting. He thought she would realistically and	Mr Siebel opined that the plaintiff's assessed functional capacity meant that she was able with difficulties to perform some of the tasks associated with being a registered nurse in a medical ward. However, she was commercially unable to cope with most of the tasks associated with that role. She would be functionally precluded from working in a reasonably efficient and long-lasting basis in registered nursing occupations that required prolonged standing, crouching and stooping, pushing and lifting and carrying. She would be at an increased risk of experiencing further musculoskeletal problems to her lower back and shoulders by working in such positions. He thought that with difficulties she had the functional capacity to work in a call centre or in a community educator role, but she would find the amount of sitting painful and difficult to tolerate. Mr Siebel thought she would continue to make every reasonable effort to remain at work in her present job as a registered nurse in the Medical Ward of the Royal Brisbane & Women's Hospital, but he could not see her prevail. Her theoretical employment direction could be in

Item	Report dated 24 November 2017	Report dated 6 August 2020
	practically find it very challenging to source an appropriate job in the future.	very few registered nursing jobs, such as at a call centre or in some community educator type roles. On balance of the evidence available, he considered that she could potentially sustain working up to 20 hours per week, if she had the very good fortune to source a suitable job in these classifications, with an empathic employer, where the duties and physical demands were in proportion to her assessed functional capacity. She would realistically and practically find it very challenging to source an appropriate job in the future.
3	Based on the plaintiff's "self-reported needs for assistance, expected functional recovery, functional presentation and the physical demands of daily living tasks", Mr Siebel concluded that before the accident, the plaintiff was fully independent with all daily living activities, but that since then she had needed some assistance with activities of daily living. Mr Siebel estimated the plaintiff's reasonable past requirements for assistance with the activities of daily living as follows: - 16 hrs/week for the 4 week period up to 21.03.16 - 12 to 14 hrs/week for the 9 week period up to 22.05.16 - 12 to 14 hrs/week for the 13 week period up to 22.08.16 - 6 to 8 hrs/week from 23.08.16 to 24.11.17 He opined it would be reasonable for her to receive future commercial assistance with some of the domestic and gardening tasks in light of her lower back and shoulder problem. This would be in the order of 5¼ to six hours per week.	Mr Siebel opined that the plaintiff's future requirements for assistance with the activities of daily living were as he had described in his initial report and were unchanged.
4	Mr Siebel concluded the plaintiff had no home modification requirements or adaptive equipment needs.	Mr Siebel continued to hold that view.
5	Mr Siebel concluded that consultation with a pain physician to identify further medical approaches to assist the plaintiff to manage her persistent pain would be beneficial.	Mr Siebel continued to hold that view.
6	Mr Siebel opined that physical rehabilitation would be necessary if the plaintiff proceeded to have shoulder surgery which had been recommended by Dr Gillett. He thought 10 to 12 sessions of post-operative physiotherapy	Mr Siebel continued to hold that view.

Item	Report dated 24 November 2017	Report dated 6 August 2020
	will be necessary at $90 per consultation (for each shoulder).	

[60] Ms Zeman provided a report dated 11 September 2019. The report was addressed to the Court and contained the confirmations contemplated by r 428 of the UCPR. She had assessed the plaintiff on 17 July 2019. The executive summary in her report summarised her opinions in this way:

> 1.3 [The plaintiff] has required assistance with instrumental activities of daily living following the subject accident, assessed as having been reasonable and necessary as follows:
>
> - Period 1: 21.02.2016 - 19.03.2016 (4 weeks), 7.75 hours per week
> - Period 2: 20.03.2016 - 17.05.2016 (8.4 weeks), 7.75 hours per week over 4 weeks, reducing to 4.25 hours per week
> - Period 3: 18.05.2016 - current (167 weeks), 0.25 hours per week
>
> 1.4 Future assistance is assessed at 0.25 hours per week relating to change of bedlinen, however, I note that despite her claim that she was undertaking all instrumental tasks independently pre dating the subject accident within the context of shared role responsibility with adult members of her family, [the plaintiff] did present with a significant history of previous pain symptoms some 6 months prior to the subject accident, with intermittent reliance on her husband for assistance depending on her symptom presentation. The extent to which he assisted with bedroom maintenance tasks predating the subject accident is unclear.
>
> 1.5 She continues to present with an ongoing capacity for employment on a full time basis in a suitable nursing role limiting her manual handling to the constraints outlined within this report. Given her general de-conditioning, she would benefit from participation in a graduated return to work program and work hardening, and I agree with the recommendations of Dr Douglas in this regard, based on my assessment findings.
>
> 1.6 On the basis of this assessment, I have identified her as being fit to undertake the following positions, not limited to:[3]

Registered Nurse nec[4] (e.g. Phone Triage Nurse, Medical Practice Nurse or etc.)	254499	$45.61	$1,733.00
Admissions (Ward) Clerk	542112	$27.84	$1,058.00
Medical Receptionist	542114	$27.24	$1,035.00

[61] For the following reasons, I prefer the evidence of Mr Siebel to that of Ms Zeman.

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[3] Although the column headings were not legible in the report, the first two columns are apparently references to relevant occupation descriptions from the Australian Bureau of Statistics Classification of Occupations and the next two columns are references to applicable hourly and weekly (on a 38 hour week) before tax remuneration.

[4] NEC means "Not Elsewhere Classified".

[62] First, Mr Siebel's evidence was the more recent and his August 2020 report was based on an understanding of the plaintiff's actual lived experience in attempting to return to her previous role at 0.6 FTE after there had been an attempt at work hardening. Ms Zeman's report was prepared only shortly after the plaintiff's initial return to work in the outpatient unit had commenced. *Ex hypothesi*, Ms Zeman's report was prepared without the ability to know what the actual lived experience of the plaintiff was in attempting to return to her pre-accident employment.

[63] Second, Ms Zeman's conclusion concerning the plaintiff's fitness to undertake the position of a "Registered Nurse NEC" at the remuneration she identified meant that her evidence was that the plaintiff's earning capacity was essentially the same now as it was before the accident. I am unable to accept that view. It is inconsistent with the plaintiff's evidence which I accept. It is inconsistent with the other expert opinion evidence which I have accepted. I think it reflected an overly optimistic assessment of the plaintiff's functional capacity. To my mind, the unreasonableness of that expression of view adversely affected the extent to which I could rely on Ms Zeman's other opinion evidence.

[64] Third, Ms Zeman's assessment of the extent of the plaintiff's need for gratuitous care was inconsistent with other evidence which I have accepted. It was inconsistent with the plaintiff's own evidence before me. But more significantly, I regarded it to be inconsistent with the surgical and psychiatric evidence. On Ms Zeman's view, the plaintiff only reasonably needed 15 minutes of gratuitous care per week from 18 May 2016 and onwards. But May 2016 was only three months after the accident, and Dr Mathew had opined that in May 2017, the plaintiff was at that stage unfit for any form of work as a consequence of her state of mind. I think that it is most unlikely that Ms Zeman's 15 minutes of gratuitous care per week from 18 May 2016 onwards is a reasonable assessment of the likely reasonable need of a person with the physical and psychiatric injuries described by the other evidence. To my mind the unreasonableness of that expression of view also adversely affected the extent to which I could rely on Ms Zeman's other evidence.

[65] Fourth, it became apparent during cross-examination that Ms Zeman's approach to the estimation of the plaintiff's reasonable need for gratuitous care reflected an approach in which the assessment was reduced because the task was a group task, rather than an approach which reflected an assessment of the commercial cost of satisfying the plaintiff's needs, viewing the plaintiff's needs as a single unit. That seemed to me to be inconsistent with *Shaw v Menzies* [2011] QCA 197 at [77].

Conclusions

As to the plaintiff's need for care

[66] The physical and psychiatric injuries caused by the 2016 accident had the result that the plaintiff needed (and to some extent still needs) assistance in the daily activities of life. Her needs were more significant in the early period after the 2016 accident than they are now.

[67] I have recorded the estimates which the plaintiff gave as to the areas in which she needed and received assistance from her husband. Even though the figures provided by the plaintiff in evidence before me could not be accepted as precise, I reject the second defendant's contention that they were no more than guesses. The plaintiff's evidence before me tended to support Mr Siebel's opinion evidence as to her reasonable need and I think formed a sufficient basis to accept that opinion evidence.

[68] I think the evidence as to the surgical and psychiatric injuries which the plaintiff suffered also supported Mr Siebel's assessment. That assessment struck me as conservative for a woman who had been affected in the way in which the evidence described.

[69] Accordingly, I would accept Mr Siebel's assessment as the assessment on which it is appropriate to base a damages award for the plaintiff's past and future need for gratuitous care.

As to the impact of the accident on the plaintiff's ability to work

[70] The physical and psychiatric injuries caused by the accident had the result that the plaintiff was unable to work at all for a period of time.

[71] More significantly, they had the result that the plaintiff is now unsuited to the continued performance of her previous occupation as a registered nurse in the Acute General Medical Ward.

[72] I accept the view of Mr Siebel that she is now suited only to work of the nature of that which he outlined in his August 2020 report.

[73] I do not regard his view to be significantly inconsistent with the view expressed by Dr Gillett some years earlier or indeed the views last expressed by Mr Fraser or Dr Douglas, but, in any event, when it comes to assessing the continuing functional limitations imposed by the plaintiff's physical injuries on her capacity to work, I am inclined to give greater weight to the more recent and focussed attention to that topic expressed by Mr Siebel.

[74] That conclusion is not gainsaid but is rather confirmed by events which occurred after the plaintiff sought to return to work in her previous role in late 2019. She in fact had great difficulty in coping with the load and has lost considerable time as a result of taking paid and unpaid sick leave, and annual leave. There was documentary evidence before me which supported the inference, which I draw, that the RBWH was developing a degree of impatience as to the capacity of the plaintiff to perform the role, its expectation being that the plaintiff would, after a return to work plan, return to working three full days in the ward by the end of the plan. I think it is unlikely that her employer will accept the continuation of the situation in which there is not a sustained return to normal clinical ward nursing duties.

[75] Any employment which the plaintiff obtains in the future will be limited by the number of hours she is able to work and the functional limitations which were caused by the 2016 accident. The result is that to the extent she is able to succeed to obtain employment, she is likely to be paid at a significantly lower wage than she would have earned had the accident not occurred. While the plaintiff has a residual (albeit reduced) earning capacity and is likely to continue to seek employment, she will not present as an attractive candidate in employment interviews. Dr Mathew's evidence suggests that the plaintiff will have difficulty obtaining future employment.

[76] Against those background findings, I turn now to the questions which remain for determination.

<u>The amount which should be assessed for general damages</u>

[77] The assessment of damages is governed by the provisions of the *Civil Liability Act* 2003 (Qld) (**the Act**) and the *Civil Liability Regulation* 2014 (Qld) (**the Regulation**).

[78] Based on my acceptance of the surgical and psychiatric opinion evidence, I find that the plaintiff has:

(a) a 4% impairment of whole person function due to the injuries which the 2016 accident caused to her cervical spine;

(b) a 4% impairment of whole person function due to the injuries which the 2016 accident caused to her lumbar spine;

(c) a 1% impairment of whole person function due to the injuries which the 2016 accident caused to right shoulder;

(d) a 5% impairment of whole person function due to the injuries which the 2016 accident caused to her left shoulder; and

(e) a permanent whole person impairment of 4% as determined in accordance with the PIRS, due to the psychological injuries which the 2016 accident caused.

[79] If I am to award general damages (as I observe the facts require me to do), s 61 of the Act requires me to assess an Injury Scale Value (**ISV**) as follows:

(a) the plaintiff's total general damages must be assigned a numerical ISV value on a scale running from 0 to 100;

(b) the scale reflects 100 equal gradations of general damages, from a case in which an injury is not severe enough to justify any award of general damages to a case in which an injury is of the gravest conceivable kind;

(c) in assessing the ISV, I must:

(i) assess the ISV under any rules provided under the Regulation; and

(ii) have regard to the ISVs given to similar injuries in previous proceedings.

[80] Schedule 4 of the Regulation provides the range of ISVs that can be awarded for particular injuries and Schedule 3 provides the matters to which I may or must have regard in the application of Schedule 4.

[81] The plaintiff's injuries should be assessed having regard to following items of Schedule 4 of the Regulation:

Item		**Range of ISVs**
12 Moderate mental disorder	**Comment** There is generally only moderate impairment. **Example of the injury** A mental disorder with a PIRS rating between 4% and 10%.	2 to 10
88 Moderate cervical spine injury – soft tissue injury	**Comment** The injury will cause moderate permanent impairment, for which there is objective evidence, of the cervical spine. **Comment about appropriate level of ISV** An ISV of not more than 10 will be appropriate if there is whole person impairment of 8% caused by a soft tissue injury for which there is no radiological evidence.	5 to 10
93 Moderate thoracic or lumbar spine injury—soft tissue injury	**Comment** The injury will cause moderate permanent impairment, for which there is objective evidence, of the thoracic or lumbar spine. **Comment about appropriate level of ISV** An ISV of not more than 10 will be appropriate if there is whole person impairment of 8% caused by a soft tissue injury for which there is no radiological evidence.	5 to 10

97 Moderate shoulder injury	**Examples of the injury** • traumatic adhesive capsulitis with discomfort, limitation of movement and symptoms persisting or expected to persist for about 2 years • permanent and significant soft tissue disruption, for example, from tendon tears or ligament tears • a fracture, from which the injured person has made a reasonable recovery, requiring open reduction and internal fixation • nerve palsies from which the injured person has made a good recovery • painful persisting dislocation of the acromioclavicular joint • an injury to the sternoclavicular joint causing permanent, painful instability **Additional comment about appropriate level of ISV** • An ISV at or near the bottom of the range will be appropriate if there is whole person impairment for the injury of 6%. • An ISV at or near the top of the range will be appropriate if there is whole person impairment for the injury of 12% and the injury is to the dominant upper limb.	6 to 15
98 Minor shoulder injury	**Examples of the injury** • soft tissue injury with considerable pain from which the injured person makes an almost full recovery in less than 18 months • fracture from which the injured person has made an uncomplicated recovery • strain injury of the acromioclavicular joint or sternoclavicular joint	0 to 5

[82] Given the whole person impairments assessed and having regard to the "Additional comment about appropriate level of ISV" made in item 97, the parties agreed that both the plaintiff's shoulder injuries should be assessed in accordance with item 98. However, given those comments, an ISV at or nearing the top of the range for item 98 would be appropriate for the left shoulder injury which resulted in a 5% whole person impairment.

[83] The result is that the range for each of the plaintiff's injuries are:

(a) Cervical spine: 5 to 10;

(b) Lumbar spine: 5 to 10;

(c) Shoulders: 0 to 5; and

(d) Psychological: 2 to 10.

[84] In assessing the ISV for multiple injuries, to reflect the level of adverse impact of multiple injuries on an injured person, I may assess the ISV for the multiple injuries as being higher in the range of ISVs for the dominant injury of the multiple injuries than the ISV I would assess for the dominant injury only: s 3(2) of Schedule 3 of the Regulation.

[85] By definition set out in Schedule 8 of the Regulation, the "dominant injury" of multiple injuries means–

(a) if the highest range for 2 or more of the injuries of the multiple injuries is the same – the injury of those injuries selected as the dominant injury by a court assessing an ISV; or

(b) otherwise – the injury of the multiple injuries having the highest range.

[86] The shoulder injuries may be set aside because the other three types of injuries have higher ISV ranges. However, because each of the other types of injuries all have the same highest range, the dominant injury will be the injury selected by me as the dominant injury. In the present case I do not think it matters which of those three injuries I select. The result is the

same: I may and in this case think that I should, assess the ISV for the multiple injuries as being higher in the range of ISVs for the dominant injury than I would assess for the dominant injury only.

[87] I am not, however, limited to the maximum ISV for the dominant injury. If I considered the level of adverse impacts of multiple injuries on the plaintiff to be so severe that the maximum dominant ISV was inadequate to reflect the level of impairment, I am permitted to make an assessment of the ISV for the multiple injuries that is higher than the maximum dominant ISV: ss 4(1) and (2) of Schedule 3 of the Regulation. However, the increase should rarely be more than 25% higher than the maximum dominant ISV and if the increase is more than 25% of the maximum dominant ISV, I would be required to give detailed written reasons for the increase: ss 4(3) and (4) of Schedule 3 of the Regulation.

[88] It remains to note the following:

(a) in assessing an ISV, a Court may have regard to other matters to the extent they are relevant in a particular case, for example, age, life expectancy, pain, suffering and loss of amenities of life: s 9 examples of Schedule 3 of the Regulation.

(b) An example of other matters contained in the legislation that a court may have regard to in assessing an ISV for multiple injuries is the range for, and other provisions of schedule 4 in relation to, an injury other than the dominant injury of the multiple injuries: s 9 examples of Schedule 3 of the Regulation.

(c) The extent of whole person impairment is an important consideration, but not the only consideration affecting the assessment of an ISV: s 10 of Schedule 3 of the Regulation.

(d) An ISV assessed by a court must be a whole number: s 14 of Schedule 3 of the Regulation.

[89] In my judgment, the proper reflection of the adverse impact of multiple injuries on the plaintiff suggests that pursuant to s 3(2) of Schedule 3 of the Regulation, I should assess the ISV for the multiple injuries as being higher in the range of ISVs for the dominant injury of the multiple injuries than I would if I was assessing the dominant injury only. Whether I regard the mental disorder, cervical spine injury or the lumbar spine injury as the dominant injury, the highest of the applicable range is an ISV of 10.

[90] In my judgment, the spinal injuries should each be regarded as the dominant injury to reflect the level of adverse impact of all the injuries that I have identified. In my judgment, it would be appropriate to assess the ISV for the multiple injuries as being the top of the range for the dominant injury, namely an ISV of 10.

[91] The plaintiff invited me to form the view referred to in s 4(1) of Schedule 3 of the Regulation, namely that the level of adverse impact of multiple injuries on the plaintiff was so severe that the maximum dominant ISV was inadequate to reflect the level of impact and thereafter to make a 50% uplift on the maximum dominant ISV of 10. The plaintiff's submission was that an uplift of 50% was reasonable having regard to the following factors:

(a) the plaintiff currently has three injuries that fall within an injury category that has a maximum ISV range of 10;

(b) however, when Dr Mathew assessed the plaintiff in May 2017, she had a 22% impairment on the PIRS which would have been assessed as in accordance with item 11 – Serious mental Disorder with a range of 11 to 40 under the Regulation;

(c) accordingly, had the plaintiff's general damages been assessed in May 2017, she would likely have been assessed with an ISV of between 20 and 25 for her psychiatric injury alone; and

(d) the plaintiff's persistence and determination to return to work despite the obstacles that were presented to her including having to justify being entitled to continue her registration as a Registered Nurse.

[92] I am not persuaded to take that course because I think it pays insufficient regard to the much reduced PIRS assessment by Dr Mathew in June of 2020. In my view, sufficient consideration of the adverse impact of the plaintiff of the multiple injuries she suffered including the psychiatric injury is achieved by assessing the maximum ISV for the dominant injury.

[93] Taking into account the multiple injuries, in my view, an ISV of 10 is a reasonable assessment of the plaintiff's injuries. The application of the table in Schedule 7 of the Regulation would have the result that I assess general damages of $15,750.00.

The amount which should be assessed for past and future gratuitous care

[94] Section 59 of the Act relevantly 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 hours months.

[95] In *Shaw v Menzies* [2011] QCA 197 at [73], the Court of Appeal observed:

> Accordingly, a plaintiff who includes a claim for damages for gratuitous care must adduce sufficient evidence to meet each of those thresholds. It has been a long-standing practice that solicitors advise clients making a claim for damages for personal injury, particularly where the claim includes a component for gratuitous care, to keep a weekly diary recording tasks and time to perform them by family members. As this case has demonstrated, failure to have some system, because of the requirements of s 59, may mean that a deserving plaintiff may not cross those thresholds.

[96] Here the second defendant observed that the plaintiff's evidence in this case was not attended by a diary. The suggestion was that absent that sort of evidence the plaintiff's case could not be accepted.

[97] I reject that submission. Each case must be assessed on the basis of whether the evidence persuades the tribunal of fact. Whilst the preparation of a diary recording tasks and time would have been both advisable and preferable, that does not mean that a case without that detail cannot succeed. In this case, the plaintiff gave evidence before me and her evidence was not undermined during cross-examination. I have earlier explained why I am prepared to accept the assessment made by Mr Siebel as the basis of an award for damages under this heading.

[98] Accordingly, I find that the plaintiff has met the s 59 thresholds.

[99] The parties had agreed that –

(a) the plaintiff had a statistical residual life expectancy of 36.79 years;

(b) the hourly rate that should be allowed for any award of damages for past care was $35.00 per hour; and

(c) the hourly rate that should be allowed for any award of damages for future care was $40.00 per hour.

[100] The plaintiff advanced the following submissions, which I accept:

(a) For past care up to the date of the last day of trial (2 September 2020), an allowance of 1,500 hours of care at the agreed rate of $35.00 per hour totalling $52,500.00 is appropriate.

(b) In respect of future care, allowing 4 hours of care per week (taking into account an increased capacity should the plaintiff be forced to reduce her hours) at $40.00 per hour equates to $160.00 per week.

(c) For future care an allowance of $160.00 per week, for the remainder of the plaintiff's life expectancy (36.79 years), discounted on the 5% tables totals $142,680.00.

(d) An award of $140,000.00 for future care is appropriate.

The amount which should be assessed for past economic loss

[101] The parties agreed that the plaintiff's income from employment activities between 1 July 2011 and 21 February 2016 was as follows:

Period start	Period end	Income source	Gross wage	Net wage	Fringe benefits	Avg per week incl fringe benefits
1/7/11	30/6/12	Queensland Health	$45,183.00	$37,183.00	$0.00	$713.10
1/7/12	30/6/13	Queensland Health	$44,998.00	$37,200.00	$17,000.00	$1,042.31
1/7/13	30/6/14	Queensland Health	$47,477.00	$39,387.00	$17,000.00	$1,084.37
1/7/14	30/6/15	Queensland Health	$49,968.00	$40,268.00	$15,360.00	$1,069.77
1/7/15	21/2/16	Queensland Health	$34,593.00	$27,939.00	$17,845.00	$1,363.78

[102] I have said that I accepted the plaintiff's evidence that as at the time immediately prior to the 2016 accident she had no problems with performing her duties. Accordingly, there is no reason to think that the plaintiff would not have continued to earn at least at that rate up to the date of the trial. The result is that I conclude that but for the February 2016 accident, the plaintiff would have derived a net benefit of at least that which she had been earning at the time of the accident being $1,363.78 per week.

[103] The plaintiff then advanced these submissions:

> 60. It has been 236.43 weeks since the incident. [The plaintiff's] total anticipated earnings are therefore no less than $322,436.56.
>
> 61. The only paid employment [the plaintiff] has been able to secure since the incident is by virtue of returning to employment with Queensland Health.

62. It is agreed that in this period [the plaintiff]'s actual earnings (excluding income protection benefits) total $50,000.00.

63. Accordingly, the difference between [the plaintiff's] anticipated earnings and her actual earnings is $272,436.56.

64. An award of $275,000.00 for past economic loss is appropriate.

[104] The second defendant did not direct any submission to the details of that calculation. Its primary position was that the plaintiff had not proved her loss to the requisite standard. That position could not be accepted because it was contrary to the evidence of the plaintiff and that of the expert opinion evidence which I have accepted. The second defendant's alternative submission was that if I was satisfied that the accident was the cause of the plaintiff's being unable to work and to stop working, a reasonable assessment of damages for past economic loss was $250,000.00. It did not explain how it arrived at that figure.

[105] I accept the plaintiff's submissions and conclude that an award of $275,000.00 for past economic loss is appropriate.

[106] Interest on damages compensating for past economic loss is governed by s 60 of the Act. It was not disputed that the rate for 10 year Treasury bonds published by the Reserve Bank of Australia under "Capital Market Yields–Government Bonds–Daily–F2" as at 1 July 2020 was 0.94%. The plaintiff should have an interest award on the past economic loss which I have found.

[107] The parties agreed that past loss of superannuation entitlements should be allowed at 12.75% of whatever figure was assessed for plaintiff's past economic loss. Accordingly, the damages award should include an amount calculated in that way.

The amount which should be assessed for future economic loss

[108] The parties agreed that the plaintiff had a statistical residual life expectancy of 36.79 years which would suggest that she had, as at date of trial, a further 16.71 years until retirement.

[109] The plaintiff submitted that the appropriate course to measure the amount of damages for future economic loss was –

(a) to assess an appropriate dollar figure as the amount of her lost weekly earning capacity and to regard the plaintiff as having lost that amount per week for 16.71 years;

(b) to apply the 5% discounting tables (and therefore a multiplier of 579);

(c) to apply a further discount figure of 15% to account for vicissitudes.

[110] The calculation suggested by the plaintiff was that I should assess a loss of $1363.78 per week for 16.71 years, which, discounted on the 5% tables (therefore applying the multiplier of 579) and discounting the resulting calculation by 15% would total $671,184.33. Accepting the artificiality of that apparent precision, the plaintiff sought an award of $650,000.00 for future economic loss.

[111] For its part, the second defendant submitted that no ongoing economic loss had been proved and I should assess a global award of $50,000.00 on the basis that the plaintiff may find herself off work for about 12 months whilst she finds another nursing position.

[112] For the following reasons I reject the second defendant's submission that no ongoing economic loss had been proved:

(a) Because of the functional limitations caused by the 2016 accident, the plaintiff is now unsuited to the continued performance of her previous occupation as a registered nurse in the Acute General Medical Ward at the RBWH. She is now suited only to work of the sedentary kind outlined by Mr Siebel in his August 2020 report.

(b) It is unlikely that the RBWH will accept the continuation of the situation in which there is not a sustained return to normal clinical ward nursing duties. The plaintiff's functional limitations are such that she will not be able to sustain such a return. Accordingly, it is likely she will need to find alternative employment.

(c) Her functional restrictions are such that she has a residual (albeit reduced) earning capacity. She is likely to continue to seek employment, but any employment she obtains will be limited by the number of hours she is able to cope with and is likely to be paid at a significantly lower wage than that earned as a registered nurse in the Acute General Medical Ward at the RBWH.

(d) Her ability to obtain alternative employment will be hampered by the fact that her psychiatric injuries are such that she will not present as an attractive candidate in employment interviews.

[113] The turn now to articulate the approach which I take to assessing this aspect of the plaintiff's loss.

[114] The loss to be assessed is the loss or diminution of earning capacity, not the loss of earnings: see *Qantas Airways Limited v Fisher* [2014] QCA 329 per Henry J (with whom Muir JA and Mullins J agreed) at [19]–[20], following *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 per Barwick CJ at 658.

[115] The plaintiff must not only establish a diminution of earning capacity, but also that the diminution is or may be productive of financial loss: *Qantas Airways Limited v Fisher* at [22]. (For reasons already expressed, the plaintiff has established both those things.)

[116] Reference to loss of earnings is in practice often an appropriate method of reaching an assessment of loss of earning capacity: *Qantas Airways Limited v Fisher* at [22], [28].

[117] Accordingly, I think an appropriate starting point is to assume that an appropriate measure of the plaintiff's lost earning capacity would not be less than the difference between what she could earn in her old job at 0.6 FTE and what she could earn at a sedentary job at the 20 hours per week referred to by Mr Siebel, namely 0.4 FTE. Using the plaintiff's methodology:

(a) Her net weekly benefit from RBWH at 0.6 FTE was $1,363.78.

(b) The net weekly benefit for the sort of sedentary role for which she was suited may be regarded as represented by that applicable to the admissions clerk or medical receptionist identified in Ms Zeman's report. The plaintiff's calculation was that net weekly earnings for 0.4 FTE for such roles were $506.80 and $497.80 respectively. I will use $500.00.

(c) On that basis, the lost per week would be $863.78.

(d) A loss of $863.78 per week for 16.71 years, discounted on the 5% tables (therefore using the multiplier of 579) gives rise to a loss of $500,128.62. Discounting that figure by 15% would total $425,109.33. Having regard to the artificiality of that apparent precision, say $400,000.00.

[118] It would not be appropriate to assess the plaintiff's lost earning capacity solely by reference to the calculation just made. Two other considerations operate to suggest that an award of damages based solely on the calculation just made would underestimate the plaintiff's lost earning capacity.

[119] The first consideration is the plaintiff's pre-accident intention that she would seek to move to full-time employment in her old job. As to this:

(a) The 2016 accident caused the plaintiff to lose the opportunity of moving to full-time employment as a registered nurse in a role equivalent to the role which she was then performing.

(b) The appropriate way to assess the value of the loss is to measure the net present value of the lost earnings, and then to discount the resulting calculation having regard to the probabilities and possibilities surrounding the opportunity coming to pass. This would be to treat the valuation exercise by the application of the logic examined in the line of cases applying *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

(c) In her submissions before me, by reference to the $1,363.78 net weekly benefit from RBWH at 0.6 FTE, the plaintiff submitted, and I accept, that it would be appropriate to allow $2,100 as the figure representing what her net weekly benefit from RBWH at 1.0 FTE would have been. The difference between 0.6 FTE and 1.0 FTE in her old job is $736.22. A loss of $736.22 per week for 16.71 years, discounted on the 5% tables (therefore using the multiplier of 579) would give rise to a loss of $426,271.38.

(d) Application of the *Sellars* logic would then require applying some form of discount factor having regard to the probabilities and possibilities surrounding the plaintiff being able to move to a full-time role as a registered nurse for the balance of her working life.

(e) I would assess the appropriate discount as 50%, giving rise to a calculated value of $213,135.69. Having regard to the artificiality of that apparent precision, say $200,000.00.

[120] The second consideration is that the plaintiff's psychiatric injuries may operate to prevent her from being able to obtain further employment, even in a part time sedentary nursing occupation as identified by Mr Siebel. As to this:

(a) Although Dr Mathew's evidence suggests the plaintiff will have difficulty in obtaining substitute employment, she presents as an intelligent and highly motivated individual who is likely to work very hard to avoid being unemployed for the long term.

(b) If she had completely lost the capacity to earn $500 per week at a sedentary job at the 20 hours per week referred to by Mr Siebel, namely 0.4 FTE, the application of the same methodology as previously - namely a loss of $500 per week for 16.71 years, discounted on the 5% tables (using the multiplier of 579) - would give rise to a calculated $289,500.00.

(c) Although I cannot say that there is no possibility that the plaintiff will find herself in a position of not ever being able to obtain further employment in a part time sedentary nursing occupation (or in some other employment giving her an equivalent degree of remuneration), I do not think that outcome is very likely. If I used the methodology I have applied thus far (even though this aspect is not really a lost opportunity) I would apply a very significant discount factor, say one approaching 90%, which would give rise to a calculation of $28,950.00.

(d) Another way to approach this issue might be to make a global award reflecting the likelihood that, over the remaining years of the plaintiff's working life, her psychological injuries will make it likely that she will take longer than she would have otherwise taken to be able to obtain employment. The global assessment I would make is $30,000.00. That figure is a little more than 1 year at the net weekly benefit of $500 per week.

(e) Having regard to both methodologies, I would regard this component as justifying a further $30,000.00 in the damages award.

[121] By reference to the three components analysed above, I assess the amount which the plaintiff should be awarded for the component of damages representing lost earning capacity to be $630,000.00.

[122] The parties agreed that future loss of superannuation entitlements should be allowed at 12.75% of whatever figure was assessed for the plaintiff's future economic loss. Accordingly, the damages award should include an amount calculated in that way.

The amount which should be assessed for special damages

[123] The parties agreed special damages as follows:

(a)	Past medical and rehabilitation expenses[5]	$6,849.85
(b)	Past travel expenses[6]	$ 625.17
(c)	Past pharmaceutical expenses	$2,300.00
	TOTAL	$9,775.02

[124] It was agreed that interest on the out-of-pocket expenses of $5,224.97 (being the award for special damages mentioned above less the requisite refund to Medicare of $3,248.05 and to Medibank of $1,282) should be awarded at 0.47% for 4.53 years being the period which had elapsed since the injury in February 2016 which totalled $111.70.

[125] Future expenses had been agreed as follows:

(a)	Future pharmaceutical expenses	$2,000.00
(b)	Future medical and travel expenses	$1,000.00
	TOTAL	$3,000.00

Conclusion

[126] In these reasons I have recorded the various matters of agreement between the parties and I have decided the issues which the parties raised for my determination in relation to each of the four outstanding matters in dispute.

[127] I make the following orders:

1. The parties are directed to bring in minutes of a judgment in favour of the plaintiff reflecting the Court's reasons for judgment by 4:00pm on 19 February 2021.

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5 It was agreed that this amount was inclusive of a refund to Medicare of $3,248.05 and a refund to Medibank of $1,282.00.

6 It was agreed that travel expenses should be calculated at a rate of 70 cents per kilometre.

2. The proceeding will be listed before Bond J on a date to be fixed in the week commencing 22 February 2021 for the making of formal orders reflecting the agreed position or, in default of agreement, for the resolution of any remaining disputes.
3. The parties will be heard as to the orders which should be made as to costs at the hearing referred to in order 2.