SUPREME COURT OF QUEENSLAND

CITATION:	*Silvester v Husler & Suncorp Metway Insurance Limited* [2013] QSC 26
PARTIES:	**Vikki Maree Silvester** **(Plaintiff)** **v** **Winifred Mary Husler** **(First Defendant)** **and** **Suncorp Metway Insurance Limited** **(Second Defendant)**
FILE NO:	S42 of 2011
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	20 February 2013
DELIVERED AT:	Townsville
HEARING DATE:	27, 28, 29 November 2012
JUDGE:	North J.
ORDER:	**1. Judgment for the plaintiff against the second defendant in the sum of $378,427.46**
CATCHWORDS:	Damages – Personal Injury – Assessment of Damages - *Griffiths v Kerkemeyer* Care
LEGISLATION:	*Civil Liability Act* 2003
CASES:	*Allianz Australia Insurance Limited v McCarthy* [2012] QCA 312 *Kriz v King* [2007] 1 QdR 327
COUNSEL:	G F Crowe SC with P. Cullinane for the plaintiff R D Green for the second defendant
SOLICITORS:	Shine Lawyers for the plaintiff Grant & Simpson for the second defendant

[1] The Plaintiff was injured in a motor vehicle accident which occurred on 11th May 2010[1]. Liability has been admitted by the Defendants and the issue for me to determine is the quantum of the damages recoverable from the Second Defendant, the licensed insurer of the motor vehicle driven by the First Defendant.

[2] She was driving her Holden Astra Hatch to work at approximately 7.50 a.m. in a northerly direction on Broadsound Road, Mackay when at the intersection with Boundary Road the motor vehicle driven by the First Defendant (which had been heading in a southerly direction) turned right across the path of the Plaintiff's vehicle.

[3] Extensive damage was done to the front of her motor vehicle particularly on the driver's side. She described a heavy jolt and the damage to her vehicle made it difficult for those attempting to open the driver's side door of her vehicle.

[4] She was transported by ambulance to the Mackay Base Hospital. An x-ray was taken of her neck and she was told there were no fractures. She was offered the option of being admitted so that she could be observed overnight but she elected to go home and consult her own general practitioner. She attended the Concordia Medi-Clinic that day and she was given a morphine injection for pain. She was noted by her general practitioner as complaining of a violent headache and burning pain across her chest (seat belt line).[2]

[5] In her statement of claim[3] the Plaintiff claims that as a result of the incident she sustained the following injuries:

(a) Soft tissue musculo-ligamentous injuries to cervical spine;
(b) Soft tissue musculo-ligamentous injuries to lumbar spine region;
(c) Neurological symptoms affecting the left upper limb;
(d) Soft tissue injury to the chest wall;
(e) Constant headaches;
(f) Psychological injury.

[6] No evidence was lead before me of a psychological injury and no claim for damages for injury was advanced at trial.

[7] The Plaintiff claims that since the accident she has constantly suffered from severe headaches, neck pain and occasionally low back pain. She also complains of numbness in her left arm and pins and needles in some of the fingers of her left hand.

[8] In her "quantum statement"[4] she described her current symptoms and medication as follows:

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[1] She was 48 years (DOB 15/2/1962).
[2] See the note of the attendance by her general practitioner in Exhibit 4.
[3] Filed 14 June 2011, para 6.
[4] Exhibit 5.

"39. I have had what I describe as good days and bad days since the accident.

Good / Normal days

40. I wake with a pulsation in the base of my skull, just above my neck.

41. I have a constant headache. I would describe it at a level of around 5 out of 10.

42. The muscles on the left side of my neck go into spasm when I sit for any prolonged periods without head support.

43. If I sit for too long I get pins and needles / a burning sensation up the left hand side of my neck. My left arm feels numb.

44. On these days, I take two Panadine Extra tablets in the morning and two Mersyndol Night strength tablets at night.

45. I experience intermittent back pain since the accident. I often wake in the morning with a sore lower back. I find that if I am required to sit or stand for any prolonged periods it causes me lower back pain (for example, if I am sitting in the car for long distances, sitting watching Darren's band play, watching a movie on the couch or standing in line waiting for something). When I am at home I am conscious of alternating my positions to avoid any increase in back pain.

46. My back has not been my primary concern since the accident (due to the severity of my neck pain and headaches) but it does continue to cause me pain on occasions.

Bad days

47. The pain is intense. I get a throbbing pain in my shoulder muscles, radiating up into my neck.

48. I have a constant headache. I would describe it a level of around 9.5 out of 10 on these days.

49. My eyes go blurry and I start to feel nauseous. I feel an intense pain behind both my eyes.

50. If I ever try to bend down (for example to pick something up) I get a shooting pain in my temples and I have to hold my head in pain.

51. Sometimes I can relate my bad days to an increase in activity prior to the flare in my symptoms. I am eager to identify any possible improvements in my condition so I attempt some of the smaller tasks that I used to be able to do. I find though, that regrettably, my condition has not improved.

52. More often than not, I have an onset of a bad day with no apparent cause. It can come on with no increase in activity prior which is frustrating as it means that my bad days are unpredictable.

53. I would estimate that I have 3 bad days each month, without reason. The number of additional bad days depends on my levels of activity.

54. On bad days my pain becomes unbearable. The only way to try to ease the pain is to take some medication then lie down and rest. It would be unsafe to for me to operate a vehicle on these days.

55. Generally my really bad days spread over 3 days. I would break this down as follows:

Day 1
- Instead of Panadine Extra when I wake in the morning, I take two Mersyndol Night strength.
- I take two Mersyndol Night strength at lunchtime.
- I take two Mersyndol Night strength at 4pm.
- Before bed, depending on the severity, I will take Brufen plus two Mersyndol Night strength (or alternatively, just two Mersyndol Night strength)

Day 2
- I reduce my medication to two Mersyndol Night strength tablets, three times a day.

Day 3
- I take two Mersyndol Night strength in the morning and another two at night

Day 4
* I am generally able to return to two Panadine Extra tablets in the morning and two Mersyndol Night strength at night."

[9] The plaintiff's evidence generally was that she had and continued to suffer from cervical and related pain. Her evidence was that at times the pain was intense and so severe that it forced her to lie down and rest. The pain affected her daily and at times more or less totally restricted her as indicated in her "quantum statement". Her evidence that was before the accident she was busy and active both at work and around the house. I gained the impression that the plaintiff was "house proud" and before the accident maintained her home in a very neat and tidy fashion. Her evidence was that subsequent to the accident she relied upon her husband to perform many tasks for her such as meal preparation, cleaning, shopping and washing of clothes. Moreover subsequent to the accident the burden of doing the housework and related activities had substantially fallen upon him. Her evidence, and the evidence from the medical records, demonstrates that at times the plaintiff had relied upon pain killers to assist her to cope with pain.

[10] Mr Silvester gave evidence. He said that before his wife's accident he had two jobs, a day job and that he was busy at nights as a musician. Until her accident he said

that his wife performed almost all the routine household tasks save when on weekends he would do gardening and work on renovating their home. He said that essentially he attended to the outside and she to the inside although he said his wife occasionally mowed the lawn.[5]

[11] His evidence was that after the accident he had assumed the role of doing "pretty much everything" about the house. He said he did most of the cooking, a lot of the floor cleaning including mopping and vacuuming and much of the inside cleaning. His evidence was that he did a substantial amount of the shopping (sometimes his wife would accompany him). His evidence was that the household and related domestic chores that he had assumed relating to cooking, cleaning, shopping and general fetching and carrying occupied between nine and ten hours a week. He said that this routine comprised approximately one hour per day Monday to Friday and four to five hours over a weekend.

[12] The Plaintiff called four witnesses who knew before the accident and have continued to see her.[6] All were able to confirm in different ways that since the accident the Plaintiff has been less active than she was before the accident, that she has demonstrated behaviour consistent with her being in pain and that her activities be it, domestically or socially or when work, have been more restricted since the accident than demonstrated before the accident.

[13] The witness, Rebecca Neilson knew the Plaintiff at work. She gave evidence that subsequent to the accident the Plaintiff continued to work but that she observed the Plaintiff was taking pain killers, sometimes more than once a shift and that her facial expressions suggested she was in pain and she seemed uncomfortable and stiff in her movements. Ms Neilson was the Practice Manager at the Mackay Family Medical Practice. The Plaintiff was employed as a reception supervisor in 2010. Ms Neilson explained that the Plaintiff's duties involved working alongside other receptionists and it was the Plaintiff's duties to supervise and deal with any issues raised by patients and to assist with reception and medical appointment issues. The duties involved data entry, computer work and sometimes scanning of records. She had freedom to move around.[7] There was no suggestion in Ms Neilson's evidence that the duties involved heavy lifting. There were no nursing duties nor was the Plaintiff required to sterilise instruments.

[14] Two orthopaedic surgeons were called to give evidence. Dr John Pentice had examined the Plaintiff at the request of her solicitors. Dr Ulrich Dörgeloh examined the plaintiff at the request of the solicitors for the Second Defendant.

[15] In his first report Dr Pentice[8] observed on examination:

> " There was tenderness in the cervical musculature posteriorly both sides. Tenderness in the cervicoscapular musculature on the right hand side. Decreased range of movement in all directions especially rotation to the

[5] He gave evidence that the property was approximately 900 sqm. From his description the house seems to have been a substantial residence but there's reason to infer there was a not insubstantial lawn and garden area.
[6] Jean Smith, Rebecca Neilson, Levena Stewart, and Maria Curtin.
[7] Transcript 1-75 l 29.
[8] See Exhibit 1, report dated 16/3/2011, Tab 1.

> right and left, worse to the left. Decreased flexion and extension with soreness. Decreased lateral flexion as well because of pain.
>
> There was the occasional lower back pain but on examination it was slightly tender and tender in the thoraco lumbar musculature on the right hand side with pain on lateral flexion. Rotation was reasonable. Flexion, extension was reasonable.
>
> Straight leg raising of 90 on the right, 90 on the left, jerks were present in the upper and lower limbs.
>
> No gross wasting."

[16] The comment of Dr Pentice was:

> "The lady has sustained injuries to her spine in the stated accident. They are soft tissue musculo-ligamentous injuries to the lumbar region of her spine which have settled to an acceptable degree, are not showing any clinical signs of nerve root entrapment so no operative intervention is required. Common sense, gentle exercises and analgesics would be the main stay of treatment.
>
> It has left her with a residual impairment and it would be assessed as a 5% whole person impairment, lumbar, due to the restricted guarded range of movements that she does have.
>
> With respect to the cervical region, here she does have some degenerative changes at C7/T1 and that C5/C6 and she has aggravated this and caused soft tissue injuries as well. The main problems appear to be headaches and tenderness which she gets and this is being managed conservatively. She is not a candidate for operative intervention as there are no clinical signs of nerve root entrapment, other than some mild para seizure at times C6.
>
> It is best to treat conservatively with common sense, gentle exercises and analgesics, limit any heavy lifting, any repetitive bending and straining of the spine, any vigorous activities above shoulder level, be it work, recreational or sporting. It is probably best that she doesn't return to any strenuous sports. As to work, she should be able to do most of her secretarial type jobs but should limit any heavy lifting, change her position at reasonably frequent intervals when sitting, 20 to 30 minutes.
>
> She has been left with a residual impairment and it would be assessed as a pre-existing 5% cervical whole person impairment due to the degeneration and a further 6-7% cervical whole person impairment due to the effects of the accident due to the guarded, restricted range of movement that she does have."

[17] Dr Pentice provided a further report to the court dated 29 August 2012[9]. That report, I infer, came about because of some difference of opinion between Dr Pentice and Dr Dörgeloh when they met for the purpose of preparing a joint expert report consequent upon an order of the court. Further by this time, more recent MRI investigations of the Plaintiff's cervical spine had suggested that the Plaintiff's

[9] Exhibit 1, Tab 12.

neck condition might have deteriorated somewhat. Certainly Dr Pentice noted that "comparison with previous MRIs were reported on as showing an increase in size of this disc osteophytic complex."[10]

[18] As a consequence of a review conducted by Dr Pentice on 28 August 2012 he reported in his report of 29 August 2012 concerning his findings on examination:

> "There was decreased range of movement of the neck to the left, decreased flexion with soreness, marked decreased extension with soreness. Lateral flexion was causing problems, restriction in range of movement and pain in the cervicoscapular musculature.
>
> Normal jerks in the upper and lower limbs.
>
> Straight leg raising of 90 on the right, 90 on the left.
>
> Lower spine, a stiffish range of movement with decreased lateral flexion.
>
> Motor and sensory function was normal.
>
> Jerks were normal in the lower and upper limbs."

[19] Dr Pentice went on to comment:

> "The lady has sustained injuries to her spine in the stated accident. She has been left with a residual impairment as quoted in the previous reports and has degenerated somewhat further in the cervical region. It has left her with an impairment and this is a combination of pre-existing degeneration and the effects of the accident and I believe this is as quoted in the report, a pre-existing 5% cervical whole person impairment due to the degeneration that pre-existed the accident and a further 7% cervical whole person impairment due to the effects of the accident. This is using 15.5 of AMA 5th Edition Guidelines as an estimating guide.
>
> With respect to her lumbar spine, here she has had a soft tissue injury to the region and it has left her with a residual impairment. It is still currently causing her problems and it would be assessed as a 5% whole person impairment due to the soft tissue injuries, the restricted, guarded range of movement and I believe this will leave her with a permanent impairment and susceptibility to easier aggravation of the spine long term.
>
> Management for the lumbar region would be conservative, common sense, gentle exercises, abstain from heavy lifting and repetitive bending, repetitive bending and lifting combined.
>
> As to the neck, it depends on how bad she becomes. If the condition deteriorates and her clinical signs increase she may be a candidate for operative intervention. Costings for such a procedure would be in the vicinity of $10,000.00 to $15,000.00 and a recovery period of at least nine months.

[10] See the short report from Dr Pentice of 18 July 2012, Exhibit 1, Tab 10.

> In the meantime, common sense, gentle exercises, analgesics and anti-inflammatories as tolerated would be management of choice. I believe this is probably the best form of action at this stage until she shows further signs clinically, then operative treatment would be contemplated.
>
> As to work, it is unlikely to affect her work as long as there isn't any heavy lifting involved. She should be able to carry out light sedentary jobs but may have some difficulties with it.
>
> She will have some chores around the house that she will have problems with. The heavier chores may have to be done by someone, scrubbing, cleaning. If she does vacuuming and general household cleaning and washing in short stints she should be able to cope with it but she shouldn't do any heavy lifting.
>
> Sporting and recreational activities, best not to return to tennis or long strenuous walks as these may tend to aggravate the region. Sporting and recreational activities are trial and error. If they give problems, cease them. If they don't continue with only those that she is comfortable with."

[20] Dr Pentice gave evidence by which time he had an opportunity to view the film footage contained in the DVDs.[11] His evidence was that viewing the DVDs had not altered his opinion. He conceded that the Plaintiff appeared to be freer in her movements as demonstrated in the surveillance film compared with when he last saw her. There seemed to be improvement over time on viewing the DVDs.[12] He was of the opinion that the plaintiff was fit to work in an occupation that involved light sedentary duties so long as there was no heavy lifting involved.[13] He remained of that view after having reviewed the DVD evidence.[14] He described a heavy lift as a lift involving five kilograms above shoulder height and a lift below shoulder height involving weights exceeding 10 to 15 kilograms.[15] He was of the opinion that the Plaintiff could perform activities above shoulder height provided she was careful. When he was cross-examined concerning the surveillance footage shown in Exhibits 9, 10 and 11 he described the Plaintiff as demonstrating a good range of movement. Dr Pentice confirmed that he had personally reviewed both MRI films taken in 2010 and 2012 and on viewing them he was of the opinion that the Plaintiff's condition had worsened somewhat but he was not prepared to recommend operative intervention.

[21] Dr Dörgeloh provided a report dated 20th April 2011 following an examination of the Plaintiff on 25 March 2011[16]. When describing the Plaintiff's symptoms he reported:

> "Her ongoing current symptoms are mainly still headaches after activities like gardening or any increased activity. She also still has pain in her cervical spine which is then accompanied by headaches. This pain varies from a direct pain to more a burning sensation. With specific questioning

[11] Exhibits 9, 10 and 11.
[12] Transcript 2-45 l 30-55
[13] See Exhibit 1 Tab 12, Report 29, August 2012 at p63.
[14] Transcript 2-43 l 1-35
[15] Transcript 2-35 l 40-55
[16] Exhibit 1 Tab 2

> regarding any neurologically symptoms, she intermittently gets slight pins and needles and occasionally some numbness in her left arm."

[22] His clinical examination revealed that she had normal posture. Lateral flexion and rotation were significantly reduced and during examination the Plaintiff informed Dr Dörgeloh that she did not have a specific pain but she does experience a burning sensation in her cervical spine. Neurological examination of her arms reveal no abnormalities but the Plaintiff informed the doctor that occasionally she does experience pins and needles in her left arm.

[23] Dr Dörgeloh had before him the results of an x-ray of the Plaintiff's cervical spine performed on 10 September 2010 and an MRI of the cervical spine done on 20 September 2010. He noted age related degeneration of the C5/6 intervertebral disc with some narrowing of the disc space. In the doctor's opinion that feature was essentially a pre-existing degenerative change that was responsible for the symptoms in her left arm. He noted that he had re-examined the Plaintiff's MRI and there were no signs of any new injuries or possible disc prolapses.

[24] With respect to future treatment options the doctor was of the opinion:

> "There are no surgical indications. Ongoing management therefore needs to consist of rehabilitation and it is my opinion that most probably by now, being nearly a year after the injury, most of the modalities have been exhausted. Ongoing care would consist of ongoing strengthening exercises and trying to resolve or improve her range of motion."

[25] Dr Dörgeloh was of the further opinion that:

> "Mrs Silvester has an arthritic spine which in my opinion is in relation to her age. The degenerative changes in my opinion are appropriate for her age and the only significant finding was a mild narrowing of the left C5/6 foramen. These musculo ligamentous cervical spine injuries are often accompanied with small tears and sprains in the ligaments as well as the muscular attachments of the spine and most resolve with time and the necessary rehabilitation. The pre-existing symptoms from her arthritic spine though will be ongoing."

[26] In response to specific questions asked of him, Dr Dörgeloh further reported:

> "I do believe she has suffered a soft tissue injury to her cervical spine with the motor vehicle with which she was involved on 11 May 2010.
>
> Mrs Silvester demonstrates significant stiffness of her cervical spine which cannot be based on the objective findings. Nevertheless I do believe she has a true reduced range of motion and symptoms in her cervical spine as a result of the accident.
>
> Her current treatment is symptomatic with medication and massages.
>
> Evaluating her permanent impairment … Mrs Silvester has sustained a category 2 injury which allocates 5-8% impairment of the whole person.

> In the range between 5-8% I do believe her injury is mild due to the fact that there are no objective findings of a new injury on her MRI and therefore a 6% impairment is appropriate.
>
> Due to the fact that she has age related degeneration of her cervical spine with already established osteophytes which I do believe are contributing 50% to her ongoing problems I believe a 3% impairment is appropriate.
>
> There are no surgical interventions that would benefit Mrs Silvester.
>
> I have previously stated that she has received a permanent impairment, but I believe that once she has rehabilitated, she should be able to carry out her normal duties as a medical receptionist.
>
> I believe she should be able to carry out her activities of daily living although with some difficulty. Her cervical spine will continue to age and degenerate and there will be progressive deterioration in the function which is the normal aging process.

[27] Dr Dörgeloh re-examined the Plaintiff on 14 September 2012 and reported to the solicitors for the Second Defendant that day.[17]

[28] He summarised the conclusion of his findings on examination and his opinions as follows:

> "I had an extensive review on the 14th of September 2012. Specific questioning was made in regards to these issues and she informed me that her main symptoms are still in her cervical spine where she has constant symptoms of pain, tenderness, restricted movements and headaches. According to her the main significant symptoms are the headaches that she has every morning. With specific questioning in regards to neurological involvement, she intermittently has got pins and needles that radiate into her left hand and her index and middle fingers have been regarded as the most and the thumb and little finger as being the least affected when she has those symptoms.
>
> In regards to her lumbar spine the symptoms are intermittent particularly if she has to sit longer than 1 hour. I progressed taking the history and asked her to tabulate her symptoms in accordance to their significance. She firstly informed me that her most significant ongoing symptoms is a pulsating headache that she has on both sides of her occiput at the back of her skull, the left being more than the right. She has them in the morning when she gets up, makes herself a cup of teach (sic), takes a Mersyndol and subsequently the symptoms are manageable. Any form of high level of activity then increases her symptoms and according to her the pain then radiates forward into her whole head.
>
> Her second pain generator has been her cervical spine which is always sore and she describes the feeling as ants crawling in the neck and the left side is

[17] Exhibit 1 Tab 13

> involved more so than the right. She indicates with her index finger the paravertebral muscles going from the occiput down to T1.
>
> Her third symptoms are in regards to her home duties which she informs me whatever she does increases her pain even more and she then intermittently experiences pins and needles in her left arm which resolve once she starts resting.
>
> Examination revealed that her flexion was reasonable, but it pulls her muscles according to her. Extending the cervical spine was the most symptomatic, anything onwards from neutral which caused her the most pain. Lateral rotation to the right side was well, but to the left was limited due to pain. Lateral flexion in both directions was reduced due to pain. Her left arm revealed a subjective radiculopathy in regards to what I describe would be the C7 as her middle finger is involved.
>
> In regards to her lumbar spine the symptoms are intermittent and clinically it is lower lumbar spine in her paravertebral gutters from L2 down to S1.
>
> The objective findings are therefore unchanged form my previous evaluation, but subjectively she shows a C7 radiculopathy in her left hand. I do agree the dermatomes are overlapping and not always precise as the MRI indicates it should be her C6/7 nerved root."

[29] In response to a question posed asking him to identify the facts upon which his opinion was based, he said (in part):

> "My opinion regarding her cervical spine is unchanged. The facts in regards to this matter are obtained in the documentation that I have received as well as based on my evaluations and personally discussing the matter with Mrs Silvester. I do believe the facts support my argument that she most probably has sustained an injury to both her lumbar spine and her cervical spine but I believe the injury to her lumbar spine was very mild, should have settled by now and she has sustained no permanent impairment due to the aggravation suffered in her lumbar spine. As mentioned prior in this report, she has not mentioned problems or pain in her lumbar spine to multiple medical practitioners after her injury."

[30] Dr Dörgeloh was called to give evidence by phone. In evidence he confirmed that he had viewed video surveillance footage recorded on a DVD of Mrs Silvester.[18] A file note signed by Dr Dörgeloh of a telephone conference held with counsel for the Second Defendant was tendered[19] which relevantly said:

> "1. Dr Dörgeloh confirmed that he had reviewed video surveillance footage on DVD of Mrs Silvester.
>
> 2. Dr Dörgeloh noted that he considered what was depicted in the video surveillance footage to be significantly different to what he had

[18] Exhibits 9, 10 and 11
[19] Exhibit 7

experienced in the course of the clinical examination. He considered that the Plaintiff presented and reported to be experiencing symptoms that gave rise to severe restriction. Dr Dörgeloh had the impression that the Plaintiff was unable to do anything for most of the day and she rested or reclined for most of the day apart from a couple of hours per day where she had some movement or activity.

3. Dr Dörgeloh considered that the range of movement and motion demonstrated in the video surveillance was greater than what was demonstrated in the clinical context. Dr Dörgeloh noted that in a clinical context the range of motion tests suggested severe restriction caused by pain. Dr Dörgeloh considered that there was a marked difference of what appeared to be pain free range of movement well in excess of what was evident on clinical examination.

4. Dr Dörgeloh considered that the plaintiff presented as functioning reasonably well and that she was moving relatively well. Dr Dörgeloh considered that the movements suggested that she was moving in a fashion consistent with someone of her age group."

[31] In evidence Dr Dörgeloh was asked to assume that at the time of the accident Mrs Silvester was asymptomatic. He agreed that absent the motor vehicle accident, notwithstanding the evidence of her pre-existing age related degeneration in her cervical spine, one could not say that she would have suffered from any pain or restriction in her neck or when that might have occurred. Dr Dörgeloh was pressed about the significance of the low back symptoms complained of by Mrs Silvester. He expressed the opinion that if she had suffered a significant injury to her lumbar spine in the stated accident he would have expected complaints of pain on the day in question.

[32] In evidence Dr Dörgeloh confirmed that he had personally reviewed the MRI films of the investigations conducted on 20 September 2010 and 10 July 2012.[20] He gave evidence that his opinion was that the second MRI might, but did not conclusively indicate, a change or progression in the degeneration in Mrs Silvester's cervical spine. His opinion was that if a change is demonstrated it was more likely to be related to the degeneration process but he could not exclude the possibility that the accident had contributed to the changes.

[33] Dr Dörgeloh said that the results of the second MRI did not alter his opinion expressed in his reports concerning the extent of the Plaintiff's impairment and the effects upon her capacity to work and to carry out domestic activities.

[34] Two occupational therapists provided reports and gave evidence. Ms Kathryn Purse provided a report and co-authored a joint report.[21] In her report of 3 December 2011 Ms Purse was of the opinion that the Plaintiff had "significant restrictions in her capacity to engage in normal activities of daily living" and that she had "the necessary requirement for considerable amounts of care and assistance" which was provided mainly by her husband. In the opinion of Ms Purse the Plaintiff required 10 hours assistance per week from the date of the injury which need was

[20] Copies of the relevant x-ray report of 10 September 2010, the first MRI of 20 September 2010 and the second MRI of 10 July 2012 can be seen at Exhibit 2, Tab 6.
[21] See Exhibit 1, report 3 December 2011 (Tab 5) and joint report for April 2012 (Tab 8)

continuing.[22] Ms Purse was also of the opinion that the Plaintiff required assistance with transport when required to travel longer distances and on days when pain levels were too severe for safe independent living.

[35] Ms Purse was further of the opinion that the Plaintiff had significant restrictions in her capacity to work and that she was not then (in December 2011) fit to undertake any type of employment. Ms Purse expressed the opinion that the Plaintiff would have to show a significant improvement in her condition before she could consider a return to the workforce in any capacity.

[36] Ms Purse gave evidence. She had, at the time she gave evidence, viewed the surveillance evidence. Her evidence was that the surveillance evidence did not change her opinion. Ms Purse conceded that the Plaintiff demonstrated a greater range of movement in the film footage than when the Plaintiff was examined and tested by her on 1 December 2011. Ms Purse noted that when she examined the Plaintiff in December 2011, the Plaintiff complained that she was in pain having travelled from Mackay to Townsville for the purposes of the examination.

[37] Ms Purse stated that it was possible the Plaintiff's range of movement in her neck and spine might vary from day to day because her pain level might vary from day to day. When cross-examined, Ms Purse said that based on her examination and on the Plaintiff's self reporting to her it was her opinion that activities such as vacuuming, mopping, scrubbing a bathroom, changing linen, cleaning windows and carrying heavy grocery bags might provoke bad neck pain. Other activities involving less effort might be painful but could well be tolerable for the Plaintiff.

[38] Ms Purse expressed the opinion that the Plaintiff could not perform a job such as a medical receptionist on a regular and consistent basis. While Ms Purse was of the opinion the Plaintiff could perform the individual tasks that might be required of her in such a position on a given day she doubted that the Plaintiff could perform those tasks in combination consistently and sufficiently reliably even on a part time basis. Ms Purse pointed to the joint opinion of herself and the other occupational therapist, Ms Jones,[23] that at the time of assessment both were of the opinion that the Plaintiff was not fit to undertake any type of employment and that there would need to be an improvement in the Plaintiff's condition before she could return to the workforce. Ms Purse pointed out that a graduated return to work had been tried post accident under the supervision of an occupational therapist and that that programme had failed. She was of the opinion that a graduated return to work in the Plaintiff's current condition would fail again.

[39] The second occupational therapist, to give evidence was Ms Addie Jones. She had authored a report that was in evidence and a joint report with Ms Purse[24] Additionally Ms Jones had viewed the surveillance evidence and her file note of a telephone conference with counsel concerning that evidence was tendered.[25]

[40] In the report of 5 January 2012 Ms Jones expressed the opinion that for the Plaintiff to return to her pre-injury employment as a medical receptionist she would have to

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[22] Her opinion was that this was comprised by four hours per week domestic cleaning, two hours per week heavy laundry and ironing work, one hour per week shopping, one hour per week yard care and car care and two hours per week meal preparation.

[23] See joint report at Exhibit 1, Tab 8 at pg 54.

[24] See Exhibit 1, report 5 January 2012 (Tab 6) and joint report for June 2012 (Tab 8)

[25] Exhibit 12.

benefit from appropriate rehabilitation including strengthening exercises, analgesics and avoiding aggravating activities. It would also be necessary for her to undergo a graduated return to work programme on suitable duties. She was of the opinion the Plaintiff would no longer be suited to full time work in fashion sales positions similar to those that she had held in previous years.

[41] Concerning activities of daily living including personal care and domestic activities Ms Jones then noted that the Plaintiff required some assistance with showering and dressing tasks for a week after the initial injury which she estimated at 20 minutes per day for one week. She noted that most of the domestic tasks to do with shopping, cooking, cleaning and laundry were now performed or shared with the Plaintiff's husband. She was of the opinion that the Plaintiff required 11 hours of support per week for the first two months post injury and that she continued to require a fortnightly house cleaner and twice yearly spring cleaning assistance.

[42] Concerning the surveillance footage Ms Jones' opinion[26] was that it disclosed the Plaintiff moving in a markedly different way to how she presented for the purposes of assessment. Ms Jones said that what she saw in the film was indicative of someone who did not have the problems with pain and symptomotology reported when the Plaintiff attended upon her. Ms Jones considered that what was demonstrated in the surveillance footage suggested to her that the Plaintiff was capable of returning to work as the footage had showed tolerances with respect to sitting, standing and static posture that Ms Jones considered to be consistent with a person able to undertake duties of a medical receptionist or medical practice manager.

[43] When Ms Jones was cross-examined by senior counsel for the Plaintiff he directed her to the activities of the Plaintiff shown in the surveillance footage that Ms Jones specified was particularly inconsistent with what had been said to her by the Plaintiff when examined.[27] She was closely cross-examined about these issues[28] to the effect that the matters either did not appear in her report of 5 January 2012[29] or that such "inconsistencies" were not demonstrated by the surveillance evidence. Upon at least one issue (engaging socially)[30] Ms Jones was unable to point to a record of a prior statement by the plaintiff to the effect that she was unable to engage socially. The cross-examination of Ms Jones persuades me that paragraph 3 of Exhibit 12 is not literally accurate.

[44] I was impressed by the evidence of both Drs Pentice and Dörgeloh. Putting aside the question of the percentage quantification of the disabilities, the difference between them is upon the question of whether the plaintiff sustained an injury to her lumbar spine resulting in any permanent impairment[31]. Both doctors accept that the plaintiff sustained a lumbar injury as a consequence of the accident but Dr Dörgeloh considered there was no permanent impairment.

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[26] See Exhibit 12.
[27] Refer paragraph 3 of Exhibit 12.
[28] Transcript 2-80 l 15ff.
[29] Exhibit 1, Tab 6.
[30] Compare Exhibit 12 at para 3 with Transcript 2-83 l 15.
[31] They do differ as to whether the MRIs demonstrate that the plaintiff's cervical condition might be deteriorating and the extent to which her pre-accident cervical condition contributes to her overall disability. But these seem to be minor issues. It was not suggested to either doctor that either issue makes a great difference to any evaluation of the plaintiff's past, current or future capacity as it may have been affected by the subject accident.

[45] While for the most part I accept the evidence of both Dr Pentice and Dr Dörgeloh I give greater weight to that of Dr Pentice. In evidence he appeared more open to consider objectively the evidence and the matters put or raised with him. At times Dr Dörgeloh appeared combative when questioned. I accept the evidence of Dr Pentice that the plaintiff sustained permanent impairment to her lumbar spine. As to the precise assessment of the impairments in percentage terms in respect of the cervical spine and the lumbar spine I find that they lie between the percentages suggested by both doctors, perhaps being slightly towards those of Dr Pentice.

[46] I was not impressed with the evidence of Ms Purse. In evidence she seemed dismissive of the significance of the surveillance DVD evidence. I do not accept her assessment of the plaintiff's capacity to work or her capacity to engage in domestic activities. Her assessments appeared to be based on an over readiness to accept the plaintiff's self reporting. Her conclusions seemed to be inconsistent with the opinions expressed by Drs Pentice and Dörgeloh. When she gave evidence Ms Purse, while she noted that the surveillance showed the plaintiff demonstrating a greater range of movement than when the plaintiff had been tested, she said that her opinion had not changed. I do not consider that Ms Purse gave adequate weight to the surveillance evidence when she gave her evidence.

[47] I was more impressed with the evidence of Ms Jones than with the evidence from Ms Purse but the cross-examination of Ms Jones persuades me that while I am prepared to give some weight to her opinions, on balance, I consider that the evidence from Drs Pentice and Dörgeloh is a more reliable guide concerning the plaintiff's functional capacities domestically and potentially within the workforce.

[48] The Plaintiff gave evidence over a protracted period. The reason for this was partly due to the interposition of witnesses who were called but also because of the extensive surveillance footage that was shown to her.[32] When in the witness box the Plaintiff demonstrated behaviour suggesting that she was in pain or discomfort at times. She asked leave to stand on more than one occasion when she was examined. On one occasion when standing she leant back and supported her back and head against the wall. At times when she sat and gave evidence she supported her head and neck with her hand and on one occasion appeared to rub the back of her neck on the left side using her right arm which was positioned across her chest.

[49] The appearance of the Plaintiff when she gave evidence contrasted significantly with her appearance in the surveillance footage. In the footage she can be seen, at different times and places to be sitting for reasonably lengthy periods fairly comfortably not demonstrating indications that she was in significant pain or discomfort.[33] The Plaintiff can be seen to enter and leave motor vehicles and walk distances freely and reasonably quickly without any discomfort. She journeyed from Mackay to Charters Towers in one day. The journey was broken at Proserpine and at Ayr and the Plaintiff can be seen moving about outside the motor vehicle without demonstrating any obvious indication of pain, discomfort or stiffness. The film footage taken on 14 September 2010 shows the Plaintiff driving her motor vehicle and shopping for cushions. She can be seen to be moving freely and without any obvious stiffness or limp. The next day, 15 September 2012, the Plaintiff attended her granddaughter's soccer day. She can be seen walking across

[32] Refer Exhibits 8, 9, 10

[33] Although at times, for example when filmed at the McDonalds' restaurant, there are indications the Plaintiff might be supporting her head and neck with her hand and arm.

the fields and standing watching the game without any sign of restriction. That evening she accompanied her husband to a rodeo. There is film of the Plaintiff and her husband sitting for an extended period watching the events. She is seated in a grandstand. Her husband does rub her back at one stage but this can also, in part, be interpreted as a sign of affection when considered in the context of their conduct towards one another shown in the film. The Plaintiff demonstrated no signs of apparent discomfort. When leaving the grandstand she took several large steps down from the seats they occupied. These movements involved significant activity for a person whose pain levels might be aggravated by a sudden jump or jolt. The Plaintiff showed no discomfort and no hesitation in performing this activity. Indeed she was smiling.

[50] The reliability of the plaintiff's self reporting is in issue. The surveillance footage persuades me that I should be cautious before acting upon the plaintiff's account of her pain, suffering and disabilities. While I accept that the plaintiff may have found giving evidence over a protracted period somewhat of an ordeal I formed the impression that, whether consciously or unconsciously, her presentation in court did not truly reflect the extent to which the injuries affect her in daily life. These findings also affect the weight that I should give to the evidence of Mr Sylvester so far as his evidence supported his wife's account of her apparent pain and suffering.

[51] Notwithstanding these reservations I do accept that the injuries the plaintiff sustained caused her significant pain and suffering that significantly restricted her in her attempts to work and her capacity to work and her activities in daily life for a lengthy period after the accident. In March 2012 the plaintiff's general practitioner noted sustained improvement.[34] I accept the evidence of the witnesses who were called in the plaintiff's case who knew her and observed her behaviour and demeanour at different times.[35] I will give effect to these findings in my discussion of the findings in relation to the heads of damage below.

General Damages

[52] It was common ground that consistent with the evidence of the orthopaedic surgeons that general damages should be assessed on the basis that the Plaintiff had suffered at least an ISV of 10, based upon an assessment she had sustained a "moderate cervical spine injury – soft tissue injury."[36] The Defendant submitted that damages of $11,000 should be awarded.[37] The Plaintiff submitted that because she sustained a lumbar injury as well there should be an uplift of 25 per cent to reflect the circumstance that because of multiple injuries the impact is "so severe that the maximum dominant ISV is inadequate to reflect the level of impact".[38]

[53] For the reasons I have stated above concerning my findings in relation to the claimed lumbar injury I accept that the Plaintiff has suffered multiple injuries. The nature and extent of her injuries, in combination, leaves me to conclude that an uplift as contended for by the Plaintiff is warranted. Accordingly I propose to

[34] Exhibit 2, Tab 3, p 60.
[35] Recall the evidence summarised in para [12] and [13] above.
[36] See Civil Liability Regulation Schedule 4, item 88.
[37] See Civil Liability Regulation 2003 Schedule 6A, 1(b).
[38] See section 4 of Schedule 3 of the Civil Liability Regulation 2003

assess damages based upon an ISV of 13 to reflect this uplift.[39] Accordingly general damages are assessed at $15,200.

Economic Loss – General Findings and Discussion

[54] With respect to future economic loss, and for part of the period for which I propose to award damages for economic loss pre-judgment for the reasons that will become apparent I am unable to precisely calculate economic loss solely by reference to a defined weekly loss. The evidence concerning the plaintiff's loss of capacity to earn income is not that precise. Accordingly, s 55 of the *Civil Liability Act* 2003 becomes relevant. It provides (relevantly):

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

[55] Concerning the requirement of s 55(2) White JA made the following general observations in *Allianz Australia Insurance Limited v McCarthy*[40]:

> "[47] … Section 55(2) of the *Civil Liability Act* mandates that a court may *only* award damages if satisfied that the person injured will suffer loss of earnings. In this, the provision does not alter the common law.
>
> [48] In *Graham v Baker* Dixon CJ, Kitto and Taylor JJ noted:
>
> > "… an injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution of his earning capacity is or may be productive of financial loss."
>
> That is, it must be demonstrated that the injured person's impairment has resulted in loss in monetary terms. This statement of fundamental principal was restated in *Medlin v State Government Insurance Commission*:
>
> > "A plaintiff in an action in negligence is not entitled to recover damages for loss of earning capacity unless he or

[39] See Civil Liability Regulation 2003 Schedule 6A, 1(c). It was common ground that if an uplift was to be found warranted the ISV had to be rounded up or down, that damages could not be assessed on an ISV of 12.5.

[40] [2012] QCA 312 at [47] – [51].

> she establishes that two distinct but related requirements are satisfied. The first of those requirements is the predictable one that the plaintiff's earning capacity has in fact been diminished by reason of the negligence-caused injury. The second requirement is also predictable once it is appreciated that damages for loss of earning capacity constitute ahead [sic] of damages for economic loss awarded in addition to general damages for pain, suffering and loss of enjoyment of life. It is that „the diminution of … earning capacity is or may be productive of financial loss.'"

[49] In *Nichols v Curtis* Fraser JA, with whom the President and Chesterman JA agreed, observed of a finding by the primary judge that there was no evidence that the plaintiff had lost employment or, in seeking employment, had rejected work because of her injury:

> "The effect of those findings was that the applicant did not merely fail to prove that it was more probable than not that she would have earned more money if she had not been injured; she failed to establish that there was any real prospect that that [sic] she would have earned more money. On that basis there was no room for the application of *Malec v JC Hutton Pty Ltd*."

[50] His Honour continued:

> "Nor did the primary judge make the mistake of thinking that damages for economic loss were awarded for loss of earnings rather than for loss of earning capacity. Whilst damages are awarded for loss of earning capacity, they are awarded only to the extent that the loss produces or might produce financial loss. In *Medlin v State Government Insurance Commission*, Deane, Dawson, Toohey and Gaudron JJ held that a plaintiff in [an] action for negligence is not entitled to recover damages for loss of earning capacity unless the plaintiff establishes both that the plaintiff's earning capacity had been diminished by reason of the negligence-caused injury and that the diminution of earning capacity was or might be productive of financial loss."

[51] What the respondent had to prove here, on the balance of probabilities, was that her earning capacity had been diminished because of the negligently-caused injury to her right foot."

(Footnotes omitted)

[56] Concerning the requirement that I state the assumptions upon which any awards are based and the methodology used to arrive at the award as required by s 55(3) her Honour said:[41]

[41] See *Allianz Australia Insurance Limited v McCarthy* (2012) QCA 312 at [59] – [62].

[59] In *Ballesteros v Chidlow* the President said:

> "… Section 55(3) must be read in the context of the whole section. The heading of the section is **When earnings can not be precisely calculated.** Section 55(1) makes plain that the section only applies to "an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss. Whilst [the trial judge] could have chosen to more fully state her method of reaching an award of $20,000 for damages for future economic loss including future superannuation losses, from the modesty of that award and the assumptions and facts stated previously in her reasons, her Honour's methodology is plain enough…"

[60] Fryberg J, however, took a rather more structured approach observing: "… "Assumptions" and "methodology" operate in tandem in the provision, and the one throws light on the other. Both words have overtones of at least quasi-mathematical meaning. "Assumptions" could, of course, refer to the facts found by the judge upon which the award is based. In my view that would be a most inappropriate use of the word, and it seems unlikely that it was intended in this context. Apart from anything else, the subsection would be unnecessary if that were the meaning, since judges must in any event state their findings of fact. In the context of making a global award where, ex hypothesi, precise calculation by reference to a defined loss is impossible, it is much more likely to have been intended to refer to assumed facts underlying one or more hypothetical calculations which a judge might use in order to get a general idea of what might constitute a suitable global figure; or to similar facts or sets of facts used by the judge to confirm or cross-check a global figure selected by making an experienced guess. That in turn suggests that "methodology" does not refer to anything too demanding. In this context, an experienced guess is a legitimate methodology, although if possible it should be dissected in a manner appropriate to the circumstances of the case in order to understand what it might imply in those circumstances and thereby to confirm that the figure is of an appropriate order of magnitude."

[61] His Honour suggested that the intention of a provision like s 55(3) was to promote intellectual rigour:

> "If it is not complied with, a court of appeal will be obliged to scrutinise the award rather more closely than ordinarily it would do in such cases. After all, the purpose of requiring the assumptions and methodology to be stated must surely be to expose them clearly, including to a court on appeal."

(Footnotes omitted)

[57] Earlier in my reasons I noted that the surveillance film in the DVDs [42] had been reviewed and commented upon by doctors Pentice and Dorgeloh and also by Ms Jones. Doctor Pentice had noted that the DVDs demonstrated that the plaintiff had a

[42] Exhibits 9, 10 and 11.

good range of movement and that he noted improvement from the earlier DVDs to the later DVDs. It might be noted in passing that the activity observed in the first DVD occurred on 28 March 2012, the second DVD in May 2012 and the third and last DVD in September 2012. On the view I take it is significant that the plaintiffs' GP noted sustained improvement in March 2012.[43]

[58] The evidence of Rebecca Neilson[44] demonstrates that the duties the plaintiff performed as a reception supervisor did not require heavy lifting, they were not physically onerous, and that a reception supervisor had freedom to move around. Consistent with the evidence of Dr Pentice and Dr Dörgeloh I find that the plaintiff has the capacity to work in such an occupation. Presumably the duties of a practice manager are no more physically onerous than a reception supervisor.[45] Nevertheless the plaintiff has been left with a significant disability and it remains the case that she is restricted in some movements and suffers pain from time to time. She is 51 years and has been out of the work force for some years. It may be difficult for her to retrain, make herself fit enough to undertake full time or casual work involving significant hours and there may be practical difficulties in persuading an employer to offer her a position in her circumstances. I find that following the accident the plaintiff was unable to work as a reception supervisor because of the injury and consequent pain until March 2012. Thereafter, consistent with the medical evidence that I accept, I find she was fit to work as either a reception supervisor or a practice manager. But the plaintiff has, notwithstanding her general practitioner's observation in March 2012, that there was a sustained improvement, nevertheless sustained a loss of a significant part of her pre-accident earning capacity. I would assess that at 40%.

Past Economic Loss

[59] For the plaintiff it was submitted that past economic loss should be assessed at $112,003. The submission was based upon a proposition relying upon the evidence of Ms Purse that the plaintiff was and remains commercially unemployable. For the reasons I have discussed I do not accept Ms Purse's evidence. It was submitted that the damages contended for could be justified by awarding the plaintiff her lost wages for the period of 23 weeks immediately following the accident at $653 net per week (being the net weekly wage enjoyed by the plaintiff at the time of the accident as a receptionist supervisor). Further it was submitted that the plaintiff should be awarded damages on and from 1 November 2010 (108 weeks) at $898 net per week (being the earnings of a practice manager).[46]

[60] The defendant contended that the past economic loss should be awarded the sum of $47,500. This was arrived at by a notion of $400 per week for 100 weeks post injury and thereafter $200 net per week for 33 weeks from March 2012. It was contended that this reduction was justified because the general practitioner notes which recorded a sustained improvement in the plaintiff's condition.[47]

[61] In view of my findings concerning the plaintiff's injury and her pain and suffering I propose to award damages for past economic loss on the basis that she was disabled

[43] See Exhibit 2, Tab 3, p 60.
[44] See para [13] above.
[45] While the evidence was silent upon this distinction no suggestion was made in evidence that such a state might be so.
[46] From that sum it was conceded that the $4540 earned by the plaintiff during her attempts to work post accident should be deducted resulting in a claim to $107463 for past economic loss.
[47] See Exhibit 2 at tab 3 page 60 in the records of the Concordia Medical Practice.

and unable to work as either a receptionist supervisor or as a practice manager as a result of the injuries sustained from the time of the accident until March 2012 when an improvement was noted in her condition. In the premises she is entitled to have those damages calculated upon the loss of an initial 23 weeks at $653 dollars net per week ($15,019). This period ends in October 2011. I find that the plaintiff would have taken up the offer as a practice manager. Her evidence was that had she been offered this position she would have accepted it. Doctor Hansrajh confirmed that he would have offered her the position but for the injury.[48] From November 2010 to March 2012 is a period of approximately 72 weeks. The calculated loss of income for that period is $64,656 (at $898.00 net per week). With respect to the period from the beginning of April 2012 through to judgment (a period of approximately 46 weeks) I propose to award damages on the basis that the plaintiff had lost 40% of her capacity to earn income in accordance with my earlier findings. 40% of the potential earnings as a practice manager for 46 weeks is $16,523.

[62] In summary the total of the lost earnings for those three periods is $96,198. When allowance is made for earnings received of $4540 the component for loss of income is $91,658.

Future Economic Loss

[63] Consistently with my findings and for the assessment of the plaintiffs recent past loss of earning capacity I assess damages for future economic loss starting with the proposition that the plaintiff has lost 40% of her capacity to earn income. 40% of a loss of $898 net per week until age 65[49] provides a calculated figure of $190,124.56. In addition, in my view, a further reduction should be made for contingencies. The plaintiff had a pre-accident and to some extent a progressive degenerative condition in her cervical spine. There is a prospect that it might have become symptomatic and interfered with her capacity to earn income. In a cross-examination Dr Dorgeloh agreed with the proposition that upon the assumption, as I find, that the plaintiff's neck had been asymptomatic prior to the motor vehicle accident one could not say for sure that the plaintiff would have suffered in her neck or when. In my view a further discount for contingencies of the order of 12.5% is reasonable taking into account the contingencies in light of the evidence. The rounding up a little, the discount of the calculated loss of 40% of full time working capacity is $166,500.[50]

Past Care

[64] It was agreed that the hourly rate for any award for past care was $27.50 per hour. The plaintiff submitted that an allowance based upon an assumed 10 hours of care per week for the 2.5 years since the accident should be included. The defendant submitted that no allowance should be made for care in the past.

[65] The evidence of Dr Pentice was that the plaintiff was capable of performing many of the household chores[51]. Evidence was given by Mr Sylvester however that the plaintiff suffered when she attempted heavier household tasks such as vacuuming or

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[48] See Exhibit 3 Tab 17 and transcript 2-21 l 25 ff.

[49] She is now 51. The multiplier on the 5% tables for 14 years is 529.3.

[50] For the record it might be noted that on behalf of the plaintiff it was submitted future economic loss should be awarded on the basis of a loss of $898 net per week for 15 years less 30% discount for contingencies. In my view this significantly understates the plaintiffs working capacity in light of the evidence that I have preferred.

[51] See his report of 29 August 2012, Exhibit 1, Tab 12.

mopping floors, scrubbing bathrooms, changing linen on beds or tasks such as cleaning windows or carrying heavier groceries. These were all tasks the plaintiff performed before the accident. While the plaintiff is now more able, on the view I take based upon the evidence, of performing many of the tasks about the house, such as meal preparation, pulling up the bedclothes, dusting, light laundry and stacking and unstacking a dishwasher that her evidence would suggest I accept that the plaintiff had difficulty performing these tasks for an extended period post accident. I accept that after the accident the plaintiff was provided services by her husband that were necessary[52] that the need for the services arose solely out of the injury[53] and that at times when the plaintiff suffered intense pain, most if not all of the household and domestic duties would have been performed by her husband. Notwithstanding the reservations I have had about the reliability of the plaintiff's evidence I do accept that for a period of up to two years post accident she required such domestic assistance and that the tasks previously performed by herself were performed by her husband. On average I would assess that the services provided by Mr Sylvester during that period took 7.5 hours per week.[54] At 7.5 hours per week when the agreed hourly rate is applied for two years the calculated figure is $21,450. On the evidence which I accept by a time at approximately two years post accident the plaintiff's needs for personal care and for assistance in the performance of domestic duties were greatly reduced. Consistent with the decision of the Court of Appeal in *Kriz v King*[55] the plaintiff is entitled to an award for past (and for future) care once the threshold laid down by s 59(1)(c) of the *Civil Liability Act* 2003 has been met. The most reliable guide for the quantification of the hours of care necessary to meet the plaintiff's needs for the approximately 40 weeks have passed since the second anniversary of the accident can be found in the report from Ms Jones of 5 January 2012[56] which assesses that need at approximately 1.25 hours per week at the agreed rate, a calculation of 1.25 hours for weeks is $1,375.00. I propose to award $22,825 for past care.

Future Care

[66] It was agreed that a future care were it to be allowed should be awarded at the rate of $30 per hour. The plaintiff submitted that an allowance based upon 10 hours per week for 35 years (age 85) less a reduction of 30% for contingencies should be awarded. The defendant submitted that an award should be limited to the future cost of paid care recommended by Ms Jones for occasional professional cleaners.[57]

[67] The evidence of Dr Pentice and Dr Dörgeloh concerning the plaintiff's capacities and the plaintiff's needs for care suggest that her current and ongoing needs are modest.[58] In my discussion concerning past care I indicated that I considered the evidence of Ms Jones concerning the quantification of the plaintiff's ongoing care needs was reliable. I propose to act upon her evidence. On that basis the plaintiff's ongoing needs equate to an average of 1.25 hours per week. The value of that[59] is $32,471.25.

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[52] See s 59(1)(a) of the *Civil Liability Act* 2003.
[53] See s 59(1)(b) of the *Civil Liability Act* 2003.
[54] This might have been significantly more at times in the weeks and months immediately after the accident and somewhat less by April and May 2012 but on average for two years post accident I consider 7.5 hours per week reasonable.
[55] [2007] 1 QdR 327 at [18].
[56] Exhibit 1, Tab 6 at pp 11-12.
[57] An assumed 12 hours per year at $30 per hour for 25 years resulting in an allowance of $5,000.
[58] That is confirmed to some extent by the evidence of Ms Jones notwithstanding that I have expressed a preference for the evidence of the doctors in preference to the opinions of the occupational therapists.
[59] Discounted on the 5% tables to age 85 (multiplier 865.9).

that figure should be discounted for contingencies taking into account the vicissitudes of life and the circumstance that the plaintiff had a pre-accident neck condition (albeit asymptomatic) which might have interfered with her capacities in later life. I propose to discount by the order of 25% and round the figure down modestly. I award $24,000 upon this head.

Special Damages, Past and Future Allowances

[68] It was agreed that past special damages paid by WorkCover Queensland totalled $13,816.[60] I find that the plaintiff has incurred various medical expenses, travelling and pharmaceutical expenses in the sum of $6166.72.[61] It was common ground that the plaintiff should be allowed the costs of a future pain management course estimated at $5,000. The plaintiff claimed future medical expenses and expenses for medication at $20 a week for 35 years ($17520). The defendant contended in light of the plaintiff's improvement since March 2012 and the evidence of the doctors and allowance of $6,000 was reasonable. I accept that submission.

[69] The plaintiff claimed the cost of future chiropractic expenses and treatment totalling $13,000. Evidence was given by chiropractic Dr Koz of the costs. The evidence suggests that in the past the plaintiff obtained only slight and at best minimal improvement, for a day or so, following treatment when she saw the chiropractor after the accident. She stopped claiming chiropractic treatment because of its expense. She gave evidence that she wished to take it up again.

[70] There was no evidence from either Dr Pentice or Dr Dorgeloh that this treatment was likely to be of any benefit to the plaintiff. While, in the circumstances, it was reasonable for the plaintiff to investigate this treatment post accident the balance of the evidence does not persuade me that the defendant should be called upon to bear this expense in the future. Consequently I will not award damages for future chiropractic treatment.

Summary

[71] In summary therefore damages are assessed as follows:

General damages for pain and suffering	$15,200.00
Past economic loss	$91,658.00
Interest on past economic loss[62]	$3,713.52
Past loss of superannuation contributions [63]	$8249.22
Future economic loss	$166,500.00
Future loss of superannuation contributions[64]	$14,985.00
Past special damages:	
Paid by WorkCover Queensland	$13,816.00

[60] This included medical expenses and also *Fox v Wood*.
[61] Refer Exhibit 5 schedules A and C.
[62] $91,658 less the net weekly compensation of $21,326.00 ($70,332) at 1.92% multiplied by 2.75 years.
[63] 9%
[64] 9%

Paid by the plaintiff	$6,166.72
Interest on special damages paid by the plaintiff[65]	$314.00
Pain management treatment	$5,000.00
Future medical expenses and painkillers	$6,000.00
Past care	$22,825.00
Future care	$24,000.00
Total	**$378,427.46**

[72] I give judgment for the plaintiff against the second defendant for $378,427.46.

[73] I will hear submissions as to costs.

[65] At 1.92% (and making allowance for a reduction of some travel expenses claimed)