SUPREME COURT OF QUEENSLAND

CITATION:	*Foster v Carter & Anor* [2017] QSC 135
PARTIES:	**KAREN FOSTER** (plaintiff) v **JADE MARC CARTER** (first defendant) **RACQ INSURANCE LIMITED** (second defendant)
FILE NO:	BS5017 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	28 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	6-7 February 2017
JUDGE:	Mullins J
ORDER:	**1. Judgment for the plaintiff against the defendants in the sum of $539,765.** **2. The question of the costs of the proceeding is adjourned to a date to be fixed.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where the plaintiff was injured in the course of her employment as a bus driver when the defendant's vehicle collided with the rear of her bus after the defendant lost control of his vehicle – where the defendants admit liability for the accident – whether damages should be assessed at common law or under the *Civil Liability Act* 2003 (Qld) – whether the plaintiff's employment was a significant contributing factor to the injuries DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – where the plaintiff suffered physical injuries, including cervical spine and lumbar spine injuries, and psychological injuries – where damages assessed pursuant to the *Civil Liability Act* 2003 (Qld) – where assessment of damages for the diminution in earning capacity was in issue

Civil Liability Act 2003 (Qld), s 5, s 59, s 60, s 61, s 62
Civil Liability Regulation 2014 (Qld), s 7
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 32

Farnham v Pruden [2017] 1 Qd R 128; [2016] QCA 18, followed
King v Parsons [2006] 2 Qd R 122; [2006] QCA 49, considered
Newberry v Suncorp Metway Insurance Limited [2006] 1 Qd R 519; [2006] QCA 48, considered

COUNSEL: G F Crow QC for the plaintiff
K S Howe for the defendant

SOLICITORS: Schultz Toomey O'Brien Lawyers for the plaintiffs
Quinlan Miller & Treston for the defendant

[1] The plaintiff was driving a bus in the course of her full time employment on 2 September 2014 towards a roundabout when a Holden Commodore vehicle driven by the first defendant drove through the roundabout, went out of control, collided with the rear of the bus and ricocheted to its resting place on the median strip. Liability for the accident is admitted by the defendants. The parties are in dispute over the assessment of the quantum of damages for the plaintiff's injuries sustained in the accident, in particular over the nature and extent of the physical injuries sustained by the plaintiff and the consequences of the injuries for the plaintiff's employability. There is also an issue as to whether damages are assessed at common law or under the *Civil Liability Act* 2003 (Qld) (CLA).

The plaintiff's history

[2] The plaintiff was almost 50 years old at the time of the accident. She was single, although her former partner, Mr McLeod, resided in the same house, in order to share expenses.

[3] She had been working as a bus driver since 2009. She had prior experience working as a sales representative, courier driver, factory hand, car detailer, traffic controller and in aged care. She had not worked in an office since before 2000. She did not consider herself to be "computer literate".

[4] During 2007 the plaintiff was treated for calcific tendonitis in her left shoulder. She had surgery in November 2007 and was off work for 12 months. When reviewed by orthopaedic surgeon Dr Wallace on 20 March 2008, the plaintiff was still experiencing ongoing pain and restriction of motion in the left shoulder which disabled her from returning to work as a courier driver or any job involving lifting or overhead work. Dr Wallace assessed the plaintiff using AMA 5 as having a 5 per cent whole person impairment.

[5] The plaintiff had trouble with her right shoulder in May 2012 when she was then diagnosed with calcific tendonitis in her right shoulder and arthroscopic decompression was performed in November 2012. After surgery she had three months away from work and then returned part time for a period of about six months. The defendants relied on the Medical Assessment Tribunal decision dated 5 December 2013 that assessed the permanent impairment due to the aggravation of degenerative changes in the plaintiff's right shoulder rotator cuff. The assessment was 11 per cent based on AMA 4. In WorkCover's request for the assessment on 1 September 2013, it was noted the plaintiff had been discharged from care by the orthopaedic surgeon who performed the right shoulder acromioplasty on 17 June 2013 and the plaintiff reported "ongoing discomfort and reduced movements in the right shoulder".

[6] After the plaintiff resumed work full time in 2013, two fingers on her right hand were tingling and she was diagnosed with regional pain syndrome. According to the report obtained by WorkCover from orthopaedic surgeon Dr Megson dated 21 February 2014, the plaintiff was involved in two near misses while driving the bus, the second of which occurred on 7 December 2013, after which she noticed the symptoms in her right hand. The plaintiff reported to Dr Megson that she had been on light duties at work since 7 December 2013. In the course of cross-examination, the plaintiff thought she may have had nine weeks off work for the problem with her fingers and then answered telephones for about a week on her return to work.

[7] The plaintiff states she did not have any problems with pain in her neck or lower back prior to the accident on 2 September 2014. She was working on a full time basis when the accident occurred. Her intention was to continue bus driving until the retirement age of 70 years, but she would have also liked to work past retirement.

The accident

[8] Although liability for the accident is admitted, it is relevant to record the plaintiff's evidence as to the movement of the vehicles in the course of the collision, because of the submissions that were ultimately made by the defendants about the plaintiff's tendency to exaggerate. The plaintiff described the impact of the first defendant's sedan striking the bus as "very heavy" and stated that "it was hit with high impact that actually pushed the bus to the side." The plaintiff estimated the weight of the bus as nine tonne and described that she was "holding the steering wheel trying to control the bus to make sure that it didn't go out of control." In the course of the plaintiff's evidence, the DVD (exhibit 5) that contains the CCTV footage from the bus that recorded the path of the bus, but also the path of the first defendant's vehicle immediately before the collision, was played. The footage shows the first defendant's vehicle travelling on the opposite side of the road towards the bus. The moment of impact is identifiable, as the plaintiff moves slightly in her seat and steers the bus closer to the kerb before stopping the bus. In the course of cross-examination, the plaintiff stated her belief that there were two impacts, namely when the vehicle first came across and ricocheted off the gutter hitting the front wheel of the bus and the vehicle then turns on its side and goes down and hits the back of the bus. The photographs in exhibit 3 of the damage to the bus show only damage on the driver's side between the rear of the bus and the rear wheel. The plaintiff suggested in her evidence that on impact the bus moved sideways about half a metre. The movement of the bus at the point of impact that is identifiable on the footage from the plaintiff's

immediate reaction does not reflect such lateral movement and I would describe it in terms of a slight shudder. The plaintiff's description of the accident and particularly the effect of the impact of the first defendant's vehicle was exaggerated.

Post accident

[9] The plaintiff was shaken after the accident and started to feel neck pain when she was driven back to the depot. She started to feel pain in her lower back later that night. She saw her general medical practitioner Dr Boorboor the next day. Dr Boorboor recorded her symptoms as "bilateral neck and shoulder pain with pain in her arms and back is stiff and cannot turn easily". She was prescribed Panadeine Forte and Valium which she took. She was off work on workers' compensation. She was still in severe pain and having difficulty sleeping when she returned to Dr Boorboor on 8 September 2014. She was referred for physiotherapy which she undertook. She was also started on Endone which helped her sleep better. By the time she saw Dr Boorboor on 27 October 2014, she had started hydrotherapy. The plaintiff has undertaken about 20 hydrotherapy sessions.

[10] When the plaintiff saw Dr Boorboor on 27 November 2014, she was cleared for returning to light duties and recommended to return to normal work in three months. WorkCover had referred the plaintiff to Advantage Injury Management Services for a Functional Capacity Evaluation and Worksite Assessment that was completed on 1 December 2014 by physiotherapist Ms Potter. It was not recommended that the plaintiff return to driving buses, but it was recommended that she undertake administration tasks, alternating between sitting and standing to avoid sustained postures with no lifting or carrying over five kilograms, no heavy pushing or pulling and no bending, squatting or kneeling. The plaintiff returned to work in December 2014 and undertook light duties in the office. She was unable to return to driving a bus, as Dr Boorboor would not certify that she could drive a commercial vehicle and her employment was terminated in March 2015. She has remained unemployed.

[11] On her visit to Dr Boorboor on 22 April 2015, the plaintiff got a new referral for physiotherapy.

[12] The rehabilitation advisor from the second defendant organised two occupational therapists from Edge Rehabilitation to visit the plaintiff at home and assess her on 18 November 2015. A rehabilitation program was designed for the plaintiff which she says she complied with. The plaintiff recalled that was with Sports and Spinal and that it involved her having a pool pass and doing her own physiotherapy in the pool. Edge Rehabilitation coordinated the plaintiff's rehabilitation program for a period of about 11 months.

[13] The second respondent funded six sessions of psychological counselling for the plaintiff by clinical psychologist Ms Harrison. The six sessions were delivered between 5 and 25 January 2016. The plaintiff's presenting issues for treatment by the psychologist were depression, anxiety and stress and Ms Harrison used cogitative behavioural therapy to assist the plaintiff. In her report dated 29 January 2016, Ms Harrison described the plaintiff's future prognosis as uncertain, while she was continuing to experience chronic pain, but noted that her symptoms of depression, anxiety and stress reduced over the

course of the therapy. Ms Harrison was of the opinion the effectiveness of the psychological treatment was restricted because of the plaintiff's chronic pain, lack of finances, ongoing sleep disruption and social withdrawal.

[14] A physiotherapist from Coastal Home Physio visited the plaintiff at home for treatment in April and May 2016. The plaintiff was assessed by an exercise physiologist Ms Sexton of Sports and Spinal on 31 May 2016 for an exercise program. Ms Sexton saw the plaintiff on four occasions and the plaintiff says she followed the exercise program prepared for her.

[15] The treatment and programs that the plaintiff undertook funded by the second defendant ceased in September 2016.

[16] The plaintiff had a further five sessions with Ms Harrison (approved under Medicare) from about September 2016 with the last session before the trial being on 16 January 2017. At that last session Ms Harrison described the plaintiff as presenting with low mood, reporting ongoing feelings of hopelessness, and describing "poor motivation, insomnia, ongoing pain, social isolation and frequent tearfulness". On the Depression Anxiety and Stress Scales, the plaintiff scored extremely severe for depression, but normal for anxiety and stress.

[17] Despite all the treatment and medication the plaintiff has had since the accident for the pain in her neck and lower back, the pain has persisted and the plaintiff copes by managing her activities to avoid aggravating the pain. As a result, the plaintiff stays at home, and spends a lot of time on her recliner chair.

[18] When giving evidence, the plaintiff described how the severity of the pain in her neck or back determines what she can do on a daily basis. If the pain is not too bad, she may do a load of washing that day, but by the end of the day she spends a lot of time in her recliner chair, alternating between doing tasks such as taking her dogs for a short walk and returning to the recliner chair. Her neck limits the way she can turn, particularly when she is sleeping. Putting out the washing aggravates her neck pain. Housework can aggravate her lower back pain. Sometimes she aggravates her back when she walks her dogs. It is also aggravated from walking down hills. She states that she cannot walk upstairs as a normal person and has to walk down sideways, as it aggravates her back if she lifts her legs in front of her. Her lower back pain is aggravated from sitting too long or standing too long. The plaintiff knows the limitations with moving her neck. She manages the pain by not turning her neck too far either to the left or the right.

[19] The plaintiff relied on Mr McLeod to do "everything" for her in the first six to 12 months after the accident. She describes how she has limitations in doing domestic work and that Mr McLeod does a lot of the cooking. He also cleans her shower and has to help change the linen on her bed. If there is anything heavy that needs to be moved or lifted, Mr McLeod does that. He also hangs out any heavy washing that the plaintiff cannot do and washes her car. The plaintiff accepted during cross-examination that she does the mopping with a steam mop and the vacuuming with a cords free lightweight vacuum cleaner. She also does some cooking and drives 10 minutes to the shops once every two

weeks. The boarder Mr Murray used to help the plaintiff walk her dogs, when she had three dogs, and would drive her around on long distance appointments.

Evidence of Mr McLeod and Mr Murray

[20] At the date of the accident the plaintiff was renting premises at Battery Hill with Mr McLeod. In November 2014 they moved to another rented house at the Sunshine Coast which the plaintiff described as three bedroom, two bathroom and "very small". Mr McLeod is a truck driver and is absent from the house during the day, as he works for five and a half days each week.

[21] In the year prior to the accident Mr McLeod described the plaintiff as "fit as a Mallee bull" with a "full-on social life, full work". He described the plaintiff as having "gone downhill" since the accident.

[22] When Mr McLeod returns home from work, he will sweep and tidy up after the dogs. If the plaintiff is not up to it, he will cook dinner. He usually spends anywhere between an hour or an hour and one-half on cooking, doing the dishes and other domestic chores after work. If the plaintiff needs anything from the shop, she will telephone Mr McLeod so that he can pick the goods up for her on his way home from work. When Mr McLeod returns home on a Saturday, he will put on a couple of loads of his washing, mow the lawns and tidy the yard. Every second Sunday, Mr McLeod spends an hour to two hours vacuuming the house (because the dogs lose a lot of hair and he does not like it) and doing the chores that the plaintiff finds it uncomfortable to do. Mr McLeod gives the plaintiff's bathroom a good clean one out of every three or four weekends. The plaintiff does her own washing, but if she is having a particularly bad day Mr McLeod will hang it out and bring it in for her. Mr McLeod estimated that on a Saturday he spent somewhere between an hour and two hours on performing domestic chores for the plaintiff. He estimated that every Sunday he spent between an hour and an hour and a half on doing chores for the plaintiff plus an additional hour for every other weekend when he did her bathroom.

[23] During cross-examination, Mr McLeod conceded that the arrangement that he had with the plaintiff before the accident was that they would help each other out and split chores and that has continued since the accident. Mr McLeod also conceded that prior to the accident the plaintiff complained of pain and being restricted in movement with her right shoulder. Mr McLeod recalled once or twice before the accident helping the plaintiff to hang heavy stuff on the clothesline because the plaintiff's right shoulder was troubling her. Generally, Mr McLeod had a tendency in his evidence to say what he thought was most helpful to the plaintiff. The concessions he ultimately made in cross-examination showed that caution needs to be taken in relying literally on the time estimates that Mr McLeod gave for the help he provided to the plaintiff.

[24] Mr Murray rented a room from the plaintiff and Mr McLeod for about six months between August 2015 and February 2016. Mr Murray had a disability which was limited use of his left arm for which he was seeking a disability pension and he did not work. He recalled that on at least one occasion he cleaned the plaintiff's shower. He would sometimes accompany the plaintiff when she walked her dogs and on occasions helped her walk one of the dogs, when she was finding it difficult to handle the three dogs at the

same time. Mr Murray used to clean the dog beds every second week. Mr Murray would vacuum the floors and the plaintiff was supposed to mop with the steam mop, but sometimes she could not do that. Mr Murray recalled driving the plaintiff on four occasions only where the trip was 15 minutes each way. Mr Crow of Queen's Counsel described Mr Murray as an independent witness and that weight should be placed on his observations. I found the general nature of Mr Murray's evidence not to be particularly helpful in working out the hours of care the plaintiff required during the period of time that Mr Murray was a boarder.

Neck and back injuries

[25] Neurosurgeon Dr Johnson assessed the plaintiff on 9 September 2015. Dr Johnson observed the plaintiff to display pain when getting out of the consultation waiting room chair. She was slow moving from a sit to stand position and mobilised with a stooped gait, a rolled lumbar spine and kyphotic thoracic spine. She displayed tenderness across the belt line distribution of her back. There was some mild tenderness in the thoracic paraspinal soft tissues and paracervical soft tissues. Her cervical range of motion was poor and she grimaced at the extremes of her 50 per cent range of motion. Her lumbar spine mobility was extremely restricted as well and the flexibility of her hips, knees and ankles and posterior chain soft tissue structures was "exquisitely reduced".

[26] Dr Johnson reviewed the MRI scan performed on 23 October 2014 which revealed some minor degenerative changes of the L4/5 and L5/S1 disc with some minor broad non-compressive bulging and loss of disc T2 signal. The MRI of the plaintiff's cervical spine showed similar age-related degenerative changes without any evidence of traumatic injury as a result of the accident. Dr Johnson expressed the view that in her current clinical state the plaintiff would be unlikely to maintain gainful employment due to her immobility secondary to her neck and back pain. Dr Johnson recommended effective functional movement training to improve the plaintiff's work capacity and return to employment. Dr Johnson provided further information to the plaintiff's solicitors about the functional movement training program conducted by his practice which he described as a strength and conditioning program with the focus of improving low back pain symptoms and work capacity. The program involves two coaching sessions each of one hour per week for 10 weeks at a total cost of $5,000. On 26 September 2015, the plaintiff's solicitors advised the second defendant the plaintiff would like to undergo the program recommended by Dr Johnson and inquired whether the second defendant was happy to fund that program as part of the plaintiff's reasonable rehabilitation needs (exhibit 7). On 8 October 2015, the second defendant declined to fund that program, as the recommendation resulted from a medico-legal assessment rather than a treating provider and evidence-based best practice guidelines recommend treatment at that non-acute stage of recovery as education and prescribed functional exercises (exhibit 8). It was noted that the plaintiff had already received 35 sessions of physiotherapy.

[27] Dr Johnson assessed the plaintiff's lumbosacral spine as falling into DRE Lumbar Category 2 with a 6 per cent whole person impairment and assessed the cervical spine as falling into DRE Cervical Spine Category 2 with a 6 per cent whole person impairment which made for a final calculated whole person impairment of 12 per cent. In cross-examination, Dr Johnson accepted that based on the imaging and the examination, there

was no structural or physical injury of initial significance, but that it was the plaintiff's symptoms of pain that were restricting her return to the workforce.

[28] Neurosurgeon Dr Weidmann assessed the plaintiff on 12 July 2016. Dr Weidmann reviewed plain X-rays of the cervical spine dated 3 September 2014 that showed some degenerative changes at all levels, but mainly C6/7 with narrowing of nerve root canals mainly at C5/6. Dr Weidmann also reviewed the MRIs of the cervical and lumbar spines dated 23 October 2014 which showed multi-level degenerative changes in the cervical spine, but no focal pathology, and degenerative changes at L4/5 and L5/S1. Although the report stated there is an annular tear at L4/5, Dr Weidmann considered that was "extremely doubtful". Dr Weidmann also noted that "the finding of an area of increased T2 signal is better referred to as an annular fissure rather than a tear" and noted "the significance of that finding is not well understood".

[29] Dr Weidmann expressed the view that the plaintiff's treatment to date had been adequate and appropriate, her condition had become stable and stationary, and she had reached maximum medical improvement. Dr Weidmann was of the opinion that the plaintiff would not benefit from any additional treatment, therapy, injections or rehabilitation. Dr Weidmann was unable to find her medically unfit for her usual employment as a bus driver on the basis of clinical neurological and radiological findings. Dr Weidmann considered that the plaintiff meets the criteria for DRE Cervical Category 1 in that there are no significant clinical findings, no muscular guarding, no documentable neurological impairment and no significant loss of motion segment integrity. She therefore has a zero per cent impairment of the whole person, as a result of her cervical spine condition. Dr Weidmann also considered the plaintiff meets the criteria for DRE Lumbar Category 1 in that there were no significant clinical findings, no observed muscle guarding or spasm, no documentable neurological impairment and no documented alteration in structural integrity. As such, Dr Weidmann assessed the plaintiff for zero per cent impairment of the whole person as a result of the lumbar spine injury. Dr Weidmann explained that in terms of AMA 5, impairment is meant to be an objective measure of the impact of a condition upon a person's ability to undertake activities of daily living, excluding work, but disability is defined as "An alteration of an individual's capacity to meet personal, social, or occupational demands because of an impairment". Dr Weidmann accepted that there is no reliable assessment system whereby disability can be objectively assessed and quantified, noting "Pain is very subjective. … you can't measure it and you can't prove it or disprove it".

[30] Dr Boorboor referred the plaintiff to neurosurgeon Dr Bonkowski who assessed the plaintiff on 17 June 2016. In his report dated 17 June 2016, Dr Bonkowski recorded the plaintiff's symptoms as follows:

> "Her main symptoms continue to be of significant pain going down the right arm and pain in the neck. She has also had lower back issues with low back pain. She says that she cannot sleep because she cannot get into a comfortable position, she cannot rotate the neck for more than a few degree to the left and when laying in bed she cannot lift her head off the bed because of the pain. Pains go up into the back of the head and a 'ripping' sensation when she rolls at night with sharp pains up the side of the neck. The pain goes across both shoulders but not down either arm although more recently she has started to get some low grade symptoms in the right elbow area.

> As far as the lower back is concerned she has pain in both buttocks and legs, her walking is limited because of the pain and she cannot exercise."

[31] On examination, Dr Bonkowski observed the plaintiff was walking with a forward lumbar tilt and a waddle, all her neck movements were very restricted by pain, but there did not appear to be any specific neurological deficit, insofar as there was no radicular radiation of her symptoms and there was no reflex asymmetry nor specific motor deficit in any of the upper or lower limbs.

[32] After reviewing the MRI scan carried out in November 2014, Dr Bonkowski expressed the opinion that the plaintiff's underlying problem is that she has a "multi segmental pain syndrome" that can be managed with medication and physiotherapy and that post traumatic stress and reactive depression now colour her pain so much that these need to be addressed, rather than any anatomically definable cause of pain.

[33] The defendants rely on medico-legal reports obtained by WorkCover. Orthopaedic surgeon Dr Walters examined the plaintiff on 14 November 2014 and provided a report to WorkCover dated 20 November 2014 (which appears to be the same report provided again to WorkCover dated 30 January 2015). Dr Walters examined the imaging from an MRI of the cervical spine and lumbar spine on 23 October 2014 and noted on examination there were some restriction of movements of the cervical spine, but the examination of the lumbar spine was unremarkable, apart from dysrhythmia when straightening from a flexed position. The findings on examination were consistent with the diagnosis of aggravation of established cervical and lumbar spondylosis. Dr Walters considered it unusual that the plaintiff reported no improvement in her symptoms over a period of 10 weeks during which she had received appropriate conservative treatment. Dr Walters considered the plaintiff was capable of performing some form of light duties.

[34] Dr Walters examined the plaintiff again on 23 February 2015 at which time the plaintiff reported there had been minimal improvement in her symptoms. Because there were some asymmetry of movement with respect to the cervical spine associated with muscle spasm, Dr Walters assessed impairment due to aggravation of cervical spondylitis at DRE Category 2 with 5 per cent whole person impairment. Dr Walters assessed the aggravation of lumbar spondylitis at DRE Category 1 with a zero per cent impairment.

[35] Orthopaedic surgeon Dr Pincus examined the plaintiff on 6 January 2016 at the request of the second defendant. Dr Pincus was provided with the x-ray of the cervical spine of 3 September 2014 and the MRI scans of the cervical and lumbosacral spine of 23 October 2014. Dr Pincus was also provided with the reports of Dr Walters dated 20 November 2014 and Dr Johnson dated 9 September 2015.

[36] Dr Pincus expressed the opinion that the plaintiff fulfils the criteria for DRE Category 2 injury to cervical spine, 5 per cent the whole person impairment and she does have marked multilevel degenerative change in her cervical spine. In the absence of any symptoms in her cervical spine prior to the accident, Dr Pincus attributes the impairment wholly to the accident. He expresses the opinion that the plaintiff fulfils the criteria for DRE Category 1 injury to lumbar spine, zero per cent whole person impairment.

[37] During cross-examination Dr Pincus explained why he found the impairment in the plaintiff's cervical spine as DRE Category 2, but the decreased range of movement in the lumbar spine was DRE Category 1: the decreased range of movement in the cervical spine was out of the normal plane, whereas the decreased range of movement in the lumbar spine was symmetric. Dr Pincus accepted that those assessments measure impairment and not necessarily work disability. Dr Pincus found it difficult to explain the level of pain in the plaintiff.

[38] Dr Anderson who is an occupational physician examined the plaintiff on 23 June 2016. Dr Anderson recorded in his report dated 23 June 2016 that the plaintiff presented with pain in her neck with reduced movement and occasional radiation towards the left and also down between her shoulder blades. She also had low back pain that was worse, if she were trying to walk up hill. Dr Anderson observed the plaintiff held herself in a stooped posture and noted that would increase the static loading on the spinal extensors. He also noted that the plaintiff "gave the impression of being in a lot of discomfort".

[39] On examination Dr Anderson noted that pain was located throughout the length of the cervical spine, deviated towards the left, and there was associated tenderness. Her neck was very stiff and flexion and extension were reduced to two-thirds of the normal range. Lateral rotation to the right was at half of the normal range and to the left was at one-third of the range. Lateral flexion to the left was at one-third of the range and the right was one-quarter of the range. There was a normal range of movement in the plaintiff's upper limbs. Pain was located throughout the lumbar spine radiating to each side. There was a large area of associated tenderness, but no specific focus. On forward flexion she could reach her knees. Extension was grossly reduced to one-third of the range. Lateral flexion and rotation to the left were reduced to half the range. The same movements to the right were at two-thirds of the range. Dr Anderson observed that the plaintiff walked with an almost stumbling gait. She could stand on her heels and toes but could not effectively walk on them. Squatting was grossly reduced to half the normal range.

[40] Dr Anderson diagnosed the plaintiff as experiencing a musculo-ligamentous strain of her cervical spine in the accident. She continues to have discomfort in both the cervical and lumbar spine. Dr Anderson stated:

> "The situation is further complicated by organic magnification. I also doubt if she is stretching and exercising as well as she should. Her lower back condition is adversely influenced by her unfortunate physical posture."

[41] Dr Anderson was of the opinion the injury was minor and there was no structural damage. Dr Anderson noted a tendency on the part of the plaintiff to magnify her condition and that her lifestyle is very poor with her smoking, being overweight, very deconditioned physical state and lack of reasonable physical activity. Dr Anderson suggested that the plaintiff should be referred to an exercise physiologist for specific coaching in a simple home based and self-managed stretch, exercise and aquatics program. At the date of assessment, Dr Anderson considered the plaintiff would not be fit to return to her previous occupation or any other jobs in which she has experience and that her work capacity would be limited to a part-time, light weight, semi sedentary occupation in which she could alter her postural position. Some form of reception work could be a possibility. Dr

Anderson explained that if people injured in accidents returned to work, they were much better off for a range of reasons, and he encouraged the plaintiff to try to get back to work.

[42] Physiotherapist Ms Kelly Mitchell did a Functional Capacity Evaluation (FCE) of the plaintiff on 12 July 2016 and provided a report on the same date to the second defendant. The assessment took two and one-half hours. Ms Mitchell recorded that the plaintiff reported that she currently lies down for 12 hours a day, either stands or walks for four hours a day and sits for eight hours a day. On the basis of the testing, Ms Mitchell concluded there was a match physically with full-time work in the sedentary light physical demand category for eight hours per day. The plaintiff demonstrated a safe occasional lifting capacity of six kilograms which matched her self-reporting of lifting her small dog which she estimated weighed five kilograms. She demonstrated restricted neck range of motion, but functional range for active upper limb movements with avoidance of overhead movement, and functional grip strength. She also demonstrated the capacity for frequent standing and walking, frequent half squatting and frequent forward reaching and occasionally climbing stairs when required and the capacity for occasional kneeling. Ms Mitchell equates standing independently from a sitting position as a half squat and reported that during the assessment the plaintiff was able to move from sitting to standing spontaneously without having to use her arms 20 times.

[43] It was Ms Mitchell's opinion that the FCE results were significantly affected by multiple inconsistencies throughout the assessment and that movement quality and range improved by distraction. This observation was made in respect of both neck and back movements. Ms Mitchell expanded on this. She explained that when the plaintiff was performing the Purdue Pegboard which is a two minute sustained forward bending hand function test, she demonstrated negligible forward neck movement that improved to spontaneous full neck flexion or forward flexion which was a match with frequent neck flexion.

[44] Ms Mitchell noted that during the course of the assessment the plaintiff walked for an hour and sat for 90 minutes and at one stage sat for 30 minutes continually without the need to move, which matched her reporting of having a tolerance as a sitting passenger in a vehicle of no greater than 90 minutes.

[45] Ms Mitchell expressed the opinion in the report that the plaintiff does not require domestic assistance. That was on the basis of the plaintiff's self-report that after the accident she still did home duties, but spread them across the day. It was also based on Ms Mitchell's assessment of her physical capacity to do half squats, forward reaches, elbow bends, fast grips and fine hand movement. Ms Mitchell breaks down light domestic chores into physical components and formed the view the plaintiff demonstrated the functionality to perform chores such as cleaning the toilet.

[46] Occupational therapist Ms Hague examined the plaintiff on 13 December 2016. On the date of examination the plaintiff's pain in the cervical spine was moderate and the plaintiff described it as a three out of ten. On a bad day her pain intensity would be as high as an eight out of ten. Her pain in the lumbar spine was also moderate on the day of examination. The plaintiff assessed it as a four out of ten and on a bad day her pain intensity in the lumbar spine would be as high as a six out of ten.

[47] The plaintiff told Ms Hague that she breaks up chores to manage her pain and avoids thoroughly cleaning the bathroom, due to difficulties with bending. She has her roommate assist her to change linen on her bed and he often picks up groceries on the way home from work. The plaintiff told Ms Hague that she has difficulties with standing in the kitchen to prepare meals and Mr McLeod often prepares the plaintiff a meal when her symptoms are aggravated. She cannot clean the car and has difficulties with laundry duties, including carrying the basket and reaching overhead to hang items out.

[48] Ms Hague was aware of the plaintiff's pre-existing shoulder injuries, but noted that despite the medically assessed impairment, the plaintiff had returned to work prior to the accident. Ms Hague is of the opinion that impairment does not necessarily equate to a work disability.

[49] On examination, Ms Hague observed reduced cervical rotation bilaterally and cervical flexion was reduced by one-half. Movement of the shoulders was restricted with pain at end range. The plaintiff reported sitting for long periods (with her head in fixed postures) makes her neck pain worse and can aggravate her headaches. Ms Hague noted that flexion of the lumbar spine was 40 degrees and extension was painful past neutral. There was tenderness of the paravertebral muscular ture of the lower lumbar spine. The plaintiff reported long periods of sitting or standing aggravate her spinal pain and there was difficulty moving from sitting to standing. The plaintiff described pain radiating into both lower limbs intermittently and that traversing stairs, slopes and uneven ground will aggravate her lower back pain.

[50] Ms Hague is of the opinion that the plaintiff would not be employable in an office based role on the basis her computer skills are poor. The plaintiff is no longer fit for the long periods of driving required of a sales representative and reduced tolerance for long periods of standing would preclude work as a traffic controller. The plaintiff's spinal pain would preclude her engagement in the other more laborious vocational pursuits in which she had previous experience. Ms Hague is of the view the plaintiff is precluded from commercial employment on the basis of her chronic pain, and also on the basis the pain affects her sleep, leaving her tired and fatigued during the day. The plaintiff's restricted movements preclude her from a number of occupations. Ms Hague also considers the plaintiff's presentation is poor, as she walks with a slow and antalgic gait and sits and stands with the lumbar spine in a flexed position which would make her difficulties obvious to any potential employer. Ms Hague summarised her opinion as to the reason why the plaintiff was not employable as "it's a combination of factors, physical, the psychological, her self-efficacy, her age, her pain".

[51] On the basis the plaintiff's spinal pain has caused difficulties with her usual activities around the home that she related to Ms Hague, Ms Hague expressed the view that the plaintiff's need for assistance is in the order of seven hours per week. During cross-examination, Ms Hague was unable to produce any detailed workings of how she reached seven hours per week, but attributed four hours per week to cleaning and three hours per week to shopping and meal preparation.

Psychological or psychiatric injury

[52] There is common ground between the psychiatrists Dr Markou and Dr Chalk that the plaintiff has suffered from an adjustment disorder with anxiety and depression and a pain disorder. Dr Markou assesses the plaintiff with a PIRS rating of 7 per cent impairment and Dr Chalk gives a 5 per cent PIRS.

[53] Dr Markou in his report dated 25 May 2016 encouraged the plaintiff to continue seeing a psychologist and was of the opinion that taking the prescribed antidepressant medication would be of some benefit to her pain. In dealing with the impact of the injury on the plaintiff's ability to earn an income, Dr Markou stated:

> "Because of the limitation of function of neck movement, and the ongoing pain that exists there in her neck and in her lower back, her ability to work has been severely limited. At this point she is unable to work as a result of these physical limitations, though should her physical limitations improve then there is no reason why she cannot engage in work, from a psychiatric perspective."

[54] At the time Dr Markou prepared his report, his prognosis for the plaintiff was guarded, because her psychological state had become more entrenched and he predicts that if there is not an improvement in her physical state, "it is likely her depression and demoralisation will persist on a chronic basis".

[55] Dr Chalk expressed the opinion in his report dated 4 November 2016 that the plaintiff's principal difficulties revolve around her ongoing pain and the limitations that has caused. He described the plaintiff as having "developed symptoms of an adjustment disorder with depressed and anxious mood in the setting of chronic pain". Dr Chalk subsequently confirmed that the plaintiff's psychiatric symptoms "such as they are" would not preclude her from employment and the reason the plaintiff cannot work is not because of a profound psychiatric impairment. Dr Chalk considered that the plaintiff's psychiatric symptoms are mild.

Conclusion on the extent of the plaintiff's injuries

[56] Just as the plaintiff exaggerated her description of the impact that caused the accident, her own perception of the symptoms and limitations that she suffers from her injuries is that they are much more significant than the medical opinion and the opinion of Ms Mitchell suggests. Although Ms Hague is an occupational therapist and Ms Mitchell is a physiotherapist, so that they evaluate different capacities, I found Ms Mitchell's evidence consistent with the weight of orthopaedic and neurosurgical medical opinion that the level of pain experienced by the plaintiff in her spine was not explained by the physical state of her spine.

[57] I accept that the plaintiff was not suffering pain in her neck and lower back before the accident and the injury to the cervical spine is the most serious of the injuries she suffered. The preponderance of medical opinion supports the assessment made by Dr Johnson of a 6 per cent whole person impairment for the cervical spine injury. It may be that the difference between Dr Johnson's opinion of 6 per cent whole person impairment for the lumbar spine compared to the consistent opinion otherwise of Dr Weidmann, Dr Walters, Dr Pincus and Dr Anderson was the state of the plaintiff's lumbar spine on the day that

Dr Johnson examined the plaintiff. The weight of the medical opinion supports the conclusion that the plaintiff's lumbar spine injury should be assessed at zero per cent whole person impairment. There is little difference in the psychiatrists' assessments of the plaintiff's mild psychiatric injury. It is appropriate to proceed on the basis of a 6 per cent PIRS.

Does the CLA apply to the assessment of the plaintiff's damages?

[58] The defendants assert that general damages must be assessed under the CLA, whereas the plaintiff argues that her employment as a bus driver was factually a significant contributing factor to the occurrence of the accident, so that the CLA does not apply.

[59] Section 5(1)(b) of the CLA provides:

> "(1) This Act does not apply in relation to deciding liability or awards of damages for personal injury if the harm resulting from the breach of duty is or includes-
>
> (a) …
>
> (b) an injury for which compensation is payable under the *Workers' Compensation and Rehabilitation Act 2003*, other than an injury to which section 34(1)(c) or 35 of that Act applies."

[60] Section 5(2) then provides that for the purpose of subsection (b), it is immaterial where the compensation for the injury is actually claimed under the relevant Workers' Compensation Act or whether the entitlement to seek damages for the injury is regulated under that Act.

[61] Section 5 of the CLA has been in that form with effect from 6 November 2006, as a result of the amendment made in s 8(3) of the *Criminal Code and Civil Liability Amendment Act* 2007. Prior to the amendment made by that Act, s 5 of the CLA relevantly provided:

> "This Act does not apply in relation to any civil claim for damages for personal injury if the harm resulting from the breach of duty owed to the claimant is or includes –
>
> (a) …
>
> (b) an injury as defined under the *Workers' Compensation and Rehabilitation Act 2003*, other than an injury to which section 34(1)(c) or 35 of that Act applies."

[62] The above form of s 5 of the CLA prior to the 2007 amendment was considered in *Newberry v Suncorp Metway Insurance Limited* [2006] 1 Qd R 519. Mr Newberry suffered personal injuries in the course of his employment while travelling as a passenger in a delivery truck, as a result of another vehicle which was travelling on the wrong side of the road colliding with the truck. The appellant was the CTP insurer of the other vehicle. Mr Newberry had not made a claim against his employer. It was common ground between the parties that neither s 34(1)(c) nor s 35 of the *Workers' Compensation*

and Rehabilitation Act 2003 (Qld) (WCRA) had any relevance to Mr Newberry's claim. The primary judge held that the CLA did not apply to Mr Newberry's claim. On appeal, Keane JA (with whom the other members of the court agreed) considered at [18] that the exclusion effected by s 5(b) of the CLA postulated a claim for damages for personal injury caused by a breach of duty owed to the injured claimant by the specific person against whom the claim was made. "Injury" was defined in s 32 of the WCRA as "personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury". Keane JA identified in [22] that, as the exclusionary effect s 5(b) of the CLA operated by reference to the terms of the claim, it was the terms of the claim made by Mr Newberry against the person alleged to have caused injury by the person's breach of duty that had to be considered to see whether it was claimed that Mr Newberry's injury resulting from that breach of duty was significantly contributed to by his employment. Keane JA stated at [27]:

> "It cannot be disputed that, when s 32 of the WCRA speaks of 'employment' contributing to the worker's injury, it is referring to employment as a set of circumstances, that is to the exigencies of the employment of the worker by the employer. The legislation is referring to 'what the worker in fact does during the course of employment'. The requirement of s 32 of the WCRA that the employment significantly contribute to the injury is apt to require that the exigencies of the employment must contribute in some significant way to the occurrence of the injury which the claimant asserts was caused by the breach of duty of the person (not the employer) against whom the claim is made." (*footnote omitted*)

[63] Keane JA noted at [28] of *Newberry* that the breach of duty alleged against the appellant and the injury to Mr Newberry caused by that breach were not such as to involve, or to require, any reference to the exigencies or activities of Mr Newberry's employment. It was concluded that Mr Newberry's claim did not fall within the exclusion in s 5(b) of the CLA and the CLA therefore applied to his claim for damages.

[64] Keane JA also wrote the leading judgment in *King v Parsons* [2006] 2 Qd R 122 which also concerned the application of s 5 of the CLA prior to the 2007 amendment. Mr King suffered an injury to his back in the course of his employment as a postal delivery officer employed by the Australian Postal Corporation (APC) when he was driving his motorcycle while making deliveries along a footpath and Ms Parsons reversed her car from a driveway into the path of Mr King's motorcycle, forcing him to swerve and then dropped the motorcycle to avoid colliding with a tree. The primary judge had found that s 5(b) of the CLA did not operate to exclude the application of the CLA. Keane JA (with whom the other members of the court agreed) upheld the primary judge's decision on the basis that Mr King was not a "worker" within the meaning of the WCRA, as he was employed by a licensed corporation to which the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) applied.

[65] What the plaintiff relies on from Keane JA's judgment is the analysis of the relevance of Mr King's employment by APC to his claim for damages against the respondents. Keane JA found at [9] that Mr King's claim was one for damages for injury suffered as a result of breach of duty where Mr King's employment was a significant contributing factor to the injury the subject of the claim, observing at [10]:

> "In this regard, … Mr King's employment was more than a fact apt to explain why Mr King was where he was when the first respondent's breach of duty caused his injury. The exigencies of Mr King's employment tend to explain how the first respondent's breach of duty came to cause Mr King's injury, in that the appellant's employment obliged him to ride his motorcycle on the footpath. There, he was, because of his performance of his duties as an employee of APC, particularly vulnerable to a driver in the position of the first respondent while she was reversing down a driveway."

[66] *Newberry* and *King* were followed in *Farnham v Pruden* [2017] 1 Qd R 128, even though the version of the CLA considered in that case included the 2007 amendment. Ms Farnham was employed by a government agency on a casual basis as a community visitor. She worked from home and used her own car to visit foster children at their respective foster homes. The subject accident occurred when she was travelling from her home to a foster child's home. At first instance, it was held that the CLA applied to the assessment of damages on the basis of the application of s 32 of the WCRA. On appeal, it was held (at [43]) that Ms Farnham's claim was caught by s 35 of the WCRA with the consequence that the CLA applied.

[67] Morrison JA (with whom the other members of the court agreed) also considered the application of s 32 of the WCRA and expressed the view at [55]-[57] that both *Newberry* and *King* were correctly decided, noting at [55]:

> "I respectfully agree that the requirement of s 32 of the *Workers' Compensation and Rehabilitation Act*, that the employment significantly contribute to the injury, requires that the exigencies of the employment must contribute in some significant way to the occurrence of the injury caused by the breach of duty of the person (not the employer) against whom the claim is made."

[68] The plaintiff submits her employment as a bus driver was factually a significant contributing factor to the occurrence of the accident, as her employment was more than a fact apt to explain why she was where she was when the first defendant's breach of duty caused her injuries, and that the CLA is excluded pursuant to s 5(1)(b) of the CLA. The defendants submit there is no evidence that the exigencies or activities of the plaintiff's employment made a significant contribution to the occurrence of the injury which was claimed to result from the breach of duty of the first defendant and the fact that the plaintiff was employed as a bus driver was merely coincidental.

[69] The plaintiff was only driving the bus as it approached the roundabout where the accident occurred, because of her employment. Connection between the time and place of the accident and employment is not sufficient, however, to satisfy the test for an injury pursuant to s 32 of the WCRA. The plaintiff's statement of claim is a classic pleading for a claim for personal injuries sustained in a motor vehicle accident. It is pleaded that the plaintiff was driving the subject bus at the time of the accident, but there is no pleading of any circumstances that can be characterised as "the exigencies of the employment of the worker by the employer". The fact that the plaintiff was in receipt of workers' compensation benefits after the accident does not determine the question of whether the injury to the plaintiff fell within s 32 of the WCRA. Consistent with the approach taken

to the current version of s 5 of the CLA in *Farnham*, I conclude that the CLA applies to the plaintiff's claim for damages.

General damages

[70] Pursuant to s 61 of the CLA the general damages depend on the assessment of an injury scale value (ISV) under s 7 of the *Civil Liability Regulation* 2014 (Qld) (CLR). Pursuant to s 62 of the CLA, it is necessary to select the version of the CLR that applied to the period within which the injury arose. That was the version current as at 1 July 2014.

[71] There is little difference between the parties on the assessment of damages under the CLA. It is common ground that the dominant injury is the injury to the plaintiff's cervical spine. The plaintiff selects items 88, 93 and 12 from schedule 4 to the CLR as applying respectively to the cervical spine injury, the lumbar spine injury and the mental disorder resulting in an ISV of 10 to which an uplift factor of 50 per cent is applied, resulting in an ISV of 15. The defendants select items 88, 94 and 12 resulting in an ISV of 10 with a 25 per cent uplift factor, resulting in an ISV of 13.

[72] The issue to be decided on general damages is therefore the uplift factor pursuant to s 4 of schedule 3 to the CLR. The ISV of 10 for the cervical spine injury (which is the maximum ISV for item 88 and the appropriate ISV to select in the circumstances) has taken into account to some extent the effect of the multiple injuries on the plaintiff. An uplift factor of 25 per cent resulting in an ISV of 13 is sufficient to reflect adequately the balance of the adverse impact of the plaintiff's multiple injuries not otherwise taken into account by selecting the ISV of 10. That results in general damages of $21,280.

Interest

[73] No interest is payable on the award for general damages pursuant to s 60(1)(a) of the CLA.

Past economic loss

[74] From the date of the accident to the giving of judgment in favour of the plaintiff is 147 weeks. Both parties agree that the actual earnings of $7,937 must be deducted from the calculation of past economic loss. The plaintiff uses a net weekly wage of $950 and the defendants use $817. It is not apparent from exhibit 3 from where the figure of $950 is sourced. It appears that the figure of $817 comes from the schedule of the plaintiff's earnings in Tab C of exhibit 3 for the 2014 financial year, but that overlooks in that financial year the plaintiff had about three weeks on workers' compensation. Although the accident occurred in the 2015 financial year, the plaintiff is not able to dissect the earnings from her employer for that year between pre and post accident earnings. I will therefore use the net earnings for the 2014 financial year in respect of 49 weeks which makes $844 per week. That makes a total of $124,068, leaving a balance of $116,131, after deducting the sum of $7,937. There are 2.82 years between the date of accident and the date of judgment. That is a relatively short period and I do not propose to discount the assessment of past economic loss for the vicissitudes of life.

Interest on past economic loss

[75] The interest must be calculated by deducting from the quantum of past economic loss the amount that was paid by WorkCover of $11,240 and the amount that was paid by Centrelink of $24,895. Under s 60(2) of the CLA, interest is calculated at 1.4 per cent.

Loss of past superannuation benefits

[76] This is calculated at 9.25 per cent of $116,131.

Diminution in earning capacity

[77] The single most significant head of damage upon which the parties have made quite disparate submissions as to the appropriate quantum is diminution in earning capacity or, as the parties described it, future economic loss.

[78] The plaintiff's approach is to proceed on the basis that she is commercially unemployable and that her future economic loss should be calculated on the basis of what she would have earned as a bus driver until the age of 70 years with a 10 per cent discount for all contingencies.

[79] The defendants' approach is that the plaintiff has a capacity for employment that she is not exercising and that a modest sum only of $75,000 should be awarded for this head of damages.

[80] I am not persuaded by the plaintiff's evidence in the context of the opinions of the medical experts as to the extent of her impairment in her cervical and lumbar spines, even exacerbated by the overlay of her psychiatric issues, that she has no prospects of finding future employment. I consider Ms Hague's opinion on the plaintiff's unemployability was overly influenced by the plaintiff's report of her own limitations which was inconsistent with Ms Mitchell's evaluation of the plaintiff, eg in relation to moving from a sitting to a standing position. It is apparent from the plaintiff's evidence that she has adopted a routine for managing her pain that is currently not conducive to paid employment, but on her own evidence as to the chores that she does undertake at home and the expert evidence from Ms Mitchell as to her functional capacity, she has some prospect for obtaining light sedentary work, where she is able to ensure that she is neither standing nor sitting for any length of time. The extreme reaction that the plaintiff has had to her overall moderate spine injuries means that any allowance for future employment must be modest.

[81] Although the plaintiff stated in evidence that she would have worked until she was at least 70 years old, that was an unlikely scenario at the date of the accident, in light of her history since 2007 of lengthy absences from work, due to medical issues, even before the accident. I have therefore concluded that the plaintiff should only be compensated for future economic loss on the basis that it was unlikely that she would have worked past the age of 62 years or about a further 10 years from the date of judgment. I will use the net weekly wage of $980 that it appears to be based on what the plaintiff's co-worker was

receiving at trial for like work to that done by the plaintiff at the date of the accident and is the net wage used in the plaintiff's quantum schedule (exhibit 11). I will discount the calculation by one-third to reflect the greater vicissitudes of life that must be factored in for the plaintiff (having regard to her extreme reaction to the injuries suffered in this accident and her prior medical history) and the slight residual earning capacity. That results in $270,000 for future economic loss.

Loss of future superannuation benefits

[82] This should be calculated at 11.33 per cent.

Fox v Wood

[83] The parities are agreed that the amount for the *Fox v Wood* factor is $1,455.

Gratuitous care

[84] The parties are agreed that the rates for any award of domestic assistance are $28 per hour for past care and $30 per hour for future care. The assessment of damages for gratuitous care is regulated by s 59 of the CLA. I accept the plaintiff's evidence that she needed greater assistance from Mr McLeod up to 12 months from the date of the accident.

[85] Despite the lack of precision in the evidence of both the plaintiff and Mr McLeod as to the extent of care provided immediately after the accident, I accept that there was enough detail in the evidence to allow a finding of seven hours per week for the first year. It is apparent that although the plaintiff continued to receive some help from Mr McLeod after the first year, but that the plaintiff settled herself into a routine where she could look after most of the chores in the house for herself, if she did them in her own time. Taking into account that in the second year after the accident, she also had some small assistance from Mr Murray for a period of six months, I consider it reasonable to allow past care for the second year after the accident at four hours per week. For the balance of the period of 0.82 years to the date of judgment, I consider the assistance that the plaintiff has established on the evidence that she requires in the house is limited to the occasional meal, changing the sheets on her bed, cleaning her bathroom every third or fourth weekend and assistance in hanging out a heavy wash. I estimate that assistance at no more than two hours per week and that is also the assistance the plaintiff has established she requires for the future. That makes past care of 657 hours at $28 per hour which is a total of $18,396. That makes future care on the basis of two hours per week at $30 per hour for 30 years (822) less 10 per cent for vicissitudes which is $44,388.

Special damages

[86] It is agreed the special damages paid by WorkCover were $8,776.98, the other special damages were $4,796.94 and that there should be interest on the component of the special damages paid by the plaintiff of $3,449. The interest the parties used under the CLA is 1.4 per cent.

Future expenses

[87] The plaintiff seeks future expenses of $36.50 per week for 30 years which equates to $30,000 using the 5 per cent tables, whereas the defendants propose an amount of $8,000. The medication schedule at p 9 of Tab D of exhibit 3 in conjunction with the plaintiff's evidence on the frequency of usage suggests a cost of $48 per month. Applying the multiplier of 822 from the 5 per cent tables to $12 per week results in $9,864 for future expenses.

Summary of damages

[88] The following table sets out my assessment of damages for the plaintiff:

Description	**Amount**
General damages	$21,280.00
Past economic loss	116,131.00
Interest on past economic loss of $79,996 @ 1.4 % for 2.82 years	3,158.00
Loss of superannuation benefits (past) @ 9.25%	10,742.00
Future economic loss	270,000.00
Loss of superannuation benefits (future) @ 11.33%	30,591.00
Fox v Wood	1,455.00
Past care 657 hours @ $28 per hour	18,396.00
Future care 2 hours pw @ $30 per hour for 30 years (822) less 10%	44,388.00
Special damages (paid by WorkCover)	8,776.98
Special damages (paid by plaintiff $3,449.55)	4,796.94
Interest on $3,449.00 @ 1.4% for 2.82 years	186.00
Future expenses $12 per week for 30 years (822)	9,864.00
Total	**$539,764.92**

Orders

[89] It follows that judgment should be given for the plaintiff against the defendants in the sum of $539,765.

[90] I will give the parties an opportunity to consider these reasons and to decide whether an oral hearing is required to determine costs or whether the parties can agree on a timetable for exchange of written submissions and for costs to be determined on the papers. In the meantime, I will order that the question of costs be adjourned to a date to be fixed.