

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title: Ivers v Mehdi

Citation: [2020] ACTSC 112

Hearing Date: 17-19 February 2020

Decision Date: 12 May 2020

Before: Burns J

Decision: See [173]-[174]

Catchwords: **CIVIL LAW** – NEGLIGENCE – Personal injury – plaintiff sustained psychological injury when she saw a motor vehicle strike a pedestrian – motor vehicle driven by first defendant – whether the first defendant owed the plaintiff a duty of care – whether the first defendant breached that duty of care – whether the pedestrian was guilty of contributory negligence – consideration of the medical evidence – consideration of s 34 of the *Civil Law Wrongs Act 2002* (ACT) – consideration of damages

Legislation Cited: *Civil Law Wrongs Act 2002* (ACT), ss 34, 100, 104
Road Transport (Third-Party Insurance) Act 2008 (ACT) s 151
Workers Compensation Act 1951 (ACT)

Cases Cited: *Jaensch v Coffey* (1984) 155 CLR 549
KS and XT v Calvary Health Care ACT trading as Calvary Hospital and Dr Andrew Foote [2018] ACTSC 84
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638

Parties: Wendy Ivers (Plaintiff)
Shahid Hussain Mehdi (First Defendant)
Transport Accident Commission (Second Defendant)
Kamplete Pty Ltd (Third Party)

Representation: **Counsel**
D Crowe (Plaintiff)
J Turnbull SC with N D Compton (First and Second Defendant)

Solicitors
Maliganis Edwards Johnson (Plaintiff)
Moray and Agnew Lawyers (First and Second Defendant)

File Number: SC 449 of 2018

BURNS J:

1. The plaintiff, Ms Wendy Ivers, now known as Ms Wendy Lee, claims damages for a psychological injury she says she sustained on 25 November 2016 when she saw a motor vehicle driven by the first defendant, Mr Shahid Hussain Mehdi, strike a pedestrian (Mr William Atkinson) in the underground carpark of the Canberra Outlet Centre in Fyshwick, ACT (the Centre). The plaintiff's claim against the first defendant is in negligence. The second defendant is the compulsory third party insurer of the vehicle driven by the first defendant and is named as a party pursuant to s 151 of the *Road Transport (Third-Party Insurance) Act 2008* (ACT). No submission was made that any judgment entered against the first defendant should not also be entered against the second defendant.
2. The particulars of the negligence alleged against the first defendant are:
 - (a) failing to keep any, or any proper, lookout;
 - (b) failing to maintain proper attention on the road whilst driving his motor vehicle;
 - (c) failing to keep the motor vehicle he was driving under proper control;
 - (d) failing to steer the motor vehicle he was driving so as to avoid the accident;
 - (e) failing to warn of the approach of the motor vehicle he was driving; and
 - (f) failing to apply the brakes on the motor vehicle he was driving when necessary to do so.
3. The first and second defendants filed a joint defence, and were jointly legally represented at the hearing. The defendants admitted that the motor vehicle driven by the first defendant struck a pedestrian on 25 November 2016 but denied that the first defendant owed a duty of care to the plaintiff or, in the alternative, that he had breached any such duty. The defendants did not admit that the plaintiff suffered any injury as she claimed, or that she suffered any of her claimed losses. Finally, and in the alternative to their denial of liability, the defendants pleaded that the pedestrian was guilty of contributory negligence. The particulars of contributory negligence on the part of the pedestrian were pleaded as:
 - (a) failing to take proper care of his own safety;
 - (b) failing to keep a proper lookout;
 - (c) placing himself in the path of the first defendant's motor vehicle; and
 - (d) failing to pay proper attention to his surroundings.
4. The defendants claimed that by reason of the pedestrian's contributory negligence, s 104 of the *Civil Law Wrongs Act 2002* (ACT) (the Wrongs Act) is engaged whereby any damages recoverable from them by the plaintiff are to be reduced having regard to the pedestrian's share in the responsibility for the plaintiff's loss or damage.
5. The defendant issued a third-party notice to Kamplete Pty Ltd (the third party) which was said to be the occupier of the car wash in the underground carpark adjacent to where the pedestrian was struck. The defendant's claimed contribution or indemnity from the third party is based on its alleged negligence. It is unnecessary to be more

specific about this aspect of the pleadings, because the defendants' claim against the third party resolved before trial.

Evidence of the plaintiff

Evidence-in-chief

6. At the time of the hearing, the plaintiff, Ms Lee, was 63 years old. The incident occurred on 25 November 2016 when the plaintiff was 59 years old.

The plaintiff's medical history

7. Dr Fleur Paterson has been the plaintiff's regular General Practitioner (GP) for a considerable period of time. In May 2008, the plaintiff told Dr Paterson she was experiencing panic attacks and was stressed about home, work, and her father's health. In her evidence, the plaintiff said she was also experiencing difficulties in her relationship with her second husband, Mr John Scheltus, with whom she subsequently separated in 2008. Dr Paterson diagnosed the plaintiff with a panic disorder and prescribed Xanax.
8. In July 2009, Dr Paterson prescribed the plaintiff Imigran nasal spray and some tablets for migraines.
9. In 2010, the plaintiff told Dr Paterson she was experiencing stress regarding the hairdressing salon she had purchased and worked at, and the ill-health of Mr Scheltus, with whom she still lived after their separation. Dr Paterson prescribed the plaintiff Alprazolam, commonly known as Kalma, to treat anxiety.
10. In March 2011, the plaintiff consulted Dr Doumani, who owned the practice that Dr Paterson worked at, and received another repeat script for Alprazolam. The plaintiff received further prescriptions for Alprazolam in November 2011 and January and March 2012.
11. In April 2012, while working at Maliganis Edwards Johnson, the plaintiff suffered an injury to her left knee and made a workers' compensation claim. In the course of that claim process, the plaintiff received treatment through a multidisciplinary pain management program at the Canberra Injury Management Centre. This included psychological counselling with Ms Vicki Coghlan, with whom the plaintiff attended three of the six assigned sessions. The plaintiff recalled not going back for the remainder of the sessions because she "felt worse" but said she felt psychologically "really good" at the end of the treatment.
12. In March 2014, the plaintiff experienced another injury at her then workplace, LJ Hooker, when a filing cabinet tipped over and landed on top of her. The plaintiff injured her back, knee and suffered some cuts, and was taken by ambulance to the hospital. The plaintiff made a workers' compensation claim for which she received treatment with psychologist Ms Kerriane Abbott from about July 2014, seeing her approximately four times. After the plaintiff's injury at LJ Hooker, she stopped working there and was unemployed for a few months.
13. In July 2014, the plaintiff told Dr Paterson that she was suffering from stress associated with her mother's dementia and disagreements with her siblings about becoming her mother's power of attorney. The plaintiff also told Dr Paterson she was stressed about her separation from her third husband, with whom she subsequently

divorced. In December 2014, Dr Paterson noted the plaintiff's stress levels were very high, as an Apprehended Violence Order had been taken out against her third husband.

14. In March 2015, the plaintiff told Dr Paterson she experienced lower back pain and headaches, and said that she was exhausted, tired, stressed and struggling with work due to constant pain. The plaintiff said she managed the bulk of the administrative load in her position at the Real Estate Shop, and had to transfer her mother to a full-time care facility. In April 2015, Dr Paterson gave the plaintiff a further prescription for Diazepam, to treat anxiety.
15. In July 2015, the plaintiff took up a job at the Australian National Audit Office (ANAO). The plaintiff said she wanted to transfer to the public service because it was flexible, meaning she could visit her mother and take her to medical appointments during work hours.
16. In September 2015, the plaintiff told Dr Paterson she was experiencing chest pain, stress in her new job at ANAO and poor sleep. The plaintiff said that she joined the ANAO as an Executive Assistant (EA) for an individual Senior Executive Service (SES) Band 1 employee. After two months in the position, she was the EA for three SES Band 1 employees, which she found stressful. To cope with this stress, the plaintiff used to take regular walks outside, frequented the gym, and placed pastille gels under her tongue. The stressful work environment continued for a period of three to five months.
17. In February 2016, Dr Paterson made a note that the plaintiff suffered from chronic insomnia and was stressed about her mother, who had been moved into an aged care facility. The plaintiff recalled Dr Paterson prescribed her medication specifically for sleep and stress.
18. On 8 June 2016, the plaintiff was diagnosed with breast cancer in her left breast, and, within ten days of diagnosis, Dr Majeed performed surgery. In July 2016, Dr Paterson made a record of a conversation she had had with the plaintiff's breast care nurse who was concerned about the plaintiff's anxiety and her relationship with the plaintiff's fourth husband, Mr John Ivers. He was not coping with her breast cancer, and began to drink heavily.
19. After the surgery, the plaintiff took two weeks off work. While the plaintiff had treatment for radiotherapy, she arranged to have these sessions outside of her working hours.
20. In August 2016, the plaintiff told Dr Paterson she was experiencing stress in relation to her cancer treatment, and its side effects. Dr Majeed performed another surgery on the plaintiff's right breast in September 2016. The plaintiff received radiation treatment over about seven weeks.

Immediately prior to the incident

21. In October 2016, the plaintiff undertook a Performance Plan workplace assessment. The plaintiff recalled that she had been given a rating of "exceeding expectations" and felt she was "performing at a very high level". The plaintiff was working as an Australian Public Service (APS) Level 3.3 at this time and would act at a Level 5 from time to time. The plaintiff also said that she had Negative Vetting 1 security clearance.

22. In October 2016, the plaintiff's radiation treatment had been completed and the plaintiff went on a holiday overseas with Mr Ivers in order to improve their relationship. The plaintiff recalled the relationship during this trip was "strained". After the trip, the plaintiff said that the relationship was better than it had been before, and that Mr Ivers eventually got a job which she found a relief.
23. Immediately prior to the incident, Mr Ivers was not working and the plaintiff was the only source of income in the relationship. The plaintiff said she intended to work until she was 70 years old. The plaintiff's mother was living in a full-care facility and had started to lose the ability to speak and became aggressive. The conflict between the plaintiff and her siblings had been remedied by this time.
24. At the time of the accident, the plaintiff was living in Gungahlin, ACT, with Mr Ivers. The plaintiff said she did most of the household chores and cooking. Mr Ivers would stack the dishwasher. The plaintiff had no issues with driving and would share driving to and from work with Mr Ivers.
25. The plaintiff said that herself and Mr Ivers would often socialise with friends. The plaintiff was an adjudicator and teacher in ballroom dancing, which she would engage in three to four times per week. The plaintiff said she attended the gym three times per week and walked her dogs most days. She described her appetite as "normal".
26. The plaintiff gave evidence that she did not have much contact with her son, Ben, who resided interstate. The plaintiff said her other son, Jessie, was her "biggest support" after surgery and he would come over for dinner weekly.
27. According to Dr Stephen Allnut, with whom the plaintiff consulted after the incident, the plaintiff experienced anxiety and panic attacks on the basis of three every six months prior to the incident and was taking Alprazolam as prescribed by Dr Paterson. The plaintiff said she experienced only one migraine every six months, and occasionally experienced gastrointestinal issues including stomach cramping.

The incident

28. On Friday, 25 November 2016, the day of the incident, the plaintiff attended an appointment in the morning with a breast cancer specialist and received some good news about her cancer's remission. Concluding that appointment, the plaintiff called her workplace to advise them she was not coming to work as she was going to do some shopping at the Centre.
29. After arriving at the Centre, the plaintiff got her car washed at the Star Car Wash in the underground carpark. The plaintiff said the Centre and carpark looked quite busy and there were pedestrians walking to and from the shops and their vehicles.
30. After returning from shopping to the carpark, the plaintiff paid the car wash fee at the payment counter and searched for her car which had been moved from its original parking position. After finding the car, she placed her shopping in the boot when she observed a pedestrian, who she now knows as Mr Atkinson, walking in the opposite direction of her. The plaintiff went to the driver's side door and "half got in the car", with her left leg in the car and "the right leg out and the door still open", in order to readjust the seating. She was facing such that the car wash was behind her. It was at this point that she heard somebody "screaming for help".

31. The plaintiff recalled that she “initially just sat there listening”. She did not know where the screaming was coming from but thought it may be behind her. She turned to look over her right shoulder and saw a bright blue Ford Ranger reversing into the wash bay. The plaintiff said she continued to hear screams and as she looked back at the wash bay again, she saw a “bald head and an arm outstretched, laying across the wash bay toward the back”. Mr Atkinson was lying parallel to the back wall, with his right arm outstretched, and his head and arm on the passenger’s side of the car. The plaintiff said that the rear wheel of the vehicle appeared to be almost on Mr Atkinson, and it “looked like it was on his arm or on his shoulder somehow”.
32. The plaintiff said she got out of her car and saw the Ford Ranger “rock backwards and forwards”, as if there was a log parallel to the back of the car and the car had to accelerate to get over it. The plaintiff ran towards the car, waving her arms around for the driver to stop. When she was halfway to the car, the screaming stopped, and the plaintiff believed Mr Atkinson was dead. However, the plaintiff then saw Mr Atkinson’s fingers move, and realised he was still alive.
33. The plaintiff said she told the driver to move forward a couple of metres, so the car was out of the bay, and no longer on top of Mr Atkinson. After the car moved, the plaintiff said she reached Mr Atkinson and saw that he was lying down, trying to get up. The driver and the plaintiff assisted Mr Atkinson to his feet. The plaintiff and the driver walked Mr Atkinson a couple of metres outside of the wash bay, but Mr Atkinson’s legs gave way and he landed face down on the ground. The plaintiff asked Mr Atkinson to notify his wife, and the plaintiff called 000, requesting police and ambulance attendance.
34. After Mr Atkinson was taken away by ambulance, the plaintiff drove out of the underground carpark but subsequently lost her bearings. The plaintiff said she called her husband to tell him what had just happened, and that she was now lost. Mr Ivers guided her, over the phone, to a familiar landmark, from where she was able to drive home. The plaintiff called her work and told them what happened and that she was not coming in.

After the incident

35. The plaintiff returned to work the following Monday, 28 November 2016. The plaintiff told Dr Paterson on 29 November 2016 that she was experiencing problems such as crying, not sleeping and not being able to focus or remember things. The plaintiff did not tell Dr Paterson about the incident. In the days following the incident, the plaintiff gave evidence that she “was a mess all day”, was “unable to think about anything” and was “very nervous”. She said that she had difficulty sleeping and was waking up after imagining hearing Mr Atkinson scream for help.
36. The plaintiff took some time off work in December 2016 and January 2017 as she said she was not coping like she used to with the workload. In January 2017, the plaintiff transferred temporarily to a new employment position as an EA at the Department of Parliamentary Services (DPS), as she thought a different work environment would help her cope more effectively.
37. After the incident, the plaintiff said she experienced difficulties with her memory, sleep, appetite and concentration. She described her mood as nervous, was easily agitated, and had become wary of cars moving about her. The plaintiff said she had “extremely low” energy levels, had completely stopped dancing, and did not attend

usual social activities. Her son, Jessie, came over to help with domestic chores, and Mr Ivers began taking up more domestic labour including cleaning the floors. The plaintiff said the relationship between herself and Mr Ivers “drifted” and she started to withdraw from the relationship.

38. On 16 March 2017, the plaintiff consulted Dr Paterson and told her about the incident for the first time. Dr Paterson referred the plaintiff to Ms Susan Pelengaris, a psychologist, whom the plaintiff consulted with on three occasions in 2017.
39. In April 2017, the plaintiff returned to work at the ANAO. The plaintiff said she told her manager about the incident, but had difficulty adjusting to her role.
40. In July 2017, Dr Paterson referred the plaintiff to Dr Adesanya, a psychiatrist. The plaintiff did not consult Dr Adesanya because she said there was a long waiting list and wished to see someone sooner. In August 2017, the plaintiff began seeing Dr Allnut, a psychiatrist arranged by her solicitors in these proceedings, and consulted him on subsequent occasions. In October 2017, the plaintiff was referred to Dr Matthew Sellen, a psychiatrist, with whom she consulted five or six times until January 2018.
41. Dr Paterson provisionally diagnosed the plaintiff with Post Traumatic Stress Disorder (PTSD), arising out of witnessing the incident.
42. In October 2017, the plaintiff discussed her work performance with her work supervisor. The plaintiff thought she was not performing at the level she did prior to the incident, and her capacity had been reduced.
43. In November 2017, the plaintiff was referred by Dr Gorddard, a cancer specialist, to psychiatrist Dr Burger, at the Canberra Region Cancer Centre. The plaintiff said she did not consult Dr Burger because the waiting list was long, and she wished to see someone sooner. Dr Gorddard wrote to Dr Paterson on 26 February 2018 advising that the plaintiff had missed an appointment with Dr Burger. The plaintiff gave evidence that she did not recall having such an appointment.
44. In December 2017, the plaintiff underwent surgery to have both of her ovaries removed.
45. On 25 January 2018, Ms Pelengaris wrote to Dr Paterson advising that she had not seen the plaintiff for some time and was discharging her from her case load. The plaintiff said she had not continued to see Ms Pelengaris as “the other side” had ceased paying for her visits, and she was not able to afford the consultations herself. The plaintiff said Dr Paterson had issued a Mental Health Care Plan in relation to treatment from Ms Pelengaris which enabled the plaintiff to access to some Medicare funding. The plaintiff consulted psychologist Ms Robin Wood on about six occasions over the first half of 2018.
46. In July 2018, the plaintiff commenced a role as the EA for Mr Robert Twomey, the Chief Financial Officer of the Department of Treasury (Treasury), for a period of 6 months. The plaintiff did not inform Treasury of any psychological problems or work issues.
47. In September 2018, the plaintiff told Dr Paterson she experienced an incident at work where someone screamed at her on the phone. The plaintiff said that she “froze” and “burst into tears” and ran into the rest rooms where she vomited. Dr Paterson wrote

the plaintiff a medical certificate in relation to reducing her hours at work. The plaintiff said she reduced her work hours from 40 or 45 hours per week, to 40 hours per week.

48. In January 2019, the plaintiff attended a consultation with psychiatrist Dr Sabiosky.
49. In March 2019, Mr Twomey asked that the plaintiff be transferred to a different role at Treasury. The plaintiff gave evidence that Mr Twomey said her memory was “causing too many problems” and he needed an EA who was “on the ball”. The plaintiff said she told Mr Twomey in January 2019 about witnessing the incident, but advised him she was receiving appropriate treatment.
50. In November 2019, the plaintiff told Dr Paterson about an incident at work, separate to the incident in September 2018, where somebody had yelled at the plaintiff over the phone. The plaintiff said this led to her discussing her PTSD with her supervisors. The plaintiff said that after this time, Treasury paid for five appointments with Ms Wood that the plaintiff arranged. The plaintiff said she received the same treatment as she had previously with Ms Wood.
51. In January 2020, the plaintiff told Dr Paterson she was “not coping at work”. Dr Paterson suggested the plaintiff reduce her working hours down to 28 hours per week, however the plaintiff said that she has not made this reduction, as she is the only income earner in her household.
52. From commencing her position at Treasury in July 2018 until present, the plaintiff said she has felt emotionally unstable, her memory has become worse, and sleeps poorly, despite taking several sleeping tablets a night. She says she feels her concentration long term has suffered and feels “continually afraid” around cars. The plaintiff said her appetite is quite small and her energy levels have continued to be very low. She is able to make dancing once a week, if she is feeling up to it, but does not socialise otherwise.
53. The plaintiff gave evidence that she continues to receive treatment in relation to her emotional health and psychological symptoms, including an ongoing treatment plan with Ms Wood. The plaintiff said she is currently taking the medications of Amitriptyline, Ativan, Mirtazapine and Temazepam. The plaintiff says she pays for her own medication.
54. The plaintiff said she takes off one to two days per month and does not feel secure in her current employment. She gave evidence that she had a meeting last week about performance management, where her supervisors indicated she needed to undertake a medico-legal evaluation to assess her suitability for work.
55. The plaintiff and Mr Ivers have been separated since late 2019.

Cross-examination

56. In cross-examination, the plaintiff said she did not recognise the name Ms Coghlan but could recall the Canberra Injury Management Centre where she received treatment. The plaintiff confirmed she felt worse after her sessions at the Canberra Injury Management Centre. After the six planned sessions had ceased, the plaintiff said she did not ask Dr Paterson to see another psychologist, because she thought the insurance company would not pay.

57. The plaintiff confirmed that she commenced working in the APS in July 2015, but denied the move was because it offers flexible work arrangements.
58. The plaintiff confirmed that she had been prescribed Diazepam, Kalma, Temazepam and Imovane over the years for symptoms of anxiety. The plaintiff said she was not taking Temazepam or Imovane daily after she started work in the public service, but only as she needed them. The plaintiff said she did not take them for sleeping difficulties but confirmed she had experienced problems sleeping prior to the incident, for which she had been prescribed various medications.
59. The plaintiff did not agree that she had won a “promotion” on 16 July 2018 for a position in Treasury. However, the plaintiff agreed that she received an increase in salary, went up a pay grade and moved from an APS Level 3.3 to a Level 4 position. The plaintiff agreed that on 10 July 2018, she moved to an APS Level 5 position at Treasury.
60. The plaintiff agreed with the notes taken by Ms Coghlan, or members the Canberra Injury Management Centre, on 21 August 2012, that she had left Maliganis Edwards Johnson, because she could not cope with the “demands and stressors being a legal secretary” since the onset of her pain as a result of her workplace injury in 2012. The plaintiff agreed with the following notes, she: had separated with two adult sons after leaving a violent marriage; was unable to be involved in teaching or judging ballroom dancing; was no longer riding her horses and had to sell them; stopped riding a motorcycle; and that these changes had affected her opportunities for social interaction. The plaintiff further agreed with the records that she reported poor sleep, but said this was due to a back injury. The plaintiff agreed at that time, she achieved sleep with a combination of Kalma and Restavit.
61. The plaintiff confirmed that after the cabinet incident in 2014, she received treatment in relation to a physical injury but said she was not suffering from anxiety. The plaintiff agreed she underwent a cognitive behavioural pain management program, but did not remember specifically being treated by a physiologist called Mr David Halpin.
62. Senior counsel for the defendant, Mr Turnbull SC, put to the plaintiff that documents produced by the workers’ compensation injury insurer suggest that in April 2014, the plaintiff was experiencing daily migraines and sometimes vomiting up her medication. The plaintiff agreed with this assessment, and said these symptoms were the result of a back injury. The plaintiff recalled seeing Active Recovery in Belconnen, ACT after a referral was prepared by Dr Paterson on 5 June 2014. The plaintiff agreed with the statement in Dr Paterson’s referral that the plaintiff “has very high stress levels which are impacting upon her recovery”. The plaintiff agreed that she was prescribed Kalma at this time, but said she did not believe she was suffering from stress.
63. The plaintiff said she did not realise there was a causal link between the incident and her psychological symptoms, as she did not understand the indicators of PTSD. The plaintiff said she attributed the symptoms to tiredness, finishing cancer treatment and other things. The plaintiff confirmed that nothing else had occurred on the day of the incident that would have negatively affected her mood.
64. The plaintiff agreed she consulted Dr Paterson on at least two or three occasions after the incident without mentioning that she was unable to stop crying at work, or that her concentration at work was reduced. However, the plaintiff said she did believe in the two visits prior to March 2017 that she did tell Dr Paterson she was very

upset all the time, felt anxious, and had problems crying at work but said she did not mention any problems about sleeping.

65. The plaintiff agreed that the date at which she told Dr Paterson about the incident was a date after she had seen solicitors in relation to initiating a claim concerning the incident. The plaintiff could not remember if she was still crying daily at work but recalled her concentration problems began sometime after telling Dr Paterson about the incident. She confirmed that she had images associated with the sound of Mr Atkinson screaming about 20 times per day, which began a few days after the incident. The plaintiff said when she consulted Dr Paterson on 11 and 27 April 2017, she believed she did speak to Dr Paterson about her crying, problems at work and the images in her head.
66. The plaintiff agreed the period she took off between the incident in November 2016 and the end of 2016 was associated with witnessing the incident, but she did not realise this at the time.
67. The plaintiff could not recall telling Dr Allnut that she “had never had any prior contact with mental health professionals such as psychiatrists, psychologists, social workers or counsellors” despite this being recorded in his notes. The plaintiff agreed she did not mention to Dr McMahon treatment that she received associated with the 2012 and 2014 workplace injuries, and did not recall whether she told him she had seen three psychiatrists before the incident occurred. The plaintiff said she “simply forgot” to tell Ms Wood that she had seen a psychologist before the incident occurred. The plaintiff denied she was trying to deliberately keep these doctors from knowing she had a history of receiving psychological treatment.

The incident

68. In cross-examination, the plaintiff confirmed the driver, Mr Mehdi, was driving a Ford Ranger, not a Range Rover as Ms Wood had included in her report. The plaintiff said she later corrected Ms Wood.
69. The plaintiff agreed she has never seen CCTV footage of the incident at the request of herself and Dr Allnut. The plaintiff agreed she may have mistakenly recalled that she “got half in her car” immediately prior to the incident, rather than fully in the car as the CCTV showed, as the incident was over three years ago and details have blurred.
70. The plaintiff agreed she had told Dr Allnut it looked like Mr Atkinson’s head was under the tyre, but agreed that this was what it looked like to her from her position, and that she was not suggesting that the tyre had driven over him.
71. The plaintiff disagreed that Mr Atkinson had already started to get up by the time the plaintiff had reached him. However, she accepted that the CCTV showed that he was already starting to get up.
72. The plaintiff denied she had described the incident as a “war zone” to Dr Sellen, despite the words “war zone” appearing in inverted commas in his notes. The plaintiff agreed that the use of that term would have been a gross embellishment.
73. The plaintiff confirmed that the phrase “revving and seesawing atop the pedestrian” in the Statement of Claim referred to when the car wheel had hit part of Mr Atkinson’s arm, and the driver “was moving backwards and realising there was an obstruction behind the car so he wasn’t able to continue to move backwards”. It was

suggested to the plaintiff that the term “seesawing” was a gross embellishment of what occurred. The plaintiff said that was the word she chose at the time to describe what she saw. The plaintiff agreed the term “rocking” was more suitable.

74. The plaintiff agreed she had previously visited the Centre carpark, was familiar with the surrounding roads, and left via the usual exit on the day of the incident.
75. The plaintiff agreed that she has thought about the incident on many occasions since it occurred. She agreed she experienced intrusive thoughts about what occurred, and that she had dreams about it, particularly in the early years after the incident. The plaintiff agreed the details of the incident may well have become blurred in her mind.
76. The plaintiff initially agreed she did not have to step out of the way of the four-wheel drive to back in. The plaintiff was then referred to a hand-drawn diagram of the incident. The plaintiff agreed that she had written on the diagram: “immediately prior to the accident I had stepped sideways to allow for a blue four by four truck to reverse into the wash bay”. She agreed her memory as recorded in that document was incorrect.

After the incident

77. The plaintiff agreed in cross-examination she did not mention witnessing the incident or any associated emotional problems when she consulted Dr Trinh or Dr Paterson in November 2016, January or February 2017. The plaintiff did not agree she did not mention the incident because she was not having problems, but said that she was blaming her emotional symptoms on other things such as post-surgery recovery and fear of the cancer returning. The plaintiff said she had never seen Dr Trinh before this consultation and did not feel comfortable giving out a lot of information to a doctor she had never met.
78. The plaintiff could not recall when she applied for the position in the DPS, or whether it was before or after the incident in the carpark. The plaintiff agreed she sought the transfer as she was not coping well as a result of the incident.

Evidence of Mr Twomey

79. Mr Robert Twomey is the Chief Financial Officer in Treasury and gave evidence that he came to know the plaintiff when she was interviewed for the position of his EA in May 2018. The plaintiff commenced in this position in July 2018 and ceased at Mr Twomey’s request in March 2019.
80. Mr Twomey described the plaintiff’s performance as “[not] too good” as she suffered from poor memory and had difficulties with basic administrative tasks. On one occasion, Mr Twomey said the plaintiff made a mistake regarding credit card acquittal whereby the Treasury Compliance Team had to investigate the matter as an issue of, in effect, fraud.
81. Mr Twomey is part of the management team considering implementing formal performance management proceedings against the plaintiff. These proceedings would, after an eight-week period, result in Mr Twomey determining whether the plaintiff has either been found suitable to continue employment, should be demoted to a different position, or her employment be terminated.

82. In cross-examination, Mr Twomey said at the time of interviewing he had access to the plaintiff's CV, but not her APS employment record nor any past performance reviews or sick leave.
83. Mr Twomey agreed the position of SES is a busy and high-pressure job, and inevitably the EAs are required to perform at a high standard.

The plaintiff's medical evidence

Dr Fleur Paterson

84. Several reports from the plaintiff's GP, Dr Paterson, were tendered. The first such report is dated 6 July 2017. Dr Paterson stated that the plaintiff had told her that on 25 November 2016 the plaintiff witnessed a motor vehicle accident involving a car and an elderly male pedestrian. Dr Paterson said that the plaintiff said that she saw a car reversing towards the pedestrian and then saw him fall. He disappeared from view and then she saw that the car had reversed over him. Dr Paterson stated that the plaintiff vividly recalled seeing the car and the elderly man's bald head and arm protruding from under the vehicle with the tyre over him. At that time, the plaintiff felt sure that the man was seriously injured and that he may have been killed. The plaintiff called out to the driver to stop and assisted until an ambulance arrived. The plaintiff complained that since the accident she had been troubled by intrusive thoughts about the accident and flashbacks, particularly of the image of the man's head protruding from under the car.
85. Dr Paterson noted that the plaintiff had a history of anxiety and depression. There had been several stressful periods in the plaintiff's life over the time that she had been treated by Dr Paterson. She diagnosed the plaintiff as suffering from PTSD as a result of witnessing the accident. She referred the plaintiff to a psychologist for treatment. She believed that the plaintiff should respond well to treatment.
86. Dr Paterson's second report is dated 12 September 2018. Regarding the plaintiff's pre-accident psychological state, Dr Paterson said that the plaintiff had previously suffered from anxiety and depression and at the time of the accident was going through a highly stressful period in her life. The plaintiff was undergoing treatment for an aggressive breast cancer which was diagnosed in June 2016. At the same time, her mother was admitted to residential aged care with dementia. The plaintiff acted as her mother's enduring power of attorney, and there were ongoing disputes with the plaintiff's siblings as to their mother's care. Subsequent to the accident, there had been further stressors including marital problems, further health problems for herself and her mother, and a limited family support in dealing with her mother's issues. Dr Paterson stated that the plaintiff was suffering from depression and anxiety, which were pre-existing conditions. She also met the criteria for PTSD.
87. The third report from Dr Paterson is dated 3 April 2019. It repeated much of the material found in the report of 12 September 2018 and maintained the diagnosis of PTSD.
88. Dr Paterson's fourth report is dated 29 August 2019. Dr Paterson states that the plaintiff continues to experience symptoms consistent with PTSD. She has anxiety, hypervigilance and insomnia. She also has frequent intrusive thoughts about the accident and flashbacks and nightmares with images of the accident. Her thoughts and anxiety are intrusive during the day and impair her ability to concentrate and also

impairs her short-term memory which is impacting on her work performance. She frequently feels overwhelmed and fatigued. Dr Paterson expressed the opinion that, on the balance of probabilities, the plaintiff suffered a psychological injury as a result of the accident on 25 November 2016. She diagnosed that injury as PTSD. Regarding the plaintiff's prognosis, Dr Paterson noted that the plaintiff was working full-time in the public service and had no physical restrictions on her work capacity. However, psychologically, the plaintiff struggled to manage her full-time workload and her symptoms impacted on her work performance. The plaintiff found it difficult to perform in roles commensurate with her skills and experience. Dr Paterson thought it probable that the plaintiff would not be able to work full-time in the near future, and that it was likely that she would have to work part-time or work at a lower level. It was also possible that she may have to discontinue working. Dr Paterson expected that the plaintiff's symptoms would continue long-term.

89. In a supplementary report dated 5 February 2020, Dr Paterson stated that it was probable that an increase in the plaintiff's medication for reflux and migraine would not have been required but for the accident on 25 November 2016.
90. Dr Paterson agreed in cross-examination that she had previously prescribed the plaintiff with Xanax in 2008, and Kalma from 2010 to treat the plaintiff's anxiety. Dr Paterson said the plaintiff had suffered from migraines for approximately 20 years.
91. On 20 October 2014, Dr Paterson agreed that she recorded the plaintiff had a family disagreement concerning her mother's care and remembered being told about family disputes regarding her mother's power of attorney. Dr Paterson prescribed Diazepam to treat the plaintiff's symptoms of distress, stress and anxiety.
92. Dr Paterson agreed that Circadin, Temaze, Imovane and Diazepam had been prescribed to the plaintiff for a number of years leading up to the incident in November 2016, to treat anxiety, stress and sleeping issues. Dr Paterson formally diagnosed the plaintiff with insomnia in February 2016. Dr Paterson agreed that the plaintiff had a long history of anxiety and depressive symptoms, and it would be reasonable to say the plaintiff's anxiety and depression were chronic. She noted the plaintiff's stress, anxiety and other mood symptoms were in reaction to a series of highly stressful life circumstances.
93. Dr Paterson agreed that, as far as she knew, the plaintiff was open with her about any emotional and psychological problems she suffered. Dr Paterson agreed the plaintiff did not mention the incident or her symptoms to her until 16 March 2017.
94. Dr Paterson agreed that the diagnosis of PTSD made on 16 March 2017 was a provisional diagnosis after one consultation. In order to make a definitive diagnosis, Dr Paterson said this would require more than one consultation. Dr Paterson agreed she was going to rely on the psychological opinion of Ms Pelengaris, to whom she referred the plaintiff, to assist her in assessing whether the plaintiff had PTSD.
95. Dr Paterson agreed the plaintiff's long history of anxiety and depression was likely to render her vulnerable to having a psychological reaction to events that, for others without such a history, were unlikely to have.
96. Dr Paterson agreed the plaintiff must have told Dr Paterson that Mr Atkinson was "crying out" some time after Dr Paterson authored the first report, but before she authored the second report dated 12 September 2018.

97. Dr Paterson said she could not recall, prior to writing her second report, having received any correspondence from Ms Wood to confirm whether the plaintiff was attending treatment. Dr Paterson confirmed that she was aware the plaintiff had seen Ms Pelengaris when she wrote her second report, as she had received a letter from Ms Pelengaris on 16 June 2017.
98. Dr Paterson agreed that the plaintiff would respond well to treatment consisting of six to 12 sessions with a psychologist and psychiatrist. Dr Paterson agreed that if the plaintiff received that treatment, her ability to cope with work and life generally would increase.
99. Dr Paterson agreed the plaintiff's breast cancer, her mother's dementia and her marriage difficulties were stressful events for the plaintiff, and that such stress was likely to have a negative impact on her concentration and performance at work.
100. Dr Paterson confirmed any medical certificates she had provided the plaintiff to not attend work were in relation to breast cancer treatment or gynaecological surgery, and not for any psychological symptoms arising from the incident.
101. Dr Paterson agreed at the time of authoring the third report, the diagnosis of PTSD had not been confirmed. Dr Paterson confirmed that she had not been told by the plaintiff or Dr Sellen whether the plaintiff had consulted Dr Sellen.

Ms Robin Wood

102. Ms Wood, a clinical psychologist, provided the plaintiff's lawyers with a report dated 10 August 2018. She treated the plaintiff on six occasions between 6 April 2018 and 4 May 2018. The plaintiff provided Ms Wood with the following description of the events of 25 November 2016:

Ms Ivers reported that on 25 November 2016, she drove to the retail centre called DFO Fyshwick intending to shop as she had been informed her breast cancer diagnosis had been eradicated. Ms Ivers confirmed that she was in a positive mood after receiving her good news. She parked in the DFO carpark but as she alighted from her car she heard "piercing screams" for help close by. Shocked, she looked towards the carwash and saw a bald head and an arm trapped behind a big car (thought to be a Range Rover), that was reversing into the cleaning bay. Ms Ivers stated that, to her horror, this car was reversing over an older man, and no one at the car wash seemed to be aware of this terrifying situation. As Ms Ivers recalled this event, she became extremely agitated, tearful and distressed, stating she felt immediately compelled to provide assistance by getting the car to stop reversing. She yelled for the car to stop but no-one appeared to hear her over the car wash noise. She reported the desperate screaming continued but the car continued to reverse. Once she attracted the attention of the car wash staff, the car stopped and she tried to help the older man to get up. Ms Ivers then noticed that he had skid marks on his neck and head. She reported that 'he walked a bit then collapsed'. She was horrified to note that his right arm and his face were 'covered in blood' and his neck was 'black'. Ms Ivers then rang both the ambulance and the man's wife for urgent assistance.

103. Ms Wood expressed the opinion that the plaintiff met the criteria for a diagnosis of PTSD, with dissociative symptoms. This occurred as a direct result of the frightening incident she observed on 25 November 2016. Ms Wood said that whilst the plaintiff had endured other traumatic life events, she had been able to continue coping and had resumed enjoyable activities and making future plans prior to the incident on 25 November 2016, making it logical that her symptoms of PTSD could be directly attributed to the incident on that date. Ms Wood's prognosis for the plaintiff was guarded.

Dr Matthew Sellen

104. A consultant psychiatrist, Dr Sellen, provided a report dated 10 January 2018. Dr Sellen agreed with the diagnosis of PTSD and recommended that she continue with medication and graduated exposure therapy. He also recommended that she see an appropriate psychologist for trauma focused Cognitive Behavioural Therapy.

Dr Stephen Allnutt

105. Dr Allnutt, a forensic psychiatrist, provided three reports to the lawyers for the plaintiff. In his first report dated 5 October 2017, Dr Allnutt stated that, on the balance of probabilities, the plaintiff had suffered psychological injuries as a result of the accident on 25 November 2016. He stated that the plaintiff manifested a constellation of symptoms consistent with chronic PTSD. He noted the history of pre-existing stressors, including the death of the plaintiff's father and the breakdown of her marital relationship, with the onset of panic attacks and anxiety as well as sleep disturbance. He did not believe, however, that there was any evidence of PTSD at the time of the incident on 25 November 2016. He considered the plaintiff's prognosis to be guarded. He recommended continuing psychological treatment.
106. In his second report dated 2 July 2019, Dr Allnutt noted that he reviewed the plaintiff on 18 June 2019. Dr Allnutt also had the benefit of reviewing a number of reports, including a report dated 10 January 2018 by Dr Sellen and a report dated 10 August 2018 by Ms Wood. Dr Allnutt stated that his opinions as expressed in his report dated 5 October 2017 had not changed. He remained of the view that the plaintiff manifested a constellation of symptoms consistent with a chronic PTSD and that there was probable evidence of a pre-existing vulnerability to developing such a disorder, with prior evidence of anxiety and depressive symptoms with insomnia. He remained of the view that the incident of 25 November 2016 made a substantial contribution to her current mental state, being chronic PTSD. Dr Allnutt noted that there had been a gradual decline in her work performance, with the plaintiff now working in an area of less responsibility and demand. Despite this, she continued to experience difficulties with her short-term memory, concentration and motivation, as well as being distracted by flashbacks. In his opinion, the plaintiff's employability was in jeopardy and she was at least partially impaired. Given the persistence of the plaintiff's symptoms despite psychological treatment and antidepressant medication, Dr Allnutt regarded her prognosis as relatively poor.
107. In an addendum, dated 27 August 2019, addressed to the plaintiff's solicitors, Dr Allnutt stated that based on his experience and training it was reasonably foreseeable that sights of the kind that a person in the plaintiff's position might see, sounds of the kind that a person might hear, tasks of the kind that a person might have to undertake to try to ease the suffering of the physically injured pedestrian and taking him to safety, would be, in combination, such as might have caused a person of normal fortitude to develop a recognised psychiatric illness.
108. Finally, Dr Allnutt provided a report dated 17 February 2020. In that report, he noted that he had been provided with CCTV footage of the subject accident. Dr Allnutt stated that he reviewed the CCTV footage of the incident and, on balance, found no reason to alter the opinions expressed in his previous reports. He noted that a diagnosis of PTSD requires exposure to actual or threatened death or serious injury. Dr Allnutt then went on to say:

Having regard to the CCTV footage, my impression is that until it stopped, the motor vehicle was about to drive over an ageing man's head. To my lay eye the wheel did not actually go over his head. However, until that point, I would regard observing the incident as meeting the necessary criterion of exposure to threatened death or serious injury (Criterion A) as required by the DSM-V for a diagnosis of Post Traumatic Stress Disorder. At [sic].

That Mr Atkinson was not as severely injured as the plaintiff might have feared he could have been, and that she may have been aware immediately after the incident that he was not as severely injured, does not alter my diagnosis. The analogy that I might draw would be a person observing another person being shot at but the bullet missing them. The initial shock is the perception of the threatened death or serious injury. Such a scenario in my view, be [sic] enough to cause a person of normal fortitude to develop a condition such as Post Traumatic Stress Disorder or a Trauma and Stressor-Related Disorder.

109. Dr Allnutt was not required for cross-examination.

Defendant's medical evidence

Medical reports concerning prior accidents

110. A Psychological Assessment Report from a clinical psychologist, Ms Coghlan, dated 28 August 2012 was tendered on behalf of the defendants. The Report was addressed to Dr Paterson, the plaintiff's GP. The Report notes that the plaintiff was referred for a psychological assessment following an injury on the way to work with the subsequent development of a chronic pain problem. The plaintiff reported that she had stepped in a hole the size of a 50 cent piece in a carpark near her work, resulting in the heel of her shoe becoming caught and the plaintiff rolling her ankle. She had continuing pain in her knee, diagnosed as a torn posterior cruciate ligament. The plaintiff was employed as a legal secretary and complained that she was crying at work and could not cope with the demands of her position since the onset of her pain. The plaintiff reported pain in her lower back, especially the right side, with sciatic pain and aching in her left knee. She reported that she tried to keep active and attended a gym every second day, walking 45 minutes on alternate days. She also had a routine of dancing stretches. She was unable to continue her involvement participating in, teaching and judging ballroom dancing. She could no longer ride horses, and she also stopped riding on a motorbike. Her injury had affected her opportunity for social interaction. The plaintiff reported that she experienced a depressed mood four days out of seven. She also reported poor sleep, treated with medication.
111. A subsequent Discharge Report from Mr Halpin dated 1 July 2013 was also tendered. The report noted that the plaintiff had completed treatment at the Canberra Injury Management Centre consisting of three hydrotherapy sessions to accompany her three-month independent gym membership. It also noted that the plaintiff had previously undertaken a Cognitive Behavioural Pain Management Program which was completed in February 2013. The Report noted that the plaintiff had made reasonable progress during her three hydrotherapy sessions during May and June 2013, being able to carry out over 30 minutes of advanced hydrotherapy exercises without reporting an increase in pain during or after sessions. The plaintiff reported that she continued to suffer occasional flare-ups, as well as bad days.
112. The defendants also tendered a Physiotherapy Plan dated 3 April 2014. The plaintiff's employment at that time is recorded as "accountant" and her employer as LJ Hooker Canberra City. The document records an injury having occurred on 26 March 2014. It states that the plaintiff was not working as at the date of the

Physiotherapy Plan. The areas of the plaintiff's body treated were described as "cervical spine/headache, thoracic spine and lumbar spine".

113. The defendants also tendered a medical certificate for workers' compensation purposes, completed by the plaintiff's GP certifying that the plaintiff was unfit to work from 8 April 2014 to 6 May 2014. The certificate stated that the plaintiff was suffering soft tissue injuries to her neck, shoulders, thoracic and lumbar spine, as well as bruising to her arms and legs and migraines occasioned by an injury on 26 March 2014.
114. The defendants also tendered a letter from LJ Hooker Canberra City dated 11 April 2014 advising the plaintiff that her role of Assistant Accounts Manager was redundant and that her employment was terminated.
115. A further Physiotherapy Plan, dated 12 May 2014, was tendered by the defendants, demonstrating that the plaintiff continued to have physiotherapy subsequent to the injury sustained on 26 March 2014.
116. A letter dated 5 June 2014 established that the plaintiff was referred by her GP to "Active Recovery". A report from that organisation, dated 25 June 2014, notes that the plaintiff presented three months after an injury at work affecting her lower back, neck and shoulders. She reported high levels of symptoms across multiple areas of the body. The plaintiff also reported high levels of emotional distress associated with her symptoms and psychosocial factors. The plaintiff reported that she did not believe that she was improving. The physiotherapist who completed the report stated that on examination the plaintiff had some restriction to her range of motion. Her movements were limited by pain and a concern about activity increasing her symptoms. A neurological examination of the plaintiff's lower limb found signs of neurological involvement. It was recommended that she undertake a course of cognitive functional rehabilitation.
117. A medical certificate dated 30 July 2014 certified that the plaintiff was unfit to work from 30 July 2014 to 30 September 2014 because of an injury sustained on 26 March 2014.
118. A report dated 30 September 2014 from Ms Kerriane Abbott, a psychologist, noted that the plaintiff was working on pain management concepts and stress management techniques in order to deal with the pain arising out of the accident on 26 March 2014. The report noted that the plaintiff's condition was improving. The author of the report stated that the plaintiff did not require any further intervention at that time.
119. A report dated 24 March 2015 from the plaintiff's GP, Dr Paterson, to the plaintiff's lawyers at that time was tendered by the defendant. It noted the history of the plaintiff being injured at work on 26 March 2014 when a filing cabinet at the plaintiff's workplace overbalanced and fell on her. Dr Paterson noted that the plaintiff complained of pain in her lumbar spine, thoracic spine, cervical spine and both shoulders. She also complained of daily headaches, and was teary and distressed. She was referred for physiotherapy, given analgesia and time off work. She subsequently started a multidisciplinary treatment program including physiotherapy, hydrotherapy and psychological treatment for pain management. The report noted that the plaintiff had very significant psychosocial stressors with the breakdown of her marriage, and difficulties with her mother who needed to be moved into residential care. The plaintiff was also under considerable financial stress.

120. A report dated 27 March 2015 from an occupational physician, Dr Peter Wilkins, was also tendered by the defendants. Dr Wilkins examined the plaintiff on 27 March 2015. The report notes the history of injury sustained on 26 March 2014 and the plaintiff continued to suffer symptoms when seen by Dr Wilkins some 12 months later. It was Dr Wilkins' opinion that the plaintiff was likely to be left with a permanent impairment affecting particularly her neck and lower back.
121. Finally, a copy of a document titled Application for Registration of Agreement for Compensation, dated 16 June 2015, was tendered by the defendants. That agreement evidences a commutation of the plaintiff's workers' compensation rights for the sum of \$100,000 exclusive of payments already made under the *Workers Compensation Act 1951 (ACT)*.

Medical reports concerning the present claim

Dr John McMahon

122. On behalf of the defendants, the plaintiff was seen by a psychologist, Dr John McMahon, who provided three reports. The first report dated 12 December 2017 reported that the plaintiff had been "on a high" on 25 November 2016 as a result of receiving good news after continuing investigations following surgery for breast cancer on 30 June 2016. She had been at the Centre, and returned to her car in the underground carpark. As she got into her car, she reported that she heard someone screaming for help. She said that she looked out of her door and behind her car was a "big blue ute" and she could see the top of a bald head and an arm coming out from under the back left tyre. The plaintiff told Dr McMahon that she got out of her car and ran across towards the man, yelling and screaming at the driver of the ute. She reported that as she got closer the screaming stopped, and she thought the man was dead. About 30 seconds later she heard moaning and realised that the man was not dead. She provided first-aid assistance.
123. Regarding her symptoms at the time that she saw Dr McMahon, the plaintiff reported that she felt nervous near the Centre and avoided going there. She reported that she was usually calm, but was now easily irritated. She reported that she had "down days", and that she was often tearful. She thought about the man who had been hit by the car when she fell asleep at night. She also sometimes dreamt about him, and would wake feeling poorly. She had lost weight since the incident, and her appetite was reduced. She also reported that her concentration was reduced and was becoming a problem at work. She was working as an EA on a full-time basis. She did most of the cooking, but she felt tired all the time and her husband did the cleaning and general running of the house. In his initial report, Dr McMahon expressed the opinion that the plaintiff met the criteria for PTSD which was to some extent attributable to the incident of 25 November 2016 and to some extent attributable to other medical conditions. Dr McMahon noted some psychological symptoms of depression were likely associated with her medical condition. He believed that the plaintiff was fit for normal employment duties, although she had some reduced work efficacy due to her symptoms. He considered the plaintiff's prognosis to be fair to good. Dr McMahon had been provided with a copy of Dr Allnutt's report of 5 October 2017, and he stated that he and Dr Allnutt saw the case similarly.
124. Dr McMahon's second report is dated 5 October 2018. In that report he stated that given the plaintiff's previous anxiety, complex grief and a significant health condition,

she was more susceptible to developing a psychological disorder because of witnessing the accident on 25 November 2016. He also expressed the opinion that given the traumatic nature of the accident, it was possible that a person of normal fortitude may develop a mental disorder in response to witnessing the accident. He went on to say that the majority of people with a low burden of pre-existing trauma could witness a traumatic event without developing a mental disorder or condition.

125. Dr McMahon's third and final report is dated 21 October 2019. In that report, he was asked to provide an opinion whether he would expect a person of normal fortitude might, if presented with the same circumstances of the plaintiff, have suffered a recognised psychiatric illness upon seeing the accident of 25 November 2016 based upon a description of the accident given to him by the defendant's lawyers. The salient features of the description of the accident given to Dr McMahon were:

- (a) on 25 November 2016 the plaintiff was in the carpark of the Centre located in Fyshwick in the Australian Capital Territory in the vicinity of a "Star Car Wash";
- (b) at the same time the plaintiff was in the carpark, the defendant, Mr Mehdi, who worked at the car wash, reversed a motor vehicle being a Ford Ranger utility, from one carpark across the roadway into a wash bay, for the purposes of washing the car;
- (c) the defendant's vehicle travelled less than 25 metres, at an estimated speed of about 5 km/h (but no more than 10 km/h);
- (d) the defendant saw the plaintiff waving her arms in front of the vehicle yelling "stop";
- (e) the defendant immediately stopped reversing the vehicle;
- (f) the defendant then drove forward a few metres and stopped the car. He alighted from the car, travelling around the front of it and witnessed Mr Atkinson lying on the ground of the wash bay;
- (g) it was apparent that the defendant's car had struck Mr Atkinson;
- (h) the defendant, with the assistance of the plaintiff, helped Mr Atkinson up to a seat in an adjacent carpark until an ambulance arrived;
- (i) the defendant observed redness, bruising and swelling on Mr Atkinson's arm. No other injuries were observed on Mr Atkinson; and
- (j) no black marks were observed by the defendant on Mr Atkinson.

126. Based upon this description, Dr McMahon expressed the opinion that a person with normal fortitude may be distressed by witnessing such an event but would be unlikely to develop a mental disorder that is a recognised psychiatric disorder.

127. Dr McMahon was not required for cross-examination.

The defendants' submissions

128. The defendants accept that the first defendant was, on 25 November 2016, reversing a motor vehicle that collided with, and "pushed over", Mr Atkinson. By their defence, the defendants:

- (a) deny that they owed the plaintiff a duty of care and rely on s 34 of the Wrongs Act;
 - (b) deny that the actions of the first defendant constituted negligence on his part;
 - (c) in the alternative, allege that if the actions of the first defendant constituted negligence and the plaintiff was owed a duty of care, any damages awarded shall be reduced to take into account Mr Atkinson's contributory negligence;
 - (d) deny that the plaintiff in fact witnessed the accident; and
 - (e) deny that the plaintiff has suffered a recognisable psychiatric injury.
129. The defendants submitted that the CCTV footage shows the first defendant reversing "an obviously large vehicle" with a canopy on the back "which would presumably limit his view". At that time, Mr Atkinson was standing in the mouth of the wash bay. He was stationary. It is submitted that the first defendant is shown to be reversing slowly before the vehicle struck Mr Atkinson. The defendants submit that nothing the first defendant did in driving the vehicle can be said to amount to a breach of any duty he might have owed to Mr Atkinson or to the plaintiff. The defendants submit that Mr Atkinson "placed himself in a clearly dangerous position resulting in him being struck by the vehicle".
130. In the alternative, if the Court were to find that the first defendant did owe the plaintiff and Mr Atkinson a duty of care and that he had breached that duty, Mr Atkinson's conduct of placing himself in the mouth of the car wash bay when it could be expected that vehicles would be moving in and out, constituted contributory negligence on his part. The defendants submitted that Mr Atkinson failed to keep a proper lookout of what was going on around him. The defendant's submission on contributory negligence is based on s 104 of the Wrongs Act, which provides:

104 Claims by third parties—contributory negligence

- (1) This section applies if—
 - (a) a person (the **first person**) suffers damage partly because of the first person's failure to take reasonable care (**contributory negligence**) and partly because of someone else's wrong; and
 - (b) because of the damage to the first person a third person suffers damage.
 - (2) In an action by the third person, the contributory negligence of the first person must be taken into account under section 102 (Apportionment of liability—contributory negligence) in reducing the damages recoverable by the third person for the damage as if the contributory negligence were a failure by the third person to take reasonable care.
131. The defendants submitted that on the basis of the evidence and s 104 of the Wrongs Act, any damages payable to the plaintiff should be reduced by 50 per cent by reason of Mr Atkinson's contributory negligence.
132. With regard to the contention that the first defendant did not owe the plaintiff a duty of care, the defendants called in aid s 34 of the Wrongs Act, which provides:

34 Mental harm—duty of care

- (1) A person (the **defendant**) does not owe a duty to another person (the **plaintiff**) to take care not to cause the plaintiff mental harm unless a

reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

- (2) For the application of this section in relation to pure mental harm to a person, the circumstances of the case to which the court must have regard include—
 - (a) whether or not the mental harm was suffered as the result of a sudden shock; and
 - (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in danger; and
 - (c) the nature of the relationship between the plaintiff and anyone killed, injured or put in danger; and
 - (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.
- (3) For the application of this section in relation to consequential mental harm to a person, the circumstances of the case to which the court must have regard include the nature of the bodily injury out of which the mental harm arose.
- (4) This section does not affect the duty of care a person (the **defendant**) has to another person (the **plaintiff**) if the defendant knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude.

133. The initial submission advanced by the defendants was that the plaintiff was not, as at 25 November 2016, a person of normal fortitude and as much s 34 operated to preclude a finding that the first defendant owed her a duty of care. In oral submissions, this submission was abandoned in favour of a submission that a reasonable person in the first defendant's position would not have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a recognised psychiatric illness if the first defendant did not exercise reasonable care. In their written submissions, the defendants said:

51. It is clear from the evidence from Dr Allnutt in his three reports that the plaintiff was not a person of normal fortitude. She clearly had pre-existing psychological vulnerability to suffering psychiatric symptoms if exposed to relatively minor incidents. That is what has occurred in this case.

52. A reasonable person in the defendant's position would not have foreseen that a person of normal fortitude would suffer such an extreme reaction as occurred in the present case. Further, the fact that she was not of normal fortitude was the reason she suffered a recognisable psychiatric injury and accordingly, the defendant is entitled to the protection of s.34.

53. Whilst the accident itself was undoubtedly shocking, as any running down incident is, it is important to note that Mr Atkinson was not killed. Indeed, he did not appear to suffer any significant trauma. This was evidenced by the fact that the plaintiff herself was able to assist. There has been no evidence tendered by the plaintiff as to the extent of the Mr Atkinsons [sic] injuries. At its highest, the plaintiff [sic] own evidence was that she saw some blood on his arms, after the accident when she rolled up his sleeves to check for injuries.

134. The defendants referred to a number of inconsistencies said to be found in the recitation of the events by the plaintiff to medical practitioners, and in the oral evidence. They submitted that the plaintiff had sought to exaggerate the circumstances of the accident, and had sought to mislead medical practitioners regarding her mental health history. For example, in the history taken by Dr Sellen the words "war zone" appear, framed by inverted commas. It was suggested to the plaintiff that she used that description in giving her history to Dr Sellen, and that it was

a gross exaggeration. The defendants also submitted the plaintiff attempted to mislead Dr Sellen and Dr Allnut by failing to disclose to them her “significant history of at least 3 years of psychological treatment” prior to the accident on 25 November 2016. The defendants also submitted that she had not given a full history of her prior psychological treatment to Dr McMahon.

135. Another matter which the defendants submitted affected the plaintiff’s credibility was her failure to report the accident and her alleged symptoms to medical practitioners until she was invited by her current solicitors, who were then acting on behalf of Mr Atkinson, to provide a statement in relation to his claim for damages.
136. Allied to this submission is another, suggesting that I should not accept the plaintiff’s evidence that she did not mention her disorientation immediately after the accident to her treating medical practitioners immediately after the accident because she did not know what was causing the symptoms. It was submitted that the real reason she did not refer to symptoms, when she consulted medical practitioners after the accident, was because the accident had not had any impact on her.
137. The defendants referred to the report of Dr Paterson of 12 September 2018 in which she referred to the fact that the plaintiff found providing a statement to Mr Atkinson’s solicitors stressful and resulted in her symptoms worsening. They submitted that it was open to this Court to conclude that it was not the accident itself that caused the plaintiff’s symptoms, but the attendance upon Mr Atkinson’s solicitors to provide the statement.
138. In the course of the plaintiff’s evidence, she said that she had provided a statement to Mr Atkinson’s solicitors, who later became her solicitors, in relation to Mr Atkinson’s case. The defendants called for a copy of that statement. It was not produced. The defendants submitted that I should infer that the statement would not have assisted her case.
139. In the event that they were found liable to the plaintiff, the defendants submitted that an amount of \$60,000.00 to \$80,000.00 for non-economic loss would be appropriate, bearing in mind that the plaintiff has been able to continue in employment and remains able to care and look after herself, albeit with the assistance of some treatment. The defendants submitted that no allowance ought to be made for the cost of care, as there was no evidence to support the claim. The defendants submitted that no allowance ought to be made for either past or future economic loss.
140. Regarding out of pocket expenses, the defendants submitted that the plaintiff obtained various prescriptions medications for pre-existing conditions such as anxiety and panic attacks before the subject accident. This should be used as a “base line” in determining whether she had incurred any further costs for medication after the accident. The defendants submitted that any allowance for future treatment should be limited to 12 to 18 months of therapy, summarised as follows:
 - (a) two GP consultations per year at \$80.00 per consultation;
 - (b) eight sessions of psychological treatment at \$220.00 per consultation;
 - (c) four psychiatric consultations at \$350.00 per consultation; and
 - (d) an additional medication buffer of \$1,500.00.

The plaintiff’s submissions

141. The plaintiff submitted that the first defendant owed a duty to take reasonable care not to cause psychiatric injury to any persons in the immediate vicinity of an accident caused by his driving and who:
- (a) may directly perceive physical injury and suffering caused by that accident to a third person; and
 - (b) may voluntarily render assistance to the injured third person and in so doing witness the suffering of that third person.
142. In that regard, the plaintiff referred me to the judgment of Deane J in *Jaensch v Coffey* (1984) 155 CLR 549 at 605-606, where his Honour said:
- While the relationship of the plaintiff with the threatened or injured person (e.g. that of spouse, parent, relative, rescuer or uninvolved stranger) may well be of critical importance on the question whether risk of mere psychiatric injury was reasonably foreseeable in a particular case, the preferable view would seem to be that a person who has suffered reasonably foreseeable psychiatric injury as the result of contemporaneous observation at the scene of the accident is within the area in which the common law accepts that the requirement of proximity is satisfied regardless of his particular relationship with the injured person.
- (Citations omitted.)
143. The plaintiff accepted that this Court might find that she was not a person of “normal fortitude” for the purpose of the application of s 34 of the Wrongs Act, but the evidence established that it was reasonably foreseeable that a person of normal fortitude might develop a recognised psychiatric condition if they had been in the position of the plaintiff. Once it was established that the first defendant owed her a relevant duty of care, the plaintiff submitted, it was clear that he breached that duty by negligently reversing the Ford into Mr Atkinson.
144. The plaintiff submitted that the CCTV footage established that Mr Atkinson:
- (a) was standing on the side of the roadway, close to the empty wash bays;
 - (b) came to stand at the point of the collision at a time before either the brake or reversing lights on the Ford were illuminated;
 - (c) simply stood still, looking at the sign displayed at the car wash; and
 - (d) was and could not have been alerted to the fact that the Ford was moving towards him.
145. On this basis, the plaintiff submitted that there had been no contributory negligence on the part of Mr Atkinson.
146. It was accepted by the plaintiff that there were some minor discrepancies between her evidence and the description of the incident she gave to medical practitioners, but this was to be expected and they were not such as to cause doubt about her reliability in her evidence of what she saw and heard.
147. The plaintiff submitted that her failure to recount to medical practitioners that she had seen psychologists after her accidents in 2012 and 2014 was explicable on the basis that she consulted those practitioners in the context of having suffered physical injuries. One of the psychologists, Ms Coghlan, having diagnosed a pain disorder secondary to her physical injuries and the other, Ms Abbott, referred in her treatment plan to the plaintiff’s psychological symptoms in the context of her physical injuries. In

addition, the plaintiff submitted, she had only seen Ms Coghlan on three occasions and Ms Abbott on three or four occasions.

148. The plaintiff submitted that her pre-accident episodes of anxiety and stress were in reaction to specific stressful events in her life, and that medication had been prescribed on that basis. The evidence demonstrated, she said, that she had been able to “bounce back” from these episodes, maintain employment in the APS and to lead an active social life.
149. The plaintiff submitted then an award of \$175,000.00 for non-economic loss would be appropriate, citing my decision in *KS and XT v Calvary Health Care ACT trading as Calvary Hospital and Dr Andrew Foote* [2018] ACTSC 84 (*KS and XT*) as a comparison. The claim for future loss of earning capacity was expressed to be founded on the principles in *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 (*Malec*), and based on the proposition that there is a real risk that she will suffer a loss or diminution in earning capacity by reason of her injury.
150. It was accepted by the plaintiff that no evidence had been given regarding the number of hours of gratuitous assistance she had required around the house after the accident. The plaintiff submitted that I could “take judicial notice” of the sort of time involved in performance of the type of domestic duties for which she received assistance after the accident.

Consideration

151. On the basis of the CCTV evidence, I am satisfied that on the morning of 25 November 2016, the first defendant reversed a Ford motor vehicle into Mr Atkinson knocking him to the ground. This occurred in the carpark of the Centre in Fyshwick. Immediately before the first defendant began to reverse the Ford, Mr Atkinson was standing motionless to the side of the roadway and in front of the empty wash bays reading a sign erected in the carwash. Mr Atkinson’s back was towards the car being reversed by the first defendant. There was no reason, in my opinion, why Mr Atkinson should have apprehended that someone would reverse a vehicle from the parking bays opposite the carwash into the wash bay near where he was standing. He did not have an opportunity to observe the brake lights or reversing lights illuminate on the Ford because of the position in which he was standing. The first defendant, as the driver of a large motor vehicle in an area where significant numbers of pedestrians who may be struck during the reversing manoeuvre, had a heavy onus to ensure that he reversed the Ford safely. If, as surmised by the defendants, the view of the area behind the Ford was obscured during reversing by reason of a canopy on the Ford, this only heightened the obligation on the first defendant to ensure that he reversed safely. To my mind, it is beyond any argument that the collision between the Ford and Mr Atkinson was solely attributable to the fault of the first defendant. As such, there is no occasion for reduction of the plaintiff’s damages by reason of the operation of s 104 of the Wrongs Act.
152. Based upon the evidence of the complainant and the CCTV material, I accept that the plaintiff became aware of the fact that the Ford had struck Mr Atkinson when she heard him scream for help. At that time, she was in the process of entering the driver’s door of her vehicle and seating herself on the driver’s seat. Her vehicle was parked in a parking bay opposite and on a slight angle to the wash bay where Mr Atkinson was struck by the Ford. From where the plaintiff was situated, I have no doubt she saw Mr Atkinson’s head and one of his arms protruding from under the

Ford, with the Ford rear passenger-side wheel appearing to be on or adjacent to Mr Atkinson's head or body. The incident as observed by the plaintiff clearly happened very quickly, but I have no hesitation in accepting her evidence that she initially believed Mr Atkinson had been killed. But for the intervention of the plaintiff, that may well have occurred.

153. I accept that the plaintiff believed that the Ford rocked back and forward, but in fact this was probably the first defendant slowly reversing the Ford and, perhaps, touching the brakes as he did so. From the plaintiff's perspective, this may well have appeared to be a process of rocking backward and forward on the body of Mr Atkinson.
154. All of the medical practitioners who provided reports accept that the plaintiff was, at the time they saw her, suffering from PTSD. The suggestion by the defendants that this disorder was not the result of seeing the accident, but was the result of providing a description of the accident to Mr Atkinson's solicitors some time later, is extremely improbable. If actually witnessing and participating in the event did not cause the plaintiff to suffer PTSD, it is highly improbable that recounting the event at a later time, at a place divorced from the event, and in the then knowledge that Mr Atkinson had not been killed or badly injured, would cause the onset of such a condition.
155. I am not satisfied that the plaintiff's failure to mention the previous psychological treatment she had received to the medical practitioners who assessed her after the accident was an attempt by her to mislead those medical practitioners. She had received that treatment briefly in the context of treatment for and recovery from physical injuries, and there was no reason why she should consider it relevant to the condition which she developed after the accident. Similarly, I see nothing sinister in the plaintiff's failure to report her symptoms to medical practitioners in the months after the accident. By the time she left the carpark on 25 November 2016, the plaintiff knew that Mr Atkinson had not died and had not been badly injured. She knew that she had received a shock, but she also knew that what she had feared had not come to pass. It is not at all surprising that someone without training in, or knowledge of, the development and symptoms of PTSD may not have linked the events of the accident to their developing symptoms where by the time the symptoms developed they knew that the accident had, in fact, been relatively minor. This would be even more likely where, as here, the person had multiple other stressors in their life.
156. I accept the evidence of the plaintiff regarding the onset of symptoms after the accident. I am perfectly satisfied that the plaintiff developed PTSD after the accident and that the accident made a substantial contribution to the development of that condition. I accept the evidence of Dr Allnut that the plaintiff had a pre-existing vulnerability to developing such a disorder, as evidenced by her prior symptoms of anxiety and depression. I accept that the plaintiff's evidence regarding the effect that the PTSD has had on her work and social life. The plaintiff's evidence of a deterioration in her work performance after the accident is supported by the evidence of Mr Twomey.
157. As someone who witnessed at least part of the accident, who was present at the scene and ran to provide assistance to Mr Atkinson, the plaintiff falls within the class of persons whom the first defendant should have foreseen may suffer a recognised psychiatric injury if he negligently collided with a pedestrian.
158. I have set out the terms of s 34 of the Wrongs Act at [132] above. Whether a duty of care is negated by s 34 depends not on the personal characteristics of the plaintiff,

but on the nature of the event said to have caused the plaintiff's psychological reaction. If the event was one which a reasonable person in the defendant's position would have foreseen might, in the circumstances of the case, cause a person of reasonable fortitude in the plaintiff's position to suffer a recognised psychiatric illness if reasonable care was not taken, then the defendant's duty of care is not negated by the section irrespective whether the plaintiff is not a person of normal fortitude.

159. The question then becomes one of whether the first defendant should have foreseen that a person of normal fortitude who observed what the plaintiff observed from her vantage point when the first defendant hit Mr Atkinson with the Ford, might suffer a recognised psychiatric illness if he did not take reasonable care? I accept the plaintiff's evidence that, from her vantage point, she believed that Mr Atkinson had been killed or seriously injured. She ran to alert the first defendant to the presence of Mr Atkinson under the car, and then provided assistance to Mr Atkinson. I accept the clear opinion of Dr Allnut that what the plaintiff perceived and her actions in coming to the assistance of Mr Atkinson, in combination, might cause a person of normal fortitude to develop a recognisable psychiatric illness. I prefer the opinion of Dr Allnut to that of Dr McMahon in that regard as Dr Allnut had the inestimable advantage of having seen the CCTV footage of the accident whereas, for some reason, Dr McMahon was not shown that footage by the defendants. The version of the accident provided to Dr McMahon for the purpose of preparation of his third report is clearly incomplete as it omits the vital circumstances regarding what the plaintiff saw and heard from her vantage point, and the circumstance that she believed that Mr Atkinson had been killed. These were relevant "circumstances of the case" for the purpose of the application of s 34, and Dr McMahon did not, at the defendant's direction, have regard to them in formulating his opinion.
160. In summary, I am satisfied that the first defendant owed the plaintiff a relevant duty of care not to cause her mental harm by reversing the Ford without reasonable care. I am satisfied that he breached that duty when he reversed the Ford without reasonable care, striking Mr Atkinson and causing him to fall to the ground under the rear of the Ford. The duty of care owed to the plaintiff is not negated by the terms of s 34 of the Wrongs Act. As a consequence of the first defendant's negligence, the plaintiff developed a recognised psychiatric illness, being PTSD.

Damages

161. I accept the evidence of the plaintiff regarding the impact that her disorder has had on her life. I would describe the effect of her PTSD on the plaintiff as significant, but not overwhelmingly so. She has particularly experienced problems at work; she feels emotionally unstable, her concentration and memory have deteriorated, and her sleep problems have intensified.
162. In my opinion, the plaintiff is not nearly as badly affected by her disorder as was the principle plaintiff in *KS and XT*. I would assess non-economic loss in the sum of \$100,000.00, of which I attribute \$70,000.00 to the past and \$30,000.00 to the future. I allow interest on the sum of \$70,000.00 for 3.5 years at 2 per cent, amounting to \$4,900.00.
163. The plaintiff submitted that I should allow a buffer of \$30,000.00 for future out of pocket expenses. This was based on an allowance of \$750.00 per annum for medication and four GP consultations per annum at \$100.00 per consultation, equating to \$22.00 per week. Using a multiplier of 452 for 10 years this amounts to

\$9,944.00. In addition, the plaintiff claims psychological counselling either once a week or once a fortnight for between 6 and 12 months at \$220.00 per session, amounting to a range of \$2860.00 to \$11,400.00. Finally, the plaintiff submits, the evidence supports an allowance for treatment by a psychiatrist based on an initial four to six treatments and thereafter less frequent consultations with an allowance of \$360.00 per consultation.

164. In his initial report, Dr Allnutt recommended that the plaintiff see a psychologist for a period to be determined in collaboration with the treating psychologist. He envisaged weekly to twice weekly consultations for a period of 6 to 12 months. In addition, he recommended that she see a psychiatrist for a period to be determined in collaboration with the treating psychiatrist. He envisaged four to six weekly consultations for a trial of antidepressant medication and then less frequent contact over a period of 12 months.
165. The amounts claimed by the plaintiff for medication and GP visits are moderate and supported by the evidence. It is difficult to be precise with regard to the plaintiff's future psychologist and psychiatrist treatment needs, as much depends on the effectiveness of treatment. I will allow eight sessions with a psychiatrist at \$360.00 per session, amounting to \$2,880.00. I will allow 26 attendances upon a psychologist at \$220.00 per attendance, amounting to \$5,720.00. The total I have allowed (\$9,944.00 plus \$2880.00 plus \$5720.00) amounts to \$18,544.00.
166. The plaintiff claimed \$6,600.00 for past wage loss, based on 37 days of annual leave taken due to the accident between September 2017 and February 2019. This was based on an average taxable income of \$58,000.00 per annum. This is a moderate sum supported by the evidence.
167. The plaintiff claimed a buffer of \$60,000.00, or approximately one year's income, for future loss of earning capacity. The claim is based upon the opinion expressed by Dr Allnutt in his second report that, based on the difficulties in her workplace reported by the plaintiff, her "employability is in jeopardy and she is at least partially impaired, potentially totally impaired". By this statement I take Dr Allnutt to say that there is a risk that the plaintiff may in the future be unable to continue employment due to the symptoms of PTSD. Dr Allnutt's opinion is silent, however, on the magnitude of that risk.
168. The proper approach to assessing damages for potential events was stated by the High Court in *Malec*. The plurality of the Court (Deane, Gaudron and McHugh JJ) said, at [7]:

If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high – 99.9 per cent – or very low – 0.1 per cent. But unless the chance is so low as to be regarded as speculative – say less than 1 per cent – or so high as to be practically certain – say over 99 per cent – the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability.
169. The fact that Dr Allnutt, as an expert providing an opinion to the Court, was sufficiently concerned to raise the prospect that the plaintiff may come to lose her capacity to earn by reason of her condition strongly suggests that he saw the risk as

real, in the sense of more than a speculative risk. On the other hand, the plaintiff has maintained full-time employment with the benefit of treatment for the past three and a half years. The APS is a large employer, and there is always a possibility that the plaintiff may be redeployed to other, less stressful duties if she were to find herself unable to continue in her current position. Doing the best that I can, I would not assess the risk that the plaintiff may lose her capacity to earn by reason of her condition at higher than 10 per cent. Adopting the plaintiff's net income for the financial year ending 30 June 2019 as \$56,575.00, this equates to a weekly net earning capacity of \$1,087.98. Applying a 3 per cent multiplier of 309 for 6.5 years to the sum of \$1,087.98 gives a total loss of \$336,185.82. This sum must in turn be reduced by 90 per cent to reflect the level of risk of its occurrence, leaving a sum of \$33,618.58.

170. The second defendant has paid \$2,822.00 past out of pockets on behalf of the plaintiff. In addition, the plaintiff claims \$4,682.85 for unpaid out of pockets. This is supported by the evidence.

171. The plaintiff claims \$8,500.00 for past gratuitous services pursuant to s 100 of the Wrongs Act. I accept that the plaintiff has been obliged to rely upon others to perform domestic duties since the accident that she would otherwise have performed. There is no evidence of the number of hours of such work performed by those others. It is probable that the majority of that work was undertaken in the first 12 months, after that the need for such assistance was reduced. The plaintiff makes no claim beyond 1 October 2019, being 147 weeks. I would be comfortable, bearing in mind the plaintiff's description of the work, to allow 1 hour per week at \$35.00 per hour, making a total of \$5,145.00.

172. I therefore assess damages as follows:

Non-economic loss	\$ 100,000.00
Interest	\$ 4,900.00
Past out of pocket	\$ 7,504.85
Future out of pocket	\$ 18,544.00
Past economic loss	\$ 6,600.00
Future economic loss	\$ 33,618.58
Past gratuitous services	\$ 5,145.00
Total	\$ 176,312.43

173. There will be judgment for the plaintiff against the defendants in the sum of \$176,312.43.

174. Unless a party seeks a different order by application made within 14 days of publication of this judgment, I order that the defendants pay the plaintiff's costs of the proceeding as agreed or assessed.

I certify that the preceding one hundred and seventy-four [174] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Burns.

Associate:

Date: