

by Peter Sacre<sup>1</sup>

# Heads of damage

## in spinal (paraplegic & quadriplegic/tetraplegic) and acquired/traumatic brain injury claims in Queensland

In Queensland in the last 11 years, there has been significant prescriptive intervention affecting common law claims for damages arising out of personal injury. The *Motor Accident Insurance Act 1994* (as amended), *Workers' Compensation and Rehabilitation Act 2003*, *Personal Injuries Proceedings Act 2001* (as amended) and the *Civil Liability Act 2003* are the principal prescriptive statutes affecting the common law.<sup>2</sup> Some of the common law principles of assessing damages have been modified by these statutes. It is therefore timely to review the guiding authorities and the method of assessment of damages in catastrophic claims.

Quantifying the damages for a catastrophic injury claim is an extension of general principles applied to assessing damages for personal injury, with which most personal injury lawyers are familiar. This paper examines the heads of damage in spinal and acquired brain injury claims, which lawyers may only encounter infrequently.

Turning to the heads of damage:

### Pain, suffering and loss of amenities

Assessment of general damages in respect of injuries consequent upon negligence on the highway and all other claims, save for master and servant claims, for damages for personal injury occasioned after December 2, 2002, are the subject of ss 51, 61 and 62 of the *Civil Liability Act 2003* and the 'injury scale value' ('ISV') as calculated by reference to, inter alia, Schedule 4, Part 1, Items 1, 2 and 5 of the *Civil Liability Regulation 2003*. The calculation of ISV for multiple injuries is prescribed by Schedule 4, Part 1, Division 1 of the *Civil Liability Regulation 2003*.

Because catastrophic injury, in addition to paraplegia, quadriplegia and acquired brain injury, often includes associated neurological, orthopaedic, urological, sexual or intestinal injuries, it is necessary to examine the schedules of the *Civil Liability Regulation 2003* carefully to properly estimate the ISV.

In respect of master/servant claims, the common law as modified by the *Workers' Compensation and Rehabilitation Act 2003* applies (as distinct from the assessment of the work-related injury for the statutory compensation claim under the *Workers' Com-*

*pensation and Rehabilitation Act 2003*).

In acquired brain injury claims, often there is a loss of speech, memory, insight and motor function, but not the utilities. Acquired brain injury claims attract inferior awards when compared with the awards in high level quadriplegic claims.

In respect of catastrophic injury claims, a component of the quantum of the award for general damages is the objectively determined social and psychological suffering and social disability which a claimant with an acquired brain or spinal injury will endure for the remainder of their life. Consequent upon catastrophic injury, there are often psychiatric disorders including depression and behavioural disorders.<sup>3</sup>

Age is relevant. An older person has less time to suffer, but the remainder of the unimpaired life is more precious because it is a scarce resource.



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<sup>2</sup> On September 1, 1994, the *Motor Accident Insurance Act 1994* became the statute which prescribed for compulsory third-party insurance for injuries caused on the highway. The *Workers' Compensation Act 1990* is the relevant statute law for work injuries suffered prior to February 1, 1997. For work injuries suffered between February 1, 1997, and July 1, 2003, the *WorkCover*

*Queensland Act 1996* (as amended) is the relevant statute. After July 1, 2003, the *Workers' Compensation and Rehabilitation Act 2003* is the relevant statute. For common law claims, other than highway or master and servant claims, after June 18, 2002, the *Personal Injuries Proceedings Act 2001* (as amended) and after December 1, 2002, the *Civil Liability Act 2003* (the

CLA applies to PIPA claims after December 1, 2002).

<sup>3</sup> *Scarf v State of Qld & Anor* unreported, SC Qld No.1272 of 1993, White J, October 30, 1998; C6 quadriplegia with consequent depression; *Winterton v Mercantile Mutual Ins. (Aust) Ltd* [2002] QCA 249 (brain injury).

Younger people suffer longer but have more time and flexibility of mind and body to adapt to the impairment. The pain and suffering consequent to the initial injury and any relevant surgery or treatment thereafter sounds in damages.<sup>4</sup>

Musculo skeletal and neuropathic pain are common problems following spinal cord injury and sound significantly in awards of general damages.<sup>5</sup>

In awarding a C5 quadriplegic female \$200,000 for general damages in *Theden v Nominal Defendant & Ors* [2004] QSC 310, in addition to various differences between the comparative plaintiffs by way of age and comparative upper limb disability, Jones J noted much depended on the quality of the pre-accident life of the claimant and what their prospects for the future were.<sup>6</sup>

### Loss of consortium

In respect of highway claims and other claims, save for master and servant claims, the court must not award damages for loss of consortium unless the injured person died, or general damages are assessed in excess of \$30,000. Loss of servitium claims are limited to three times average weekly earnings per week.<sup>7</sup>

In any event, the awards for loss of consortium demonstrate the low monetary value the courts attach to loss of sexual function.<sup>8</sup>

### Loss of expectation of life

In respect of highway claims for injuries occurring after December 2, 2002, awards under this head of damage are captured within the award for “general damages” calculated by reference to the Civil Liability Regulation 2003.<sup>9</sup>

The award for loss of life expectancy is referred to as the loss of expectation for life. It is not usually a large sum of money.<sup>10</sup>

### Interest on general damages

Interest on general damages has been abolished for highway claims and other claims, save for master and servant claims.<sup>11</sup> In respect of master and servant claims, the court determines the appropriate interest rate up to judgement.<sup>12</sup>

### Life expectancy

Life expectancy is a contingency which must be reflected in the calculation of future economic damages.<sup>13</sup> It is determinative of the multiplier applied using the 5 percent tables to calculate present values of future weekly costs. The beginning point for an Australian claimant when calculating an estimate of life expectancy is the most recent Australian Bureau of Statistics life expectancy tables. There are Australian Bureau of Statistics life expectancy tables for indigenous Australians. When assessing damages for foreign nationals, the life expectancy tables of their country of origin need to be ascertained.

Some acquired brain injury claimants have their life expectancy discounted to reflect any loss caused by accident-related injuries.<sup>14</sup>

Some acquired brain injury claimants have normal life expectancy.<sup>15</sup>

A paraplegic’s life expectancy is usually the normal expectancy, save where there is some pre-existing condition such as arteriosclerosis, hypertension, diabetes, smoking or a post-accident history of recurrent pressure sores or urinary tract infections.<sup>16</sup>

A quadriplegic’s life expectancy, in addition to the risk of recurrent pressure sores or urinary tract infections, is prejudiced by risk of respiratory infection. Further, quadriplegics – because of their upper limb disability – are not as able in relieving pressure on their backsides by lifting. This is usually exacerbated by post-injury weight gain consequent to sedentary lifestyle.

4 *Winterton v Mercantile Mutual Ins. (Aust) Ltd* [2000] QCA 249 brain injury, general damages \$150,000; *Goode v Thompson & Suncorp General Insurance Ltd* unreported, SC Qld No Ambrose J, July 2, 2002, brain injury, general damages, \$150,000; *Castro (by her next friend Castro) v Hillery* [2001] QSC 510, brain injury, general damages \$160,000; *Theden v Nominal Defendant & Qld* [2004] QSC 310 C5 quadriplegia, general damages \$200,000; In *Castro (by her next friend Castro) v Hillery* [2001] QSC 510 Jones J compared the various brain injury cases for the purposes of assessing general damages. In assessing the comparatives relevant to Mrs Castro, Jones J noted (para phrasing): in *Winterton v Mercantile Insurance* a plaintiff, 14 years of age, sustained severe brain damage resulting in an impairment of gross and motor skills and severe cognitive deficits who received \$150,000. In *Goode v Thompson*, a 12-year-old boy was struck by a motor vehicle and suffered severe brain damage which resulted in physical

and cognitive deficits. Goode’s injuries were dissimilar to and not as severe as Mrs Castro’s injuries. Both of these plaintiffs were younger than Mrs Castro and therefore had to endure their respective disabilities for a longer period. Prior to the accident, the plaintiff Winterton was in the mildly retarded range and had very significant cognitive deficits. The effect of her injury was to reduce her from being a person who, although not very bright, could be expected to cope on her own to one who was unable to live independently. Winterton, prior to her accident, demonstrated behavioural problems and had difficulty in socialising with her peers and coping with school discipline. The diagnosis was she was suffering from was Attention Deficit Disorder. However, she did have a higher than average range of intellectual activity. But because of the uncertain outcome of her pre-existing disorder, it is difficult to compare her prospects in light of those of Mrs Castro. Further, Mrs Castro lost the power of speech. \$160,000 was

assessed with \$60,000 apportioned to the past period; In *McChesney (by her litigation guardian McChesney) v Singh* [2002] QSC 311, McKenzie J found the plaintiff suffered reduced expectation of life, closed head injury, reduced cognition, orthopaedic injuries, reduced function in left hand and arm, and an affected gait. General damages were assessed \$150,000. 5 *Beecroft v The Proprietors Top of the Mark Building Units Plan No.3410 & Ors* unreported, SC Qld, No.3500 of 1986, Ambrose J, November 1, 1995, paraplegia minus arteriosclerosis resulted in award of general damages of \$100,000; *Hoban v Amcor Ltd* unreported, SC Qld BC 960 1930, Cullinane J, April 2, 1996, general damages \$150,000; T12 paraplegic with burning pain; *Groeneveld v Mt Isa Mines Ltd*, unreported, SC Qld, No.1562 of 1993, White J, June 19, 1996, incomplete paraplegic with ongoing back pain resulted in award of general damages of \$100,000. 6 *Hornberg v Horrobin & Horrobin & The*

*Council of the Shire of Warroo* unreported 24.10.97, SC Qld, No.836 of 1997 & No.8196 of 1996, Ambrose J, 23, female, C3, general damages \$200,000; *Scarf v State of Qld & Anor* unreported, SC Qld, No.1233 of 1993, White J, October 24, 1997, male C6 general damages \$180,000; *LeBon v. Lake Placid Resort Pty Ltd & AMP & Ors* [2000] QSC 49, female, C6, general damages \$170,000. 7 Section 58 of the *Civil Liability Act* 2003. 8 *LeBon v Lake Placid Resort Pty Ltd* [2000] QSC 49, Justice Williams, as he then was, awarded \$4,000 to the ex-husband under this head, referring to the claim as a “relic of a bygone era”. 9 Section 51 of the *Civil Liability Act* 2003. 10 *Hornberg v Horrobin & Horrobin & The Council of the Shire of Warroo* unreported 24.10.97, SC Qld, No.836, 1997, & No.8196 of 1996, Ambrose J, 23, female, C3, \$3,000; *Scarf v State of Qld & Anor* unreported, SC Qld, No.1233 of 1993, White J, October 24, 1997, male C6 lost 10-15 years of his life expectancy \$3,000; *LeBon v Lake Placid*

For quadriplegics, loss of life expectancy may be 10 to 15 years.<sup>17</sup> Life expectancy of ventilated quadriplegics is additionally prejudiced by the risk of ventilator failure.

Rehabilitation physicians have produced predictive tables as to the estimated loss of life expectancy associated with various levels of spinal lesion.<sup>18</sup> After the court makes a finding in respect of life expectancy, it is not further discounted when the court turns its mind to other contingencies which might require discounting of various heads of future damages.<sup>19</sup>

## Employability

The usual principles apply when assessing damages under this head. The most significant indicia of future loss of earnings is the history of past employment.

In respect of economic loss, if an acquired brain or spinal injured claimant's life expectancy is shorter than the pre-accident working life, there will need to be a set-off for the lost years.<sup>20</sup>

Retraining as part of rehabilitation, where possible, answers the claimant's duty to mitigate their loss.

Post-injury employment for remuneration for acquired brain-injured claimants, who are able and willing to work, is possible. Work opportunities are limited to employers who are able and willing to integrate brain-injured persons into their workforce in a position for which they are competent.

Where there is wheelchair access, including bathroom access, in the workplace, and a willing employer, post-injury employment of spinal-injured claimants is possible.

There are statutory affirmative action measures to assist catastrophically injured persons into public service employment.<sup>21</sup>

Paraplegics and quadriplegics will likely have a

shortening of their post-injury working life, because the energy necessary to ambulate in a wheelchair is at least twice that required by persons walking. There are also arthritis and joint problems, and spinal cysts and nerve compression consequential to spinal cord injury. Residual employability<sup>22</sup> is often an issue in paraplegic claims.

Some quadriplegics do work without carer support and others require carer support to undertake work. There is usually little discounting for residual employability in quadriplegic claims.

Prior to any trial or settlement, there would need to be substantial participation in paid post-injury employment, prior to discounting of economic loss.

## Interest on past economic loss

For highway claims, interest on damages awarded for past loss of income is calculated by reference to the ½ of the 10-year Treasury bond rate as set and published by the Reserve Bank of Australia.<sup>23</sup> In respect of master and servant claims, the court determines the appropriate interest rate up to the date of trial.<sup>24</sup>

For claims other than highway and master and servant claims, interest on damages awarded for past loss of income is calculated by reference to the ½ of the 10 year Treasury bond rate as set and published by the Reserve Bank of Australia.<sup>25</sup>

## Discount rate on future economic loss

For highway claims, the discount rate on compensation for future loss is 5 percent.<sup>26</sup> In respect of master and servant claims, the discount rate for compensation for impairment of earning capacity is 5 percent.<sup>27</sup> For claims, other than highway and master and servant claims, the discount rate for compensation for future expenditure and loss is 5 percent.<sup>28</sup>

*Resort Pty Ltd* [2000] QSC 49, His Honour, Justice Williams, as he then was, awarded \$3,000 under this head for a C6 female quadriplegic who lost five to 10 years of her life expectancy.

11 Section 60(1) of the *Civil Liability Act* 2003.

12 Section 47 of the *Supreme Court Act* 1995.

13 *Malec v J.C. Hutton Pty Ltd* (1989-90) 169 CLR 638.

14 In *Castro (by her next friend) v Hillery* [2001] QSC 510, Mrs Castro was at risk of choking when unsupervised because her gag reflex was impaired. At time of trial, but for injury, she had 42 years of future life expectancy. Discounting for risk of choking reduced her life expectancy to 34 years.

15 *Winterton (an infant) v Mercantile Mutual Insurance (Australia) Limited*, unreported, Supreme Court of Queensland, No.8 of 1999, Demack J, 6.9.99, female plaintiff 18 years at injury had future life expectancy 64 years.

16 *Beecroft v Prop. Top of the Mark B.U.P. No.3410 and Ors* unreported, SC Qld,

No.3500 of 1986, Ambrose J, November 1, 1995, pre accident arteriosclerosis & smoking, age 39 at time of accident and age 51 at trial, pre-existing arteriosclerosis would have reduced his life expectancy to 30 years, at age 51 his arteriosclerosis & paraplegia reduced his future life expectancy to 10-15 years = 12 years; *Hoban v Amcor Limited* unreported, Supreme Court of Qld, Cullinane J, 2.4.96, age 51 at trial, life exp. 25 years; *Groeneveld v Mt Isa Mines Ltd*, unreported, SC Qld, No.1562 of 1993, White J, June 19, 1996, incomplete paraplegic pre-existing hypertension, diabetes & past history of smoking were a risk to his life, history urinary tract infection, 59 yrs at trial, actuarial life tables indicated future 18 years reduced to 15 future years.

17 *Hornberg v Horrobin & Horrobin & The Council of the Shire of Warroo* unreported, 24.10.97, Supreme Court Queensland, No.836 1997 No.8196 of 1996, Ambrose J, 23, female, C3, at time of trial 47 future years; *Scarf v State of Qld & Anor* unreported, No.1233

of 1993, White J, October 24, 1997, male C6 hospitalised for urinary tract infection, depression, smoking loss of 10-15 years to 33 future years; *Lebon v Lake Placid Resort Pty Ltd & AMP & Ors* [2000] QSC 49, female, C6, 35 years at time of trial, 48 future years reduced to 33-38 years.

18 Yeo et al, 'Mortality following spinal cord injury' *Spinal Cord* (1998) 36, 329-326 is the most comprehensive recent paper on life expectancy after spinal injury.

19 *Sharman v Evans* (1976) 138 CLR 563@ 587 per Gibbs & Stephen JJ; *Goode v Thompson & Suncorp General Insurance Ltd* unreported, SC Qld No.S5829 of 1999, Ambrose J, July 2, 2002; contra *Hornberg v Horrobin & Horrobin & The Council of the Shire of Warroo* unreported, 24.10.97, Supreme Court Queensland, No.836 1997 & No.8196 of 1996, Ambrose J found life expectancy of 47 years but discounted future care by \$250,000 for reasons including that Dr Hill was over-generous with life expectancy.

20 *Skelton v Collins* (1966) 115 CLR 94.

21 *Equal Opportunity in Public Employment Act* 1992 (Qld); *Equal Employment Opportunity (Commonwealth Authorities) Act* 1987 (Cth).

22 *Cecil v Property Unit Nominees (No.3) Pty Ltd* unreported, SC Qld, No.154 of 1989, Helman AJ 25.06.92, male T8/9 complete paraplegia age 54 at trial earned money writing computer programs post-accident; *Coughlin v Stanley & Ors* unreported SC Qld, No.3330 of 1988, Byrne J, 3.11.92, female T9 complete paraplegia, age 22 at trial, physical capacity of four to six hours daily but prospect of permanent work slim.

23 Section 55 E(1) of the *Motor Accident Insurance Act* 1994 (as amended).

24 Section 47 of the *Supreme Court Act* 1995.

25 Section 55(1) of the *Personal Injuries Proceedings Act* 2002 (as amended).

26 Section 55 B (a) of the *Motor Accident Insurance Act* 1994 (as amended).

27 Section 16(1) of the *Supreme Court Act* 1995.

### Past care (*Griffiths v Kerkemeyer & commercial*)

Post-hospitalisation, the acquired brain and spinal injured are rehabilitated from the hospital ward to their own accommodation in the community or an institution.

Prior to rehabilitation to their own accommodation, there may be need for house alterations, aids and equipment to be provided, and care arranged. The cost of rehabilitation is borne by the motor accident insurers, WorkCover or by the public hospital system. In respect of master and servant claims, workers have a right to a care allowance and additional sum as part of their entitlement to statutory compensation.

Motor accident insurers and WorkCover have rehabilitation coordinators, who work closely with clinicians to provide necessary house alterations, aids and equipment, and care for claimants where liability is admitted or partially admitted.<sup>29</sup> In respect of claims occasioned by negligence on the highway, after April 9, 2003, claims for damages for gratuitous care are subject to s59 of the *Civil Liability Act 2003*.<sup>30</sup>

The requirement that the need for services arises “solely out of the injury” in the equivalent New South Wales legislation<sup>31</sup> has been the subject of comment that damages may be awarded for that portion solely attributable to the accident.<sup>32</sup>

In master and servant claims for damages for past paid care, the court is limited to awarding damages for services not usually provided, either of a kind performed by the worker himself prior to the injury or gratuitously by others, or by paid carers to the worker after the injury.<sup>33</sup>

The harshness of this in catastrophic claims is set off in part by the worker’s right to additional lump sum compensation for gratuitous care as part of the their statutory claim for workers’ compensation

benefits.<sup>34</sup> Care must be taken to document the need for care during the statutory claim and to insist that the additional lump sum is paid by WorkCover by way of gratuitous care and not by way of an additional lump sum for having a work-related impairment equal or in excess of 50 percent.<sup>35</sup>

The distinction between the two statutory entitlements becomes relevant in common law proceedings because the additional lump sum paid by WorkCover for gratuitous care is not included in the statutory refund<sup>36</sup> whereas an additional lump sum for having a work-related impairment equal or in excess of 50 percent is included in the statutory refund.<sup>37</sup>

For other common law claims, s54 of the *Personal Injuries Proceedings Act 2002* (as amended) provides the services must be necessary and, inter alia, for at least six hours a week and be for at least six months.

Most catastrophically injured claimants need more than six hours of care per week. In the early period, post-hospitalisation care needs are likely to be higher until the daily routine becomes familiar.<sup>38</sup> The findings of fact, in respect of awards for future care, are a good indicator of the medium and long-term care needs of the catastrophically injured claimants.

Acquired brain injury claimants often need a full-time housekeeper to supervise them lest they harm themselves unknowingly and to discourage predators.<sup>39</sup>

Paraplegics, who are able to transfer independently and use a manual wheelchair, can usually live independently and need a number of hours of domestic care per week (dependent on their level of impairment) rising to four to eight<sup>40</sup> hours a day when they are aged about 50 to 60 years.<sup>41</sup>

The care needs of quadriplegics are harder to predict, depending on their residual ability to transfer independently and their security needs. However, the prescription usually involves a full-time housekeeper and a number of extra hours of personal care per day.<sup>42</sup>

- 28 Section 52(1)(a) of the *Personal Injuries Proceedings Act 2002* (as amended).
- 29 Section 51(3) of the *Motor Accident Insurance Act 1994* (as amended) obliges insurers to provide rehabilitation services; s268(1) of the *Workers’ Compensation & Rehabilitation Act 2003* – an insurer “may” provide rehabilitation.
- 30 Section 59 of the *Civil Liability Act 2003* provides the services must be necessary, the need for the services must arise solely out of the injury and, inter alia, for at least six hours a week and be for at least six months.
- 31 Section 15 of the *Civil Liability Act 2002* (NSW).
- 32 *Woolworths v Lawlor* [2004] NSWCA 209.
- 33 Sections 308A-308E of the *Workers’ Compensation & Rehabilitation Act 2003*.
- 34 Section 193 of the *Workers’ Compensation & Rehabilitation Act 2003*.
- 35 Section 192 of the *Workers’ Compensation & Rehabilitation Act 2003*.
- 36 Section 270(2) of the *Workers’ Compensation & Rehabilitation Act 2003*.
- 37 Section 270(1) of the *Workers’ Compensation & Rehabilitation Act 2003*.
- 38 *Beecroft v The Proprietors Top of the Mark Building Units Plan No.3410 & Ors* unreported, Supreme Court of Queensland, No.3500 of 1986, Ambrose J, November 1, 1995; *Lebon v Lake Placid Resort Pty Ltd & AMP & Ors* [2000] QSC 49.
- 39 Awards for future care – *Winterton v Mercantile Mutual Ins (Aust.) Ltd* [2000] QCA 249, female age 18 years at trial, \$1,600,000; *Goode v Thompson & Suncorp General Insurance Ltd* unreported, SC Qld No Ambrose J, July 2, 2002, brain injury, age 17 years at trial, \$1,607,908; *Castro (by her next friend Castro) v Hillery* [2001] QSC 510, age 40 years at trial, \$2,850,000;
- 40 *McChesney (by her litigation guardian McChesney) v Singh* [2002] QSC 311, age approx. 25 years at trial, \$877,000.
- 41 *Morrison v Gessey*, unreported, SC NSW No.19124 of 1993, Spender AJ, 28.7.95 & unreported SCNSWCA, No.40563 of 1995.
- 42 Awards for future care – *Coughlin v Stanley & Ors* unreported SC Qld, No.3330 of 1988, Byrne J, 3.11.92, female T9 complete paraplegia, age 22 at trial, six hrs per week inclusive of child care; *Cecil v Property Unit Nominees (No.3) Pty Ltd* unreported, SC Qld, No.154 of 1989, Helman AJ 25.06.92, male T8/9 complete paraplegia age 54; *Beecroft v The Proprietors Top of the Mark Building Units Plan No.3410 & Ors* unreported, Supreme Court of Queensland, No.3500 of 1986, Ambrose J, November 1, 1995, paraplegic age 51 years at trial; *Hoban v Amcor Ltd* unreported, SC Qld BC 960 1930, Cullinane J, April 2, 1996, T12 paraplegic age 51 at trial; *Groeneveld v Mt Isa Mines Ltd* unreported, SC Qld, No.1562 of 1993, White J, June 19, 1996, incomplete paraplegic age 62 at trial.
- 43 Awards for future care – *Hornberg v Horrobin & Horrobin & The Council of the Shire of Warroo* unreported, 24.10.97, Supreme Court Queensland, No.836 of 1997 No.8196 of 1996, Ambrose J, 23, female, C3, age 23 years at trial, 47 future years, live in housekeeper; *Scarf v State of Qld & Anor* unreported, No.1233 of 1993, White J. October 24, 1997, male C6, approx. age 33 years at trial, 33 future years, live in housekeeper plus lifestyle carer; *Theden v Nominal Defendant & Qld* [2004] QSC 310, C5 female, age 49 at trial, 30 future years, live in housekeeper plus handyman plus care.
- 44 Section 308A-308E of the *Workers’ Compensation & Rehabilitation Act 2003*.
- 45 *Theden v Nominal Defendant & Qld* [2004] QSC 310.

Catastrophically injured claimants injured at work, who after hospitalisation are cared for in the home by their families or paid carers, are not able to claim damages for gratuitous or paid services, respectively, in court proceedings.<sup>43</sup>

The practical effect of ss308A-308E *Workers' Compensation & Rehabilitation Act* 2003 is that injured workers either refuse to leave hospital or their families and friends provide their care. The latter option has the risk of family dislocation.<sup>44</sup> Catastrophically injured claimants injured at work, who after hospitalisation are cared for by professional carers or who, after the court case, genuinely intend to engage professional services, even if that intention is formed after taking legal advice, may claim for future care.<sup>45</sup>

Rehabilitation physicians usually opine that the additional stress and workload occasioned by caring for a catastrophically injured spouse, child or parent should be avoided if independent paid care is available. Practically, this difficulty is overcome, at least for a period of time, because an injured worker may claim for care in their statutory compensation claim arising from Chapter 3 of the *Workers' Compensation and Rehabilitation Act* 2003.

In respect of Chapter 3 claims for statutory compensation, WorkCover rehabilitation coordinators provide up to a monetary limit necessary house alterations, aids and equipment, and care to catastrophically injured workers irrespective of whether the injured worker has a common law claim. The claim by a catastrophically injured worker for statutory compensation, pursuant to Chapter 3 of the *Workers' Compensation and Rehabilitation Act* 2003, includes a right to a monetary allowance for care by family and a lump sum of, presently, \$157,955.<sup>46</sup>

In respect of common law claims, past *Griffiths v Kerkemeyer* damages may be evidenced by diaries of care showing the date of the service, the nature of the service and the time spent. The commercial cost of care is applied for the time spent providing the ser-

vices. In the absence of care diaries, the occupational therapist or clinical nurse consultant/care agency may be asked to opine to the claimant's need for care during the relevant period.

At common law, the insurer must pay the commercial cost for the services reasonably required to satisfy the need for which the claimant's impairment gives rise.<sup>47</sup> If the evidence is that, in addition to daytime care, overnight care is required by way of repositioning in bed, supervision or sometime personal care needs in accordance with the principles enunciated in *Griffiths v Kerkemeyer*, the insurer must pay for services reasonably required to satisfy a 24-hour-a-day period. The damages are to be assessed not by actual cost but by market costs of providing those services.<sup>48</sup> Personal care is related to the person – the management of the utilities, bathing, toileting, dressing changes, suction, catheter changes, pressure lifts, loading into the transport and assistance with transfers and turns. Domestic care is related to the domicile, management of the home, cleaning, cooking, shopping, washing car, washing clothes and changing linen.

There is a blurring of the divide between personal and domestic care when it comes to supervision. An acquired brain damaged claimant who can ambulate but has behavioural or short-term memory problems may need supervision with money, medication or gas and electricity.

A high-level quadriplegic who cannot turn in bed may need someone within hailing distance if they get into an awkward position whilst asleep or need assistance to evacuate in the event of fire. In both cases there will be little daily hands-on care of the person but there is a need for supervision and physical intervention of short duration to prevent harm from time to time.

The adoption of commercial care agency costs based on the Disability Workers' Award – State has made this head of damage problematic.



45 *Karanfilov v Inghams Enterprises Pty Ltd* [2003] QCA 242,

46 Section 274 of the *Workers' Compensation and Rehabilitation Act* 2003 provides an insurer may pay a caring allowance to a worker entitled to compensation, if the worker depends on care for the fundamental activities of daily living and the care is provided in the worker's home by a person on a voluntary basis to whom compensation is not payable. Section 192 *Workers' Compensation & Rehabilitation Act* 2003 provides that, in addition to the usual statutory benefits payable under the Act, claimants with a work-related impairment in excess of 50 percent are entitled to additional lump sum compensation of \$157,955.

47 The common law principle applied in respect of gratuitous care is as established in *Griffiths v Kerkemeyer* (1977) 139 CLR 161 and explained in *Van Gerven v Fenton* (1992) 175 CLR 327, Mason CJ, Toohey & McHugh JJ at

p. 333, stated the principle as follows: "Consequently, it should not now be accepted that the true basis of a *Griffiths v Kerkemeyer* claim is the need of the plaintiff for those services provided for him or her, and that the plaintiff does not have to show, as Gibbs J held, that the need is or may be productive for financial loss . . ."

Damages under this head are costed at the commercial cost of providing the needed care pursuant to the principles in *Grincelis v House* (2000) 74 ALJR 1427 and *Marshall v Andjelic* (1993) 31 NSW LR 162 where Kirby P & Meagher JA found @ 174.

"However in the light of the decision in *Van Gerven* it would appear that what is nowadays to be taken as a reasonable objective measure of damages will invariably be the commercial market cost."

The majority in *Marshall v Andjelic* (*supra*) went on to observe that it is wrong to reduce the quantum of damages for

support which would "commonly be expected from a member of the family" and to do so was to proceed contrary to the principle laid down in *Van Gerven*. In *Grincelis v House* (1988) 84 FCR 190 the Federal Court of Australia held that the satisfaction of the appellant's need for full-time care was the commercial value of that care which included a live-in allowance for a commercial care-giver. The care had in fact been rendered by the plaintiff's parents and a live-in allowance initially had not included. Hill & Keifel JJ @ 207 observed:

"In our respectful view the only basis apparent from the master's reasons for what is a very substantial reduction in the award for this head was a concern that the cost of the parent's services appeared to be too much. The evidence however required such a conclusion; it follows in our view, that the award must be increased . . ."

In *Grincelis v House* (2000) 74 ALJR 1247

@ 1250 the majority remarked in respect of the cost of the parents' services, that the parties did not seek: "to reopen the decision in *Van Gerven v Fenton*."

48 The application of *Griffiths v Kerkemeyer*, *Van Gerven v Fenton* & *Kars v Kars* resulted in Mr Castro being paid at commercial rates whilst sleeping in his own bed at night and supervising his sleeping wife. [*Castro (by her next friend Castro) v Hillery* [2001] QSC 510] The insurer suggested this was not contemplated by the High Court *Van Gerven v Fenton* and *Kars v Kars*. The claimant relied on the remarks of Mason CJ, Toohey & McHugh JJ) in *Van Gerven* @ p335:

"It does not seem reasonable that the defendant's liability to pay damages should be reduced at the direct expense of the provider by invoking notions of marital or family obligation to provide the services free of charge or at less than market rates."

For the care of many acquired brain injury claimants, where the utilities are not impaired, the services needed may amount to domestic care (house-keeping, shopping and cooking) and supervision where there are security issues. Level 2, pay point 1 of the Disability Workers' Award – State is often relied on as the basis of calculating the carer's rate of remuneration including overtime rates (not including administration and statutory on costs) for the provision of needed domestic care.

Persons who have suffered acquired brain injury in non-compensable circumstances are often cared for gratuitously by relatives, even grandparents. The cost of care for the same acquired brain injury

suffered in compensable circumstances attracts the inclusion of administration fees (sometimes up to \$5 an hour), statutory charges (superannuation levy, Goods and Services Tax, WorkCover insurance, payroll tax) and penalty rates for non-daytime and weekend attendance of carers (based on the Disability Worker' Award – State) in the commercial cost.

The rate of remuneration, included in the commercial cost of care, increases when the needs of high-level quadriplegics (lesions complete

above C 5) are contemplated. There may be a need for lifting and turning claimant/plaintiffs (sometimes with hydraulic hoists), insertion of suppositories, changing in-dwelling catheters, cleaning tracheostomy and supra pubic catheter sites, and suction of fluids out of ventilated lungs.

The carers who attend to these tasks usually receive specialist training from the Princess Alexandra Hospital Spinal Injuries Unit, their care agency or at local TAFE colleges. The carers rate of remuneration for providing personal care to a high-level quadriplegic is often based on Level 3, Pay point 1 of the Disability Workers' Award – State which calling description includes hands-on personal care. The commercial cost (including overtime rates and statutory on costs) can be up to \$30 an hour on weekdays and \$40 an hour on weekends. A likely need for 24 or even 30 hours of care a day – the latter in the case of a ventilated quadriplegic – can produce a weekly cost

of \$5,000 to \$6,000 when the care is provided by a commercial agency.

Despite the seeming unfairness, the cost of past gratuitous care should include the administration and statutory on costs of the commercial care agency if those costs are a reasonable valuation of the services provided.<sup>49</sup>

High-level quadriplegics injured in non-compensable circumstances are often cared for by family members who receive no payment or the disability support pension. The evidence of expert rehabilitation physicians in Queensland has consistently been that high-level quadriplegics cared for gratuitously by family members are at no greater risk of medical complications than if they are cared for by commercial carers, and there is no need to have a qualified nurse to provide such care.<sup>50</sup>

Until *McChesney (by her litigation guardian McChesney) v Singh* [2002] QSC 311, the Queensland trial courts were valuing the gratuitous services of friends and relatives by reference to the commercial costs, inclusive of overtime rates, the administration costs and statutory on costs, and then discounting for the likelihood the care prescription would not be filled by a commercial agency.<sup>51</sup>

In *McChesney v Singh & Ors* [2003] QCA 498, Williams JA, with whom Davies JA and Wilson J agreed, referred to the judgment of Mason CJ, Toohey and McHugh JJ @ 334 in *Van Gervan* when deciding to not interfere with the trial judge's finding that future gratuitous care should be costed at a rate of \$15 an hour. The basis of Justice Williams' deviation from the ratio in *Van Gervan* was "in some cases the market cost may be too high to be the reasonable value of the services." More recently, \$20 an hour was awarded as the rateable value of this type of care.<sup>52</sup>

### Wilson v McLeay damages

The leading case dealing with visits by families of an injured person is *Wilson v McLeay* (1961) 106 CLR 523, a decision of Taylor J in which an amount was allowed in general damages for the cost of transport for attendance of the plaintiff's parents at hospital where she had been taken after injury.<sup>53</sup>

When making a claim for a catastrophically injured, it is difficult to evince an alleviation of symptoms distinguishable from the alleviation of symptoms provided by the nursing, therapy and medical services in a specialist spinal or brain injury hospital unit. However these claims do sound in damages.<sup>54</sup>

**When making a claim for a catastrophically injured, it is difficult to evince an alleviation of symptoms distinguishable from the alleviation of symptoms provided by the nursing, therapy and medical services in a specialist spinal or brain injury hospital unit. However these claims do sound in damages.**

The notion is further answered by Toohey, McHugh, Gummow & Kirby JJ in *Kars v Kars (supra)* @ p372:

"It is an accepted principle in Australia that damages for past and future gratuitous services constitute a sum designed to provide for the injured plaintiff's established needs. That sum may be calculated by reference to what the provider does and even what commercial costs of doing it would entail, but the focus is on the plaintiff's needs."

<sup>49</sup> *Goode v Thompson & Suncorp General Insurance Ltd* unreported, Supreme Court of Qld, No.S5829 of 1999,

Ambrose J. July 2, 2001, The claimant did not claim administration or statutory on costs but it was clear Ambrose J was of the view they were claimable; *Castro (by her next friend Castro) v Hillery* [2001] QSC 510; *Theden v Nominal Defendant & Ors* [2004] QSC 310.

<sup>50</sup> *Hornberg v Horrobin & Anor* unreported, SC Qld, No.836 of 1997 No.8196 of 1996, Ambrose J, 24.10.97.

<sup>51</sup> *Winterton (an infant) v Mercantile Mutual Insurance (Australia) Limited* unreported, Supreme Court of Queensland, No.8 of 1999, Demack J. 6.9.99 & *Winterton v Mercantile Mutual*

*Ins. (Aust) Ltd* [2000] QCA 249; *Goode v Thompson & Suncorp General Insurance Ltd* unreported, Supreme Court of Qld, No.S5829 of 1999, Ambrose J. July 2, 2001; *Castro (by her next friend Castro) v Hillery* [2001] QSC 510.

<sup>52</sup> *Winter v Bourboulas and Ors* [2005] QSC 164 per Douglas J.

<sup>53</sup> *Wilson v McLeay (supra)* Taylor J at p. 527:

"She was in hospital being hundreds of miles from home, her injuries were serious and such comfort and consultation as her parent's reasonable attention could provide . . . according to the medical

evidence, it was of some importance in the alleviation of her condition that she should have the comfort and assistance of her parents."

In *Bresatz v Przibilla* (1962) 108 CLR 541 the fares incurred by the plaintiff's mother coming from Italy to help her were disallowed as items of special damages but the principle in *Wilson v McLeay* was accepted that the cost of relatives and others visiting an injured person may be allowed in the case of a young person injured far from home.

## Past special damages

(save for past *Griffiths v Kerkemeyer* damages)

These are expenses arising from accident-related injuries, incurred by claimants or on their behalf, and include rehabilitation, hospital, medical, therapy, pharmaceutical, aids, equipment and travelling expenses. They should be evidenced by a chronologically ordered schedule, category by category showing the date the expense was incurred, the nature of the service or item, the cost of the item or service and a note as to whether the expense has been paid or not.

In master/servant claims, the cost of rehabilitation, hospital, medical, therapy, pharmaceuticals, equipment and travelling expenses will be met by WorkCover, but are refundable in the common law claim. Accordingly, the claimant must extract the costs of rehabilitation, hospital, medical, therapy, pharmaceuticals, equipment and travelling expenses from the WorkCover refund notice and claim those expenses as special damages.

In respect of highway claims, the Motor Accident Insurance Commission pays the cost of hospitalisation in any event and it need not be claimed by the claimant. The cost of hospitalisation will not be shown on the notice of refund of the compulsory third-party insurer who provides rehabilitation to the claimant. However, the rehabilitation expenses paid by the insurer must be claimed by the claimant as special damages because they must be refunded at the conclusion of the common law claim. In respect of other claims, it is necessary to write to the chief executive officer of any relevant hospital to obtain a letter particularising the refund or charge owed by the claimant so the refund or charge may be claimed as past special damages.

In respect of the Commonwealth Rehabilitation Service, Health Insurance Commission and Queensland Health it is necessary to write to obtain a letter particularising the refund or charge owed by the claimant so the refund may be claimed as past special damages.

## Interest on past special damages

In respect of highway claims, interest on past monetary loss is calculated by reference to the ½ of the 10-year Treasury bond rate as set published by the Reserve Bank of Australia.<sup>55</sup> In respect of master/servant claims, interest is calculated on past special damages at the rate the court determines the appropriate interest rate up to the date of trial.<sup>56</sup> In re-

spect of claims, other than highway and master/servant claims, interest on past monetary loss is calculated by reference to the ½ of the 10-year Treasury bond rate as set and published by the Reserve Bank of Australia.<sup>57</sup>

## Discount rate for future *Griffiths v Kerkemeyer* damages

In respect of highway claims, the discount rate to be applied where damages are awarded for gratuitous services is 5 percent for persons compensated for future expenditure and loss.<sup>58</sup> In respect of claims, other than highway claims, where damages are awarded for gratuitous services the discount rate to be applied is 5 percent.<sup>59</sup>

## Discount rate for future special damages

In respect of highway claims, for persons compensated for future expenditure and loss, the discount rate to be applied is now 5 percent.<sup>60</sup> In respect of master and servant claims, the discount rate to be applied is now 5 percent for persons compensated for future loss or damages including future care.<sup>61</sup> In respect of other claims, where a claimant is to be compensated for future expenditure or loss the discount rate to be applied is 5 percent.<sup>62</sup>

## Future special damages

The provision of future special damages requires a weighing of the cost of an aid, item of equipment or service against the benefit to the claimant such that only reasonable expenses are recoverable from the insurer.<sup>63</sup> Having regard to the alternatives that are available to a catastrophically injured claimant in respect of aids, equipment, therapy and domicile, contingency discounting for possible alternatives is an integral part of what is reasonable.<sup>64</sup>

## Care

When care is provided by commercial care providers, it takes the character of future special damages. If the care is provided gratuitously, the principles to be applied are derived from *Griffiths v Kerkemeyer* (1977) 139 CLR 161. The principles applicable to the assessment of future special damages arising from the need for care in catastrophic injury claims begin with *Sharman v Evans* (1976-1977) 138 CLR 563.

Notions of reasonableness underlie both lines of

54 *Winterton (an infant) v Mercantile Mutual Insurance (Australia) Limited* unreported, Supreme Court of Queensland, No.8 of 1999, Demack J. 6.9.99, \$4,499 awarded for mileage claim family Rockhampton, Gladstone to Brisbane; in *Goode v Thompson (supra)*, Ambrose J allowed \$5,000 for attendance of the claimant's mother at hospital for 77 days. In *Lebon v Lake Placid Resort Pty Ltd (supra)* Williams J allowed \$4,140 for the six months rent expenses of the quadriplegic plaintiff's husband to attend whilst she was in hospital and rehabilitating in Brisbane.

55 Section 55E of the *Motor Accident Insurance Act* 1994 (as amended).

56 Section 47 of the *Supreme Court Act* 1995.

57 Section 55 of the *Personal Injuries Proceedings Act* 2002 (as amended) 60(2) *Civil Liability Act* 2003.

58 Section 57(1)(b) of the *Civil Liability Act* 2003.

59 Section 52(1)(b) of the *Personal Injuries Proceedings Act* 2002 (as amended).

60 Section 55B of the *Motor Accident Insurance Act* 1994 (as amended).

61 Section 16(1) of the *Supreme Court Act* 1995; *Karanfilov v Inghams Enterprises*

*Pty Ltd* [2003] QCA 242.

62 Section 52(1)(a) of the *Personal Injuries Proceedings Act* 2002 (as amended).

63 *Sharman v Evans* (1977) 135 CLR 562 @ 573-574 per Gibbs & Stephen JJ.

64 *Malec v J.C. Hutton Pty Ltd* (1991) 169 CLR 638 @ 642 & 643:

"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."

authority.

The issues relevant to the determination of reasonably needed past services provided gratuitously/commercially are relevant to the determination of future care. However, often the claimant will be managing on a minimalist care prescription pursuant to rehabilitation by a motor accident insurer or, if having received a lump sum compensation from WorkCover, has run out of money for paid carers or an insurer is otherwise not providing care. The common law claim for future care is the only chance of having a reasonable assessment made, costed and awarded.

In master/servant claims for damages for future paid care, the court is limited to awarding damages for services not usually provided either by the worker himself prior to the injury or gratuitously by others, or by paid carers to the worker after the injury.<sup>65</sup>

The trial judge in *McChesney v Singh & Ors (supra)* held the commercial cost of paid care of \$32 an hour should be discounted to \$30 an hour. The \$30 an hour for paid care was not interfered with on appeal.

In *Theden v Nominal Defendant & Ors* [2004] QSC 310, in balancing the need for the plaintiff to have a housekeeper to be able to attend upon her when called, and having that person live-in with a number of others of care allowed, Jones J found that the plaintiff would have \$2,200 a week for the next seven years and \$3,000 thereafter. In total, \$2.2 million was allowed. This was affirmed by the Queensland Court of Appeal.<sup>66</sup>

### Child care costs

The inability of a claimant/plaintiff to assist in the provision of care for any children they may have, or intend to have, will sound in damages.<sup>67</sup> The report of the occupational therapist will address the need for and cost of child care. The need for the provision of care will likely be limited to the children reaching school age. In the event children are not in existence at the time of injury, there must be a probable rather than possible chance of the claimant having children.<sup>68</sup> This may be evidenced by an existing relationship and positive fertility tests on the claimant. The allowance for care for children must be considered as part of the overall prescription for care in respect of the claimant.<sup>69</sup>

### In vitro fertilisation

In the case of a catastrophically injured claimant, there may be a need for in vitro fertilisation to produce a child. Brain and spinal-injured women usu-

ally conceive normally and are carefully managed till delivery.

Spinal-injured men usually need medical intervention to have children.<sup>70</sup> The rehabilitation physician will evidence the need and cost of IVF treatment, or recommend a further report from a specialist in fertility issues.

### Capital cost of housing

The contingency which must be addressed prior to assessing future capital cost of housing is whether the claimant will live in institutional care or independently in the community with the support of carers if necessary.<sup>71</sup> In most cases where there is insight into their condition, the court will award damages based on independent living. When the medical evidence evinces no insight, the court will assess damages based on institutional care costs.

The report of the expert architect/builder will disclose the additional costs associated with altering a house for a brain or spinal-injured claimant. The architect/builder will particularise each necessary alteration in a list describing the alteration and indicating the associated cost. Because of the availability of wheelchair/disability design features in project-built homes, the architect's fees of designing the alterations and managing the alteration are often in dispute and result in discounting by the court.<sup>72</sup>

Insurers need not go to the expense of briefing an architect when a quantity surveyor or builder is sufficient to challenge the costings of the claimant's architect.

### Housing depreciation and recurrent maintenance

The architect's/builder's report will likely have a list of the depreciation particulars for any fittings and equipment associated with each necessary alteration. The depreciation particulars will describe the life expectancy and cost of each fitting or item of equipment associated with each necessary alteration. There will likely be a list describing the recurrent maintenance costs of each fitting or item of equipment associated with each necessary alteration and the maintenance of the total house alterations and remainder. By calculating the weekly cost of each fitting or item of equipment and applying the 5 percent tables over the period of the claimant's life expectancy, a present value of the future depreciation and recurrent maintenance costs is produced which is then discounted for alternative contingencies by the court.<sup>73</sup>

65 Sections 308A-308E of the *Worker's Compensation and Rehabilitation Act* 2003.

66 *Theden v Nominal Defendant & Ors* [2005] QCA 236.

67 *Castro v Hillery & Ors* [2001] QSC 510.

68 *McChesney v Singh & Ors* [2003] QCA 498.

69 See Williams JA in *McChesney v Singh & Ors* [2003] QCA 498.

70 *Scarv v State of Qld & Anor* unreported, Supreme Court of Qld, No.1272 of 1993,

White J, October 30, 1998, C6 male, not in a relationship, \$15,000 awarded after discounting.

71 *Wieben v Wain* (1991) 13 MVR 393; *Castro v Hillery* [2001] 510 brain-injured claimant communicating "I can't speak" = insight into her condition.

72 *Beecroft v The Proprietors Top of the Mark Building Units Plan No.3410 & Ors* unreported, Supreme Court of Queensland, No.3500 of 1986, Ambrose J, November 1, 1995; *Hoban v Amcor*

*Ltd* unreported, SC Qld BC 960 1930, Cullinane J, April 2, 1996; *Groeneveld v Mt Isa Mines Ltd* unreported, SC Qld, No.1562 of 1993, White J, June 19, 1996, incomplete paraplegic in rented premises \$40,043.50 for capital costs and \$23,565 for maintenance; *Lebon v Lake Placid Resort Pty Ltd* unreported, SC No.2043 of 1992, Williams J 13.3.00, award of \$110,000 under this head for a female C6 quadriplegic; *Winterton (an infant) v Mercantile*

*Mutual Ins. (Aust) Ltd* unreported, SC Qld No.8 of 1999 Demack J, September 6, 1999. Plaintiff able to walk with one person assisting. Modifications, including capital, depreciation and recurring costs of home were \$127,644.

73 In *Hornberg v Horrobin & Anor* (unreported SC No.836 of 1997 No.8196 of 1996, Ambrose J, 24.10.97), the court awarded \$43,000 for the recurring costs, including ongoing house maintenance; *Castro (by her next friend)*

## Aids & equipment

The rehabilitation physician's and/or occupational therapist's reports will advise the need for and cost of each aid or item of equipment, its life expectancy, capital cost and any associated maintenance costs indicating its cost and frequency of maintenance, the cost of consumables/incontinence aids indicating their frequency of use and cost, the need for, frequency and cost of therapies (physiotherapy, occupational therapy, speech therapy, hydrotherapy) and additional cost of the special vehicle and its necessary adaptations. The costs can be reduced to a schedule setting out the annual cost, weekly cost and capital cost after the 5 percent discount tables are applied over the claimant's life expectancy.

## Swimming pool

Awards including damages for the costs of a swimming pool are rare. The medical evidence must show it is needed and provides a therapeutic benefit. The court must then weigh the benefit to the claimant against the cost to ascertain its reasonableness.<sup>74</sup>

## Transport

The measure of damages is the cost beyond the cost of the vehicle the plaintiff would have had in any event, and the cost of the necessary adaptations. The report of the occupational therapist will provide the cost of the necessary adaptations and vehicle life expectancies to make the vehicle usable for the claimant.

For paraplegics who are able to independently transfer, there are usually hand controls provided to an automatic vehicle. The measure of the loss may include the additional cost of automatic as opposed to manual transmission.<sup>75</sup>

Quadriplegics who are able to transfer independently and have sufficient residual hand function may drive automatic vehicles with hand controls. Quadriplegics usually require the provision of a motor van with a ramp at the rear or the side and special fasteners to tie the chair down in the rear of the van.<sup>76</sup>

Carers are needed to load and unload persons with brain or spinal injury in electric wheelchairs into vehicles. Some ventilated quadriplegics in the habit of travelling need two carers in the vehicle – one carer to restart the ventilator if the primary batteries fail or to manually resuscitate in the event of wheelchair battery failure and the second to manage the vehicle and calls for help.

The same care prescription applies to ventilated quadriplegics when they are away from mains power support in a park or shopping centre.

## Hospitalisation

The cost of future hospitalisation cannot be left in the hope that the free public hospital system will always accommodate the claimant. The daily cost of staying in a Queensland Government hospital is regulated.<sup>77</sup>

Acquired brain injury claimants have a varying need, depending on the residual disability for hospitalisation over their lifetime.<sup>78</sup>

The courts have discounted this item in spinal injury cases because the long stays in hospital usually come later rather than sooner. Generally, paraplegics average a week to 10 days a year over their residual lifetime.<sup>79</sup> Quadriplegics usually average two weeks a year over their residual lifetime.<sup>80</sup> The report of the rehabilitation physician will evince the likely number of days per year as the future hospitalisation need of the claimant. A weekly value can be calculated and the 5 percent tables applied.

## Urology

Spinal-injured claimants usually have lifelong problems in keeping harmful bacteria out of their bladders and kidneys. Spinal-injured claimants usually need periodic investigation by way of ultrasound, x-ray and periodic pathology tests, and review by a specialist urologist. The need for, frequency and cost of periodic investigation and review by a specialist urologist is usually found in the rehabilitation physician's report with sufficient particulars to calculate a weekly cost. Where there are unusual urological problems, the spinal claimant's needs and the cost of those needs are addressed in the report of a urologist.<sup>81</sup>

## Plastic surgery

Bed-bound brain-damaged persons, paraplegics and quadriplegics are vulnerable to bedsores. The treatment of these sores is often a combination of plastic surgery and bed rest. Cost of treating a pressure sore and the likely frequency of pressure sores over a lifetime is usually found in the rehabilitation physician's report with sufficient particulars to calculate a weekly cost.

## Specialist counselling, occupational & speech therapy, physiotherapy

The need for and frequency of future counselling and therapies are opined for in the rehabilitation physician's report and the costs are opined for in the occupational therapist's report with sufficient particulars to calculate a weekly cost.<sup>82</sup>



*v Hillery* [2001] 510, Jones J awarded \$9,000 for recurring expenses relevant to alterations.

**74** *Theden v Nominal Defendant & Qld* [2004] QSC 310, A C5 quadriplegic was prescribed and had regular pre-trial hydrotherapy, but had to travel for over two hours to and from the local hydrotherapy pool. The court took the evidence of the architect as to the cost of providing a pool in the claimant's house and discounted the costs of

providing a pool in the claimant's house by subtracting the pro-rated costs attributable to the surface area of the pool in excess of the surface area of a hydrotherapy pool.

**75** *Groeneveld v Mt Isa Mines Ltd* unreported, SC Qld, No.1562 of 1993, White J, June 19, 1996, change to automatic car with hand controls \$15,000.

**76** *Theden v Nominal Defendant & Qld* [2004] QSC 310, subject to appeal, past

capital cost changeover to van + adaptations \$90,000 + future capital cost changeover to van every seven years + adaptations \$100,000 = \$190,000.

**77** The daily bed cost of \$730 a night is presently prescribed as by regulation. Health Services Regulation s6 & Schedule 1 Part 1 Item 6.

**78** *Castro (by her next friend Castro) v Hillery* [2001] QSC 510, the award was \$30,000.

**79** *Coughlin v Stanley & Ors*, unreported SC

Qld, No.3330 of 1988, Byrne J, 3.11.92, female T9 complete paraplegia, age 22 at trial, on average 10 days per year for rest of life.

**80** *Lebon v Lake Placid Resort Pty Ltd* [2000] QSC 49, C6, average 10 days per year.

**81** *Hornberg v Horrobin & Anor*, unreported SC Qld, No.836 of 1999, Ambrose J, 24.10.97, future cystoscopies \$15,000 + future IVP or ultrasound \$3,750.

### Pharmaceuticals

The rehabilitation physician will advise as to the claimant's need for injury-related pharmaceuticals. The claimant's general practitioner will have a record of the claimant's historical and current prescriptions. The pharmacy where the claimant has their prescriptions filled will be able to provide the unsubsidised cost of the claimant's prescription medicine with sufficient particulars to calculate a weekly cost.<sup>83</sup>

### General references:

1. Granwell, D. & Ors, 'Head Injury – The Facts', Oxford University Press, 1995.
2. Queensland Spinal Cord Injuries Service, 'Handbook of Spinal Cord Injuries', 2nd ed. November 2001.
3. Capildeo, R. & Anor, eds, 'Progressive Rehabilitation Paraplegia'.

### General practitioner

The accident-related injury may necessitate an increased use of the services of a claimant's general practitioner. This need in excess of what would normally be needed is usually the result of the need for periodic prescription of medication, pathology or radiology testing associated with the injury. The cost of a consultation and the frequency allow a weekly cost to be calculated.

### Computers

In *Theden v Nominal Defendant & Ors*,<sup>84</sup> there was a substantial claim for computers to reduce the claimant's dependence on others. The evidence showed the claimant used her computer up to six hours a day and that reliability, sturdiness and functionality were beyond what ordinarily would be required. The claimant was attempting to facilitate her use of voice activation software.

Jones J, taking a "broad brush approach", awarded \$120,000.

Claims for computers are common in other jurisdictions.<sup>85</sup> The NSW authorities suggest that expert evidence as to the need and cost are required to have computer costs sound in substantial damages.

### Future travel

It is difficult to objectively quantify damages for this item because it is dependant on variable pre-accident preferences, resources and residual capacity. The courts often assess a global sum on an arbitrary basis.<sup>86</sup> An award in the range of \$7,000 to \$20,000 is likely for most claimant/plaintiffs who evinced a bare intention to travel post-accident.

The better approach is to establish from the claimant their pre-accident travel history and post-accident travel intentions. The rehabilitation physician's report usually suggests that business or first class travel is needed as opposed to economy class. Upon inquiry to a travel agent, the evidence is likely to suggest accommodation in five-star hotels as opposed to three-star accommodation. There may be a need for an additional carer when a claimant travels. Within these parameters, the additional cost of travel occasioned by impairment can be calculated and reduced to a weekly cost.

Specific evidence was adduced in respect of a C5 female quadriplegic with a pre-accident history of international, national and local travel founding an award of \$175,000.<sup>87</sup>

### Funds management

A frequently asked question is whether the costs of the claimant taking advice from an investment adviser regarding the investment of large sums of money may be claimed from the insurer. The necessary evidence is obtained by requesting the Public Trustee or one of the private trustee companies to provide their costs and charges for managing the settlement or judgement sum. Except for claimants suffering a legal disability as a result of a compensable injury, the cost of fund management does not sound in damages.

The concept of damages being awarded once and for all as a lump sum necessitates the assessment of future losses and expenses on a weekly basis and applying discount rates to produce present values of future income streams. Theoretically, at least, a claim-

82 *Hornberg v Horrobin & Anor*, unreported, SC Qld, No.836 of 1997 No.8196 of 1996, Ambrose J, 24.10.97, future counselling \$4,500, future physiotherapy \$7,000, future occupational therapy \$6,500; *Castro (by her next friend) v Hillery* [2001] 510, Jones J awarded \$70,000 for future speech therapy.

83 *Hornberg v Horrobin & Anor*, unreported, SC Qld, No.836 of 1997 No.8196 of 1996, Ambrose J, 24.10.97, future medication \$145,000.

84 [2004] QSC 310 and [2005] QCA 236.

85 *Beck v State of NSW & Perisher Blue Pty Ltd* [2001] NSW SC 278. The claim for \$220,000 was supported by an expert report which was unchallenged by the defendants. Studdert J awarded \$220,000; *Simpson v Diamond & Anor* [2001] NSWSC 1048, \$292,679 awarded for computer expenses.

86 *Scarv v State of Qld & Anor* unreported, Supreme Court of Qld, No.1272 of 1993,

White J, October 30, 1998, \$7,000 awarded for travel; *LeBon v AMP, LeBon v Lake Placid Resort Pty Ltd* (2000) SC 49, \$20,000 awarded for travel; *Castro v Hillery* [2001] 510 Jones J awarded \$25,000 for future holiday expenses.

87 *Theden v Nominal Defendant & Qld* [2004] QSC 310 & [2005] QCA 236, one overseas trip every four years @ \$29,000 a trip plus two interstate trips every three years @ \$16,000 a trip plus two weekend trips every year @ \$1,200 a trip, then discounted to produce \$175,000.

88 *Nominal Defendant v Gardikiots* (1996) 186 CLR 49 The only amount properly claimable for managing judgment monies was an amount directly referable to the injury. The costs of the Public Trustee or a private trustee, including the costs of funds management, are usually confirmed at the time the sanction and protection orders are made.

In *Wills v Bell* [2002] QCA 419 White and McPherson JJ relying on a passage, quoted by Gummow and McHugh JJ in *Nominal Defendant v Gardikiots (supra)*, from the judgement of Zelling J in *Campbell v Nangle* (1985) 40 SASR 161 @ 178 and 192: "If you injure a plaintiff so badly that he has permanent brain damage and he can neither manage the resulting fund for himself nor make any decision with regard to its management, then it is foreseeable that there is going to have to be a manager to do that for him and, with a large fund of this kind, a skilled manager whose fees must be paid for." (See now *Willett v Futcher* (2005) HCA 47).

89 *Willett v Futcher* [2004] QCA 30, "Where the standard of services which a plaintiff is obliged to accept, as a matter of law, as a necessary product of the defendant's negligence, is higher than the standard which would be provided by

the unassisted decision making of an adult of no particular skill, training or interest, the defendant is liable to pay the cost of those services at the higher standard."

90 *Willett v Futcher* [2005] HCA 47 "In a case, again like the present, where the plaintiff will never be able to manage his or her affairs and will never be able to work, the damages awarded will often include a significant allowance for future economic loss. The plaintiff can make no decision about the fund. An administrator must be appointed. The administrator must invest that fund and act with reasonable diligence. It follows that the administrator will incur expenses in performing those tasks. The incurring of the expenses is a direct result of the defendant's negligence. The damages to be awarded are to be calculated as the amount that will place the plaintiff, so far as possible, in the position he or she

ant should be able to put the money in an investment which returns an, after tax, interest rate of 5 percent to answer the periodic costs of their future needs. Reasonable management fees are the expenses incurred to answer the purpose which the damages must fulfil based on assumptions, including the fund's return to zero at the end, a future income stream to answer the plaintiff's needs having regard to inflation and the necessary, after tax, rate of return on investment.<sup>88</sup>

In *Willet v Futcher* [2004] QCA 30, Davies JA, Jones and Holmes JJ, affirmed the chamber judge's finding that the establishment fee and discretionary portfolio management fee were a necessary product of the defendant's negligence. The court found the advisory portfolio management fee, fund manager fee and initial and ongoing brokerage fees, plus underlying investment manager fees, were not a necessary product of the defendant's negligence.<sup>89</sup> However, the High Court<sup>90</sup> found the correct measure of damages was an amount assessed as allowing for remuneration and expenditures properly charged or incurred by the administrator of the fund during the intended life of the fund.

The judgement of the Queensland Court of Appeal was set aside and the High Court referred the case back to that court for further assessment of what damages ought be allowed. Lawyers will have to wait until the Court of Appeal determines what fees are properly claimable.\*



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would have been in had the tort not been committed. That requires comparison with the position the plaintiff would have been in without the award of a lump sum for damages. It does not, as the distinction adopted by White J supposes, require or permit comparison with the position that the plaintiff would have been in had the disabling injuries not been sustained but the plaintiff nonetheless had a lump sum to invest. That comparison is irrelevant and inapt. In the ordinary course a person who is not injured will not have to husband a large sum of money over a long period of time in such a way as to ensure an even income stream but the complete exhaustion of the fund at the end of the period."