

*Bryan v Parks & Wildlife Commission of the NT* [2005] NTSC 1

PARTIES: IVENE DENISE BRYAN

v

PARKS & WILDLIFE COMMISSION OF THE  
NORTHERN TERRITORY

TITLE OF COURT: SUPREME COURT OF THE NORTHERN  
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN  
TERRITORY exercising Territory jurisdiction

FILE NO: SC26 of 1997 (9711685)

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JUDGMENT OF: THOMAS J

**REPRESENTATION:**

*Counsel:*

Plaintiff: R Meldrum QC with S Gearin  
Defendant: J Reeves QC with B O'Loughlin

*Solicitors:*

Plaintiff: Messrs Morgan Buckley  
Defendant: Solicitor for the Northern Territory

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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Bryan v Parks & Wildlife Commission of the NT* [2005] NTSC 1  
No. SC26/97 (9711685)

BETWEEN:

**IVENE DENISE BRYAN**  
Plaintiff

AND:

**PARKS & WILDLIFE COMMISSION  
OF THE NORTHERN TERRITORY**  
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 6 January 2005)

- [1] This is an action by the plaintiff, Mrs Ivene Denise Bryan, against the defendant for damages as a consequence of injuries the plaintiff claims she suffered after being head-butted by a ram to the base of her back. Mrs Bryan claims the ram attack took place at the front door to her office. This was within an area controlled and managed by the defendant. It is within a compound known as the Arid Zone Research Centre, also referred to as the Institute. It is agreed between the parties that there was no employer/employee relationship between them. The plaintiff's claim is in contract. Paragraphs 6, 7 and 8 of the plaintiff's Third Further Amended Statement of Claim states as follows:

- “6. On Friday 17 June 1994, the Plaintiff attended at the Institute in order to carry out her work under the said contract.
7. On the date and at the place aforesaid, the Plaintiff was bending over at or near the front door of the shed utilized by her as a work area at the Institute.
8. Whilst the Plaintiff was bent over as aforesaid, the ram butted her from behind at the base of the back, throwing her upwards and forward a distance of approximately 2½ metres.”

[2] The plaintiff claims that this incident occurred on the morning of Friday 17 June 1994, shortly after the plaintiff arrived at her place of work.

### **The Ram Attack:**

[3] A plan of the compound known as the Arid Zone Research Institute is Exhibit P6.

[4] On the day of the incident, 17 June 1994, it was wintertime in Alice Springs. The grass was quite run-down and consisted of clumps of dried bristly grass. Mrs Bryan arrived at work at 9.30am. She climbed the fence, that has also been referred to as a gate, into her workplace area. Her office was approximately 24 metres from this fence-line. She opened the front door of her office, left her keys and other items on the sink inside, and returned to her vehicle. She carried two bags of shredded paper back through the fence, climbing over it, proceeding again to the front door of her office.

[5] Mrs Bryan placed the bags on the ground so she could open the front door. She opened the door and picked up the two bags. She then felt something hit her at the base of her back, throwing her forward and up over the cement

doorstep and into the office. Mrs Bryan was thrown forward approximately 2.5 metres and landed face-down. She immediately felt severe pain in her back, groin and down both legs. She heard a loud crack at the time of impact. She also lost control of her bladder.

- [6] Mrs Bryan remained still. She was stunned and frightened to move. She stayed in that position for a couple of minutes before she rolled over slowly and noticed the ram standing over her. Mrs Bryan did not move for fear that the ram would attack her again. She called out for help for 30 to 40 minutes, but no-one came. The ram eventually moved back towards the other sheep. The other sheep, being a ewe and a lamb, were under trees near dripper points in Area B.
- [7] Mrs Bryan's main concern was her back pain, which was very severe. She could not get up, and dragged herself to a nearby chair and pulled herself into a standing position. The pain was excruciating.
- [8] Mrs Bryan then threw some kangaroo pellets on the ground, to distract the sheep so she could go to her vehicle. She had to exit via the gate as she was not able to bend to go over the fence. She threw the pellets into the next yard and the sheep followed them such that she was able to lock them in. The gate, through which the sheep were put back into Area A, was on the northern boundary of Area A near the western boundary of Area A.
- [9] Mrs Bryan got into her vehicle and drove over to the main building, known as the "Tom Hare Building", where she saw two rangers. She told them that

she had been attacked by the ram, and one of them went for her husband, Ross Bryan. Mr Bryan put Mrs Bryan into his vehicle, he took her home and contacted the Bath Medical Centre. She saw Dr Scott, who had her transferred to the Alice Springs Hospital where she was examined by Dr Winterflood.

- [10] There were no other witnesses to the attack by the ram. I found Mrs Bryan to be a credible witness. I accept her account of how she was attacked by the ram and the effect of the attack upon her. I have summarised her account as set out above.

**The Arid Zone Research Institute:**

- [11] In her Third Further Amended Statement of Claim, the plaintiff asserts that she was contracted by the defendant to carry out the maintenance and feeding of captive wallabies and bandicoots (also known as mala and bilby) at the Arid Zone Research Institute in Alice Springs. The Arid Zone Research Institute is located on the south Stuart Highway near Alice Springs in the Northern Territory (also referred to as “the Institute”).
- [12] Mrs Bryan’s work at the Institute involved the feeding and care of mala and bilbies, two endangered species. These animals, held captive for a breeding program, were housed near an area within the Institute known as the “old nursery”. The old nursery was essentially closed down. The only operational area in that part of the compound was the area in the north-eastern corner, used for the mala and bilby project.

[13] A plan of the compound known as the Arid Zone Research Institute was tendered (Exhibit P6). There is also a copy of the plan of the compound, being Annexure IDB8, to the statement of Mrs Bryan (Exhibit P1). A further plan of the compound is annexed to statement of Mr Geoff McKenzie (Exhibit P19). Another plan of the area was tendered during the evidence of Mr Philip David Wurst being Exhibits P47, D48 and P49. A further annotated plan was tendered Exhibit P79. I have relied on the compass points on Exhibit P6 rather than the compass points on Exhibits D48 and P49. A series of photos were tendered (Exhibit P3). Some of these photos show views of the compound or parts of it at the Institute. Photograph 14 is an aerial photograph taken of the compound facing generally in an easterly direction. I accept the evidence given by Mrs Bryan that photograph 14 is the best photograph of the compound area that has been tendered.

[14] On the day of the accident, in order to travel to the mala and bilby pens, Mrs Bryan drove her Suzuki into the Institute grounds through the main gate which has also been referred to as the western gate. She turned left and travelled past a brick building as well as shade houses, nursery beds an office and storage buildings. At the end of this road Mrs Bryan turned right, travelling past another nursery bed that contained two glasshouses and a race made for the movement of calves. A gate then obstructed her journey. Mrs Bryan gave evidence that her work area was approximately 24 metres on the other side of this gate.

- [15] Beyond the gate, which consisted of a moveable section of fence, were the animal enclosures. This north east section of the compound also held Mrs Bryan's office and some other enclosures that had not yet been completed. During the hearing of this matter, this area was referred to as Area B. This is the area in which the ram attack occurred. It is shown on the plan prepared by Mr McKenzie (Exhibit P19) as Area D. In these reasons for judgment I have referred to it as Area B.
- [16] The southern boundary of Area B was a fence constructed of nursery shelving and wire, attached to star pickets and poles. This fence separated Area B from Area A. The eastern and northern fences were made from cyclone fencing with barbed wire along the top. It was Mrs Bryan's evidence that some weeks before the date of the accident Area B gained a gate on the western boundary. This gate is marked "C" on the plan prepared by Mr McKenzie (Exhibit P19). This gate was built to prevent the ram and other sheep wandering out into other areas of the compound and out through the front gates up near the nursery area. On his plan, Exhibit P19, Mr McKenzie has referred to the area where the sheep were pastured as Area A. The fences he built are marked "B". The additional fence he built which could be moved is marked "C". The area where Mrs Bryan was attacked he has marked "D". There are also gates shown between Area A and Area D on the plan in Exhibit P19.
- [17] Directly to the south of the mala and bilby enclosures, was a fenced off area. During this proceeding this area was referred to as Area A. This fenced area

enclosed some nursery beds, several water tanks, a bore and a shade house.

The sheep were originally depastured in this area.

[18] The fence in Area A on the southern and eastern side, was constructed from cyclone fencing topped with barbed wire. This type of fence stopped where Area A abutted the boundary of the mala and bilby pens. There was an electrified fence on the western boundary of the mala compounds. The northern boundary fence of Area A was made from shelving units that were previously used to store potted plants. The shelving was made from iron and was attached to star pickets and poles with wire and twine. The western boundary of Area A was also of a temporary nature, made of star pickets and wire. The fence, built by Mr McKenzie, excluded the lucerne patch from Area A as the lucerne was for the mala. Mrs Bryan's evidence was that she observed the sheep pushing through holes in the northern section of this fence to gain access from Area A to Area B. Mr McKenzie gave evidence that there was a problem with the ram in that it was infiltrating the fence and getting out. He stated he did ongoing work to the fence. He stated he tried to strengthen the areas of the fence where the sheep were getting out. He used mesh nursery basket stands, wire or bailing twine. It is Mr McKenzie's evidence that in the six months prior to June 1994, he was in the mala and bilby area a couple of times a week or more.

[19] Mr Wurst was employed as both a research scientist and then as a wildlife officer by the defendant. He was based at the Arid Zone Research Centre between 1992 and June 1998. Mr Wurst referred to a plan of the compound

which was tendered Exhibit D48. He made certain markings on this plan which was also tendered Exhibit P49. On these plans the compass points are marked differently to the other plans to which I have referred. On the plan referred to by Mr Wurst in Exhibits D48 and P49, the compass point marked north are marked east on the other plans. When shown photograph 14 in Exhibit P3, Mr Wurst described this as facing in a southerly direction. Without making a finding as to which are the correct compass points, I have relied on the compass points in the plans referred to by Mrs Bryan (Annexure IDB8 to Exhibit P1), the plan tendered as Exhibit P6, the annotated plan Exhibit P79 and the evidence of Mr Bryan, for the purpose of recording where facilities within the compound are in relation to the compass points. Mr Wurst gave evidence that he had, on at least two occasions, seen the sheep out of the area where they were meant to be held secure, being Area A. Mr Wurst described the fencing around the hatched area, being Area A, as makeshift and not secure.

### **The Contract of Employment:**

[20] It is asserted by the plaintiff in par 3 of her Third Further Amended Statement of Claim and admitted by the defendant, that the particulars of contract are as follows:

[21] By written quotation number QS/2/PC/93 and dated 9 August 1993, the plaintiff tendered for the (provision of) maintenance of and feeding of captive wallabies and bandicoots at an hourly rate of \$13.50 per hour, 15

hours per week, for a period of 52 weeks. The plaintiff's quotation was accepted by the defendant, by the defendant's contract superintendent's letter dated 23 August 1993. The contract was a "Schedule of Rates" contract for a period of 52 weeks commencing 21 August 1993 and expiring 20 August 1994.

[22] The defendant asserts that the terms of the contract were wholly in writing and that the written contract comprised the following:

1. The schedule for quotation No. QS/2/PC/93.
2. The Conditions of Quotation and Conditions of Contract.
3. The quotation for works and services signed by the plaintiff on 9 August 1993.
4. The letter dated 23 August 1993 from the defendant to the plaintiff accepting the plaintiff's tender.

[23] The defendant relies upon the written contract for its full terms, meaning and effect.

[24] The plaintiff joins issue with the defendant and says that the terms of the contract were partly in writing and partly implied.

[25] The plaintiff's action against the defendant is in contract and relies upon an implied term in the contract between the plaintiff and the defendant.

Specifically, the plaintiff has pleaded, in par 4 of the Third Further

Amended Statement of Claim, that it is an implied term of the contract between the plaintiff and the defendant that the defendant should –

1. take all reasonable precautions for the safety of the plaintiff while she was engaged at the Institute in carrying out the work contracted for by her;
2. take all reasonable precautions for the safety of the plaintiff while she was a visitor at the Institute for any purpose connected with the carrying out of the work contracted for by her;
3. provide and maintain a safe working environment at the Institute for the plaintiff to carry out the work contracted for by her;
4. not expose the plaintiff to any risk of damage or injury at the Institute of which the defendant knew or ought to have known.

[26] The defendant denies that there were implied terms of the contract between it and the plaintiff, as alleged in par 4 of the Third Further Amended Statement of Claim, or at all.

[27] In the alternative it is the defendant's position that if there was an implied term of the contract between it and the plaintiff as alleged by the plaintiff in par 4 of the Third Further Amended Statement of Claim, then the contract contained an express term that the plaintiff would be liable to indemnify the defendant against any legal liability, loss, claim or proceeding for personal injury to any person arising from the carrying out of the works other than

that which may arise from the negligence, omission or default of the defendant, its servants or agents.

[28] In addition the defendant seeks an indemnity from the plaintiff for so much of any judgment the plaintiff may obtain against the defendant in these proceedings that arises from the negligence, omission or default of the plaintiff.

[29] Mr Reeves QC, on behalf of the defendant, submits that the plaintiff is attempting to imply the proposed term into the contract as a device to import what is really an action in tort into a contractual setting to avoid the correlated responsibility the plaintiff would have in tort for her contributing negligence or, as her counsel put it, because she has greater rights in contract than in tort.

[30] Counsel for the plaintiff, Mr Meldrum QC, relies on the High Court decision of *Astley v Austrust Ltd* (1999) 197 CLR 1 as authority for the proposition that the plaintiff had a choice whether to pursue her claim in contract or in tort. I do not think it is as simple as that. *Astley v Austrust Ltd* (supra) involved an action by a public trustee company against their solicitors. The Court held that an implied term of reasonable care arises by operation of law in contract for professional services and an action may be brought for professional negligence in both contract and tort. That is not the situation in the case before this Court.

[31] I agree with Mr Reeves QC, counsel for the defendant, that the plaintiff must first establish an implied term in the contract as set out in par 4 of the third further Amended Statement of Claim before the plaintiff can base an action in contract.

[32] The relevant test is that set out in the decision of *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266 at 283:

“... for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that ‘it goes without saying’; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.”

See also *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 347. The implied term must meet all of the criteria set out above.

[33] Mr Reeves QC, counsel for the defendant, has made extensive submissions as to why the proposed implied term does not meet the criteria as set out in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (supra). These have been usefully summarised in his written submissions titled Defendant’s Outline on Liability 2.4.1 – 2.4.4 as follows:

“1) This was not a negotiated agreement but a government tender. It is a written agreement that deals extensively with the rights and obligations of the parties. It operated efficaciously for 3.5 years on the same terms. There is no established need to imply any term into this contract to give business efficacy to the agreement.

- 2) To impose any of the terms proposed by the plaintiff would impose liability on the defendant for a part of the risk of executing the works in direct contradiction of Clause 1 of the contract that places the whole of the risk of executing the works on the plaintiff.
- 3) It would not be reasonable or equitable to imply a term into this contract with the ultimate effect that the plaintiff can sue in contract for the defendant's alleged negligence but not suffer any reduction for her own contributory negligence.
- 4) It is not so obvious that it goes without saying nor necessary to give business efficacy to the contract to imply a term into the contract which is equivalent to the duty of care in tort because the plaintiff is already covered under tort law."

[34] It is not the role of the court to find an implied term in a contract to achieve what it thinks is fair and reasonable between the parties in the circumstances (*Codelfa Constructions Pty Ltd v State Rail Authority (NSW)* (supra) at 406 - 407). Counsel for the defendant submits that it would be contrary to principle for the Court to interfere in the parties' contractual relations to impose on the defendant a contractual obligation of a kind, or to an extent, that the defendant would not have imposed upon it in tort outside the contractual relationship.

[35] Counsel for the defendant contends that the plaintiff has failed to meet the relevant test to have the proposed implied term implied into this contract because:

- the contract is a standard form tendered contract, and
- the contract is in writing and deals extensively with the situation the parties contracted for.

[36] In the course of his submissions Mr Meldrum QC, on behalf of the plaintiff, carried out a very detailed analysis of the written contract (Exhibit P60).

[37] The purpose of conducting this analysis was to demonstrate that the contract does not cover the situation it was intended to, and it is therefore necessary to fill the gap by including the proposed implied term into the contract. It is the submission of Mr Meldrum QC on behalf of the plaintiff that the Conditions of Contract, as set out on the back of the document titled Quotation for Works and Services, are not applicable because the parties had so inelegantly drafted what they were agreeing to that it is obvious that it was not encompassing the terms of their agreement.

[38] Mr Meldrum QC submits that the contract was substantially a building contract. He asserts that the clauses were very specific to performing building work and a builder under a building contract commonly assumes the responsibility for delivering the built product as required by the plans, specifications, permits etc.

[39] I shall go to some examples of clauses of the written contract which Mr Meldrum QC argues are totally inapplicable to the real agreement between the plaintiff and the defendant. The front page of the document “Quotation for Works and Services” states as follows:

“Contract – Clause 9 – commence works from date of notice of acceptance

Contract – Clause 9 – item for completion Fifty-two (52) weeks from date of order.”

[40] Clause 9 of the Conditions of Contract then sets out the action that can be taken by the Director of the Conservation Commission if there is a failure to complete the works within a specified time.

[41] I agree that this clause is not appropriate to an agreement which provides, as this quotation does, that Mrs Bryan provide maintenance of captive wallabies and bandicoots for 15 hours per week at \$13.50 per hour.

[42] It was not in fact a contract whereby Mrs Bryan had 52 weeks to complete the contract, or certain sanctions such as removal of her material from the site would be enforced. The maintenance of the mala and bilby required her regular attendance on the site. Clause 9 is appropriate to a building contract but would appear to have no application to the services Mrs Bryan was to provide.

[43] The contract documents are all included in Exhibit P60. These documents are as follows:

- Document headed Minute Paper. Subject: period contract for maintenance of captive wallabies and bandicoots. It is dated 16/7/93.
- Copy of advertisement involving tenders which appeared in the "Advocate" on 27/7/93 and 3/8/93. This called for tenders for a period contract – maintenance of captive wallabies and bandicoots.

- Quotation for Works and Services No. QS/2/PC/93 signed by Mrs Bryan and dated 9 August 1993. Annexed is a Schedule for Quotation No. QS/2/PC/93 with copy of the Conditions of Quotation.
- Letter dated 23 August 1993 headed Notice of Acceptance Project: Maintenance of wallabies and bandicoots contract No. QS/2/PC/93 together with a document titled Order dated 24 August 1993.
- Document titled Tender Recommendation – Project: Maintenance of wallabies and bandicoots. Tender No. QS/2/PC/93 dated 19 August 1993 and recommending that the tender from Denise Bryan be accepted. It also states “Denise has been carrying out the duties satisfactorily since 20 June 1991”.
- Original of the Quotation for Works and Services with the Conditions of Quotation and Conditions of Contract on the back of this document.

[44] The quotation for Works and Services with the Conditions of Quotation and Conditions of Contract constitute the relevant contract in writing signed by Mrs Bryan. Clause 1 of the Conditions of Contract reads as follows:

“1. The contractor shall take upon himself the whole risk of executing the works in accordance with these conditions, the plans and/or specification and shall be solely liable for loss or damage to the works from any cause whatsoever (except loss or damage caused by the negligence, omission or default of the Conservation Commission of the Northern Territory, its servants or agents) until the Director of the Conservation Commission has certified that the whole of the works have been satisfactorily completed by the contractor.”

[45] This condition is not applicable to the Schedule for Quotation in which Mrs Bryan has contracted over a 12 month period to supply her labour for 15 hours a week to the maintenance of captive wallabies and bandicoots. The condition would be applicable in a building contract but not to the scope of work that Mrs Bryan was contracted to perform, which was maintenance of captive wallabies and bandicoots. The risk referred to in this condition is that the works will not be in accordance with the conditions, plans and specifications; it is not the risk to her of executing the works.

[46] Clause 2 of the Conditions of Contract, reads as follows:

“2. The contractor shall observe and comply with the provisions of all relevant acts, ordinances, regulations, by-laws, orders and rules and all requirements of any authority as shall be in force in the place where the works are to be executed and as may relate to the works to be executed. However, the contractor is not required to submit building plans to local or other Authorities for approval. Unless otherwise specified the contractor is responsible for connection of all water, drainage, sewerage, gas and electricity services and he shall apply for relevant permits and pay all associated fees and/or charges which are levied by the appropriate Authority.”

The first sentence of this paragraph may apply as submitted by

Mr Reeves QC.

[47] I agree with the submission made by Mr Meldrum QC that the remainder of Condition 2 does not apply and that it is clearly a condition applicable solely in a building contract.

[48] Clause 3 of the Conditions of Contract, reads as follows:

“3. The contractor shall be liable for and keep the Conservation Commission of the Northern Territory indemnified against any legal liability, loss, claim or proceedings for personal injury to or death of any person or for injury or damage to property arising from the carrying out of the works, other than that which may arise from the negligence, omission or default of the Conservation Commission, its servants or agents.”

[49] I accept the argument advanced for the plaintiff that Clause 3 negates the operation of indemnity.

[50] Clauses 5 and 6 read as follows:

“5. The contractor shall indemnify the Conservation Commission at all times against any compensation paid or any action, claim, demand or expense arising from or incurred by reason of the existence of any patent, design, trade mark or copyright or other protected right in respect of any machine, plan, work material or thing, system or method or using, fixing, working or arrangement, used or fixed or supplied by the contractor in connection with the carrying out of this contract.

6. All materials and workmanship shall be of the respective kinds described in the specifications and/or drawings or if not fully described shall be in the accordance with the recognised standards. If the Director of Conservation Commission is of the opinion that any materials or work, whether fixed or not, are not satisfactory or if he detects any work during the defects liability period, he may direct removal or correction at the contractor’s own expense.”

[51] I agree with the submission made by Mr Meldrum QC that these clauses have no application to the contract between Mrs Bryan and the Conservation Commission but would appear to be standard clauses in a building contract.

[52] Similarly, Clauses 14 and 15 of the contract, which I do not think necessary to set out, would appear to be more relevant to a building contract than the contract between the plaintiff and the defendant.

[53] I agree with the general submissions made by Mr Meldrum QC, that the written contract between the plaintiff and the defendant is not complete on the face of the document. It is on the face of it a building contract, and that is not applicable to Mrs Bryan. The contract does not specify the standard of work which had to be applied or the right of the defendant to dismiss Mrs Bryan. Under Clause 1, read with Clause 3, Mrs Bryan's liability is for damage to the work she is doing, not damage to herself as the worker, where the personal injury to her has arisen out of the negligence, omission or default of the Conservation Commission its servants or agents while she was carrying out her work.

[54] I agree that the written document headed "Quotation for Works and Services" read with the "Conditions of Quotation" and "Conditions of Contract" does not express what was the real contract between the parties.

[55] It would be necessary to imply the standard of work, to imply a right of dismissal and to imply that the 15 hours a week had to be done during normal business hours.

[56] With respect to the contract, I accept the submission made by Mr Reeves QC as to the approach to be taken by a court to the construction of a contract.

- the contract was made in good faith with the object of mutual benefit by due performance.

- to be given their natural meaning and to give them their most ample operation.
- without allowing any infelicities and mistakes to give them a narrow or unreal meaning (*Kearns v Hill* (1990) 21 NSWLR 107 at 109).
- in the absence of fraud, misrepresentation or special circumstances a person is bound by a contract he/she has signed (*Wilton v Farnworth* (1948) 76 CLR 646 at 649).

[57] Mr Reeves QC referred to the contract being a formal written contract complete on its face following a formal tender process. Mr Reeves QC argued it was highly significant that the plaintiff took the benefit of the contract for years before and after the ram incident. He maintains the plaintiff is bound by the contract she signed and she cannot claim that it is inapplicable or for any other reason imply a term into the vacuum that is allegedly created.

[58] I agree with the submission made by Mr Meldrum QC that the Conditions of Contract are largely applicable to a building contract and are inapplicable or irrelevant to the actual contract between the plaintiff and the defendant. It is agreed on behalf of the defendant that reasonable access to her place of work would be an implied term to give business efficacy to the contract.

[59] I consider that there was an implied term of the contract between the plaintiff and the defendant as set out in par 4 of the Third Further Amended

Statement of Claim. I consider the plaintiff has substantiated the five criteria necessary before a term can be implied into a contract (*BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (supra)).

[60] Such implied term is (1) reasonable and equitable, (2) is necessary to give business efficacy to the contract, (3) it is so obvious that “it goes without saying”, (4) it is capable of clear expression, and (5) it does not contradict any express term of the contract.

**Liability of the Defendant as an Occupier:**

[61] In par 8A.2 of the Second Further Amended Defence the defendant:

“... admits that it controlled and managed the Tom Hare Building, the part of the DPIF building occupied by the Wildlife Research Unit and the compound at the Institute which included the land where the sheep were depastured”.

[62] Mr Johnson was, as at 17 June 1994, Regional Director of the Parks and Wildlife Commission of the Northern Territory. Mr Johnson made a statement dated 6 April 2004 (Exhibit D66). He stated that he had overall responsibility and accountability for the management of the Alice Springs region, including staff management and for making strategic decisions in relation to regional issues. He had the ability to defer some of his responsibility of day to day management of staffing resources to Mr Michael Fleming in respect of the unit known as Wildlife Research South.

[63] Mr Johnson further stated that as at 17 June 1994 he had no knowledge of the presence of a ram at the Arid Zone Research Institute in Alice Springs.

[64] Mr Johnson gave evidence that in 1979 the enclosures were converted from housing dingo, to housing mala and bilby. This conversion was done during the time Mr Johnson was responsible for the mala and bilby research project. From the time they took over the enclosure the defendant was also responsible for the nursery. After the mid 1980's, the nursery became overgrown. However, the defendant continued to be responsible for the nursery which became a problem to manage. From the evidence of Mr Johnson the problem was that the buffel grass would grow after rain and would harbour rabbits and snakes which caused a difficulty in the management of the mala and bilby in the adjoining pens. Mrs Bryan also gave evidence that snakes would gather in the long grass and be a threat to the mala and bilby.

[65] On Mr Johnson's evidence, there were a number of ways the defendant contained this buffel grass. This included mowing by contractors. Mr McKenzie had also mowed the buffel grass. Prior to 1994, sheep were placed there to graze the area. Mr Johnson gave evidence it was within the authority of the body who worked at the Arid Zone Research Institute, being approximately 80 persons, to decide how the grass would be contained. Mr McKenzie was appointed to the Safety Committee at the same meeting at which it was decided calves would be used to contain the buffel grass. Mr McKenzie, as the Safety Committee member, was responsible for

alerting the defendant to fulfilment of its safety policy which was to ensure the safety of visitors to the Commission properties. Mr Johnson stated (tp 1537) because the use of animals to control the grass area was within the parameters of expected control, a decision at the meeting to do it did not require consultation with, or authority from, him.

[66] Mr Johnson gave further evidence (tp 1537) that had he known that a ram was present where employees, contractors and visitors might be, and that the fencing was not enclosing it, he would have been concerned because it had the potential to harm people in the vicinity who were not watching it closely. It is Mr Johnson's evidence that it was preferable the ram be behind a stock proof fence. Mr Johnson was aware of the potential danger of a ram that was not properly contained even though he may not have been aware of the actual presence of this ram. On 18 March 1994, there was a meeting of the Wildlife Division at which Mr D. Langford, Mr M. Fleming and Mr G. McKenzie were amongst the 26 persons present. There was a decision made that "calves are to be employed to keep the grass down in the nursery". Minutes of this meeting held on 18 March 1994 is Exhibit P72. Mrs Bryan was not present and was not invited to be present at this meeting. Mr Johnson stated he expected that any such calves would be kept behind the stock proof fence. He said you would want to separate them from the public whether the stock were calves or sheep. Mr Johnson gave evidence (tp 1551) that the use of sheep to keep down the grass would be a reasonable management option.

- [67] I agree with the submission made by Mr Meldrum QC that on the evidence Mr McKenzie did not need any further authority than the Resolution minuted at the meeting on 18 March 1994 to change from calves to sheep. It was not necessary for Mr McKenzie to seek such specific authority from anyone else to change from calves to sheep.
- [68] Mr Johnson gave evidence (tp 1555-7) that he would not have expected Mr McKenzie to report to him that the ram was escaping. He would have expected Mr McKenzie would have reported the matter to the Safety Committee if he had perceived the ram as dangerous. At tp 1157 Mr Johnson agreed that if he had seen the ram outside the fence, his concern would not have been allayed if he were told the ram was quiet.
- [69] Mr Johnson referred in his evidence to the fact that there were veterinary officers employed by DPIF at Arid Zone Research Institute in 1994 who were available to talk to the defendant about animals and to give advice about the potential danger of rams.
- [70] Counsel for the defendant has submitted that the only duty of care that the defendant owed to the plaintiff was that owed by an occupier to an entrant. That duty, which has been brought within the general law in relation to negligence, requires the defendant to take reasonable care to avoid a foreseeable risk of injury to the plaintiff as a lawful entrant on the old nursery site (*Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 (or 69 ALR 615 or 61 ALJR 180)).

[71] I find that in addition to the duty of care the defendant owed to the plaintiff as an occupier to an entrant, there was an implied term in the contract between the defendant and the plaintiff as pleaded in par 4 of the Third Further Amended Statement of Claim. The implied term in the contract cannot be more onerous upon the defendant than its obligation in tort.

### **Was the Risk Reasonably Foreseeable?**

[72] The relevant question is whether the risk of this ram head-butting the plaintiff was reasonably foreseeable. That is assessed by reference to what a reasonable person in the position of the defendant would do by way of response to this risk. The question is whether reasonable members of the community in the defendant's position would think the risk sufficiently great to require preventative action.

[73] The issue of reasonable foreseeability arose in the High Court decision in *Tame v New South Wales* (2002) 211 CLR 317 McHugh J at pars 101-102:

“... I think that the time has come when this Court should retrace its steps so that the law of negligence accords with what people really do, or can be expected to do, in real life situations. Negligence law will fall – perhaps it already has fallen – into public disrepute if it produces results that ordinary members of the public regard as unreasonable. Lord Reid himself once said (*Cartledge v E Joplin & Sons Ltd* [1963] AC 758 at 772) ‘[t]he common law ought never to produce a wholly unreasonable result’. And probably only some plaintiffs and their lawyers would now assert that the law of negligence in its present state does not produce unreasonable results.

So far as possible, the issue of reasonable foreseeability of risk in breach of duty situations should no longer be determined in isolation from the issue of reasonable preventability and the ultimate issue of what reasonable care requires. Indeed at the breach stage, it is better

to avoid the question of reasonable foreseeability. Instead, courts should see their task as that of deciding whether the defendant knew or ought to have recognised that he or she had created an unreasonable risk of harm to others. Whether the creation of the risk was unreasonable must depend on whether reasonable members of the community in the defendant's position would think the risk sufficiently great to require preventative action. This is a matter for judgment after taking into account the probability of the risk occurring, the gravity of the damage that might arise if the risk occurs, the expense, difficulty and inconvenience of avoiding the risk and any other responsibilities that the defendant must discharge.”

See also *Mount Isa Mines Limited v Pusey* (1970) 125 CLR 383, *Jaensch v Coffey* (1984) 155 CLR 549.

[74] I would have thought it a matter of general knowledge, and certainly a matter of which I could take judicial notice, that a ram weighing 70-100 kilograms, being a male animal of significant size and weight, could pose a potential danger to people with whom it came near. There is in addition evidence to support this proposition. Mr Johnson, the regional director, gave evidence to the effect that he would be concerned if the ram were not contained behind a stock proof fence. It was Mr Johnson's evidence that a ram could be aggressive and you had to be watchful. Mr Williams who was the senior veterinarian at the shared facility, knew of the ram's potential danger and could have given this advice had he been consulted. The evidence of Dr Plant also supports this finding.

[75] Dr Plant made a statement (Exhibit P18) that he is a veterinary consultant (sheep health and production). He graduated with a degree in Veterinary Science in 1962. In his professional career he has had extensive experience

in the area of sheep health and production. He is recognised nationally and internationally as a specialist in this field. Throughout his professional career, Dr Plant has been involved in handling and examination of rams of different breeds and ages in a range of situations.

[76] Dr Plant gave evidence that the fence, as depicted in photograph 1 of Exhibit P3, could not be considered sheep proof at all. The sheep would be able to push their way under the fence. Once they knew they could go through they would continue to do so.

[77] Dr Plant prepared a report which is included in Exhibit P18 which sets out the following conclusions based on the information provided to him.

- “The incident would not have occurred if the sheep involved were only ewes, lambs or wethers.
- Rams in any enclosed area should be treated with caution, unless they are being handled on a regular basis.
- The fencing could not be considered sheep proof and would have contributed to the presence of the ram in the enclosure near the work place on the day of the incident.
- Rams that are not handled on a regular basis can show aggressive behaviour, which may include charging people.
- The likelihood of a charging incident is much higher in a smaller yard or pen.
- Any change in normal procedures could have contributed to the behaviour of the ram.”

[78] Dr Plant gave evidence that if you are in a yard with rams, they will charge without necessarily being cornered. Under cross examination, Dr Plant gave evidence that he always tells his students, when you have got rams in yards or confined areas you treat them with respect. He agreed the area where the

sheep attack took place was not a yard it was an enclosure. (tp 459) An area of approximately 1000 sq metres would be a confined area, especially if it was an irregular shaped block, as this one was.

[79] Mr Fleming, the principal wildlife research officer at Arid Zone Research Institute, stated that one of the purposes of the fence was so that sheep would not mingle with people and vehicles.

[80] Mr Philip David Wurst, who was a research scientist employed at Arid Zone Research Institute, gave evidence he was aware from his own knowledge of the potential which rams had to charge or attack people.

[81] Mr Lundie-Jenkins, an employee at the Wildlife Station at Arid Zone Research Institute, gave evidence that his observations of this ram were that it was not aggressive, nevertheless he said he tended to be cautious of rams, particularly in a confined space. Mr Lundie-Jenkins made a statement dated 29 April 2003 (Exhibit P52). He stated that a fence was erected around the area where the sheep grazed. This was to contain the sheep. He confirmed the fence was as outlined on the plan included in Exhibit P19. This was the plan drawn by Mr McKenzie. Mr Lundie-Jenkins stated that this fence was later added to by Mr McKenzie by the erection of a gate on the western boundary of Area B (shown on Exhibit P19 as Area D) that extended as far as the northern boundary of the compound. Further in his statement, he said he understood all the sheep were pets and that none of them had a violent disposition. He said the ram and sheep were quite friendly and amenable to

being touched. He further stated that he knew that one needed to be cautious in the presence of a ram as they had the potential to attack a person.

[82] Mr McKenzie, who was employed as a technical officer of the Institute, said he was cautious of a ram in a confined space. Mr Langford, who was a senior technical officer at the Institute, gave evidence that he was concerned a ram be behind an enclosure.

[83] I find that it was reasonably foreseeable that a ram could constitute a risk to persons and that such risk was sufficiently great to require preventative action on the part of the defendant. The risk involved was that a ram could head-butt a person.

#### **The Ram Placed at the Arid Zone Research Institute:**

[84] I then turn to examine the evidence concerning this particular ram.

[85] There is evidence that the ram which attacked Mrs Bryan was of a mature age weighing between 70-100 kilos. The ram's height was approximately 700mm. It had been poled and therefore had no horns. It has a very hard head. Head-butting is a ram's way of showing aggression. A head-butt from a ram can be a very heavy blow. There is evidence this ram was bottle fed and had been hand-reared prior to its placement at the Arid Zone Research Institute. There is evidence that the available grass for food was diminishing in the area where the ram was supposed to be secured. There is

evidence that all sheep will attempt to push through a fence to reach a food supply. There is evidence that in Area B where the ram attack occurred, there were a clump of trees on the northern edge under which was a dripper system and some grass.

[86] Between January 1992 and July 1995, Mr Fleming was the principal Wildlife Research Officer at the Wildlife Research Section of the Conservation Commission of the Northern Territory in Alice Springs located at the Arid Zone Research Institute. He made a statement dated 2 April 2004 being Exhibit P70.

[87] Mr Fleming stated that the area adjacent to the small animal enclosures had been a commercial nursery until 1988. Following the closure of the nursery the maintenance of the adjacent area had been a constant problem for the Wildlife Research Station. Following heavy rains, buffel grass would grow allowing rabbits and snakes to breed there. Sometimes persons were contracted to remove the grass, at other times Geoff McKenzie, a technical officer employed by the Commission, would cut the grass. A ewe and a lamb were first allowed to graze there in 1991 but were removed from the area when the growth of buffel grass was under control.

[88] After heavy rains in March or April 1994, Mr Fleming was approached by Mr McKenzie and Mrs Bryan suggesting that a ewe and a lamb again be introduced to control the buffel grass. It was decided to approach the Department of Primary Industry and Fisheries to find out whether a ewe and

lamb were available. Mr McKenzie then erected temporary fencing in the area to form a pen. The first time Mr Fleming was aware that a ram had also been procured was when he was told Mrs Bryan had been attacked by a ram.

- [89] Minutes of a meeting held on 18 March 1994, by members of the Wildlife Division is Exhibit P72. The meeting was attended by 26 members including Mr Fleming, Mr Langford, Mr Lundie-Jenkins and Mr McKenzie. These minutes record the following resolutions: “Calves are to be employed to keep the grass down in the nursery”.
- [90] In Answers to Interrogatories (Exhibit P50), Mr Johnson the Regional Director South for the defendant, stated that Mr McKenzie an officer of the defendant, gave permission for a ewe and a lamb to be brought to the old nursery area at the Institute to keep grass down. Fencing was constructed to contain the ewe and the lamb and subsequently the fence was strengthened and another gate installed to contain the ram when it arrived at the Institute.
- [91] Mr McKenzie prepared a statement dated 6 November 1995 annexed to which is a plan and a further statement (Exhibit P19). In this statement, Mr McKenzie refers to fencing an area. This is the area marked “A” on the plan, the fence itself is marked “B”. Originally calves were to be brought in but it was decided they were too big. Mr Brian Gill, a stock inspector with the Department of Primary Industry and Fisheries, was looking for a ram to breed with a ewe kept by him. Mr Gill placed a ewe in the fenced area and a short time later he placed a lamb with the ewe. About a month later a ram

was placed in there. The ram started to create problems by pushing through the fence and gate and running round the nursery. Mr McKenzie strengthened the fences. He constructed a fence across the road marked "C" on the plan as the ram kept breaking the gates.

[92] In giving evidence Mr McKenzie stated that he estimated he had started work on constructing the fence he marked "B" in his plan some six to eight months before the sheep arrived. Once the ram arrived there was a lot of problems with the ram infiltrating the fence. When informed that the ewe and lamb were getting out, Mr McKenzie had walked the fence line to strengthen those areas that had been infiltrated. He did this with wire mesh nursery stands, or nursery baskets. The "C" marked on Mr McKenzie's plan is a lift and drag type of gate. Photos 4 and 5 show the gate marked "C" on the passenger side of the Suzuki. To open the gate it was necessary to twitch a wire (tp 479) then lift and drag the gate to open it. The purpose of building the gate was to keep the sheep housed in the bottom area of the complex and to stop them going out through the front gates near the nursery offices. The area marked "D" on the plan, attached to Exhibit P19 and prepared by Mr McKenzie, is the area into which the ram had escaped when it attacked Mrs Bryan. It is referred to in other evidence as Area B.

[93] Mr Fleming gave evidence he was the supervisor of the contract between the defendant and Mrs Bryan. He stated he presumed he would have been consulted about putting a ewe and a lamb into the compound to control the buffel grass where the mala cages were attached, but has no recollection of

this (tp 1622/3/4). He stated the mala and bilby sheds were close to the northern boundary of a compound which was used in part for safe storage and vehicles overnight. The old nursery area where the grass tended to grow, abutted onto the mala and bilby fence. Within it were three overhead tanks. The propagation shed was at the southern end of where the nursery had been, and reasonably close to the overhead tanks.

[94] Mr Fleming agreed that in 1994 he had not heard anything about sheep escaping and assumed they were successfully confined inside a fence. He agreed that he believed it was desirable they be confined inside a fence for two purposes (1) to eat the buffel grass; (2) so they would not mingle with people and vehicles (tp 1635).

[95] It is Mr Fleming's evidence that Mr Lundie-Jenkins was in charge of the mala research program. He gave evidence that it was Mr McKenzie's role to build the fence (tp 1638). Mr Fleming gave evidence that a decision to use calves to keep down the buffel grass could be made at a staff meeting (tp 1644).

[96] Mr Fleming agreed that he knew there were sheep in the old nursery area before 17 June 1994 (tp 1746). He made reference to, though he could not recall which year (tp 1751), different groups of people who were interested in going in to see the bilby.

[97] Mr McKenzie was the technical officer for the research group. When the decision was made to graze sheep for the control of the buffel grass, then Mr McKenzie would have been the person to have built the fence (tp 1751).

[98] A decision had been made at a staff meeting that calves were to be used. Mr Fleming agreed he would expect Mr McKenzie would build the fence without the need to seek Mr Fleming's permission or permission from anyone else.

[99] In 1994 Mr Johnson was the regional director. At that time there were 80 staff. Mr Johnson reported directly to the Commission, in particular the Director of the Commission (tp 1527). He stated staff meetings did not require his authority to make decisions if they did not involve expenditure of money or policy issues (tp 1532).

[100] The buffel grass made the task of keeping the old nursery area clean and tidy more difficult. On Mr Johnson's evidence, Mr McKenzie had responsibility for the area (tp 1533). He had to maintain it in a safe condition (tp 1534).

[101] Mr McKenzie, as a member of the Safety Committee, had the responsibility of alerting the Commission of a situation that was a danger. Mr Johnson stated he knew that rams could be aggressive and you had to be watchful. He agreed that an individual ram hand-reared by bottle did not necessarily reduce the potential danger.

[102] Mr Johnson stated that prior to June 1994 he would have had a concern if a ram was not enclosed by a fence in an area frequented by employees, contractors to the Commission and visitors. He would prefer the ram to be behind a stock proof fence because it had the potential to harm people in the vicinity who were not watching it closely (tp 1537).

[103] The decision to use animals to control the grass did not require his authority (tp 1537). He stated that he would have assumed that they were being properly controlled (tp 1551). Tethering could have been used but whatever method he would not expect them to mingle with people.

[104] Mr Johnson stated he would not necessarily expect Mr McKenzie to report to him that the ram was escaping. Had Mr McKenzie perceived the ram was dangerous, Mr Johnson would have expected this would be reported to the Safety Committee. Mr Johnson stated it is a general management principle that you separate animals from people (tp 1557). This extended to, although would be of a lesser concern, with respect to a ram that was reportedly docile, quiet or hand-reared as a pet. It was his opinion the ram should have been kept away from the people who accessed that area. Mr Johnson agreed that consulting the veterinarian employed by Department of Primary Industry and Fisheries and Arid Zone Research Institute was an obvious place to receive advice about the potential danger of rams.

[105] Mr Owen John Williams made a statement dated 29 April 2004 (Exhibit D73) and gave evidence to the Court. It is Mr Williams' evidence that he is

a qualified vet. Throughout 1994 he was the head veterinarian employed at the Arid Zone Research Institute. In his statement he said if he had observed the ram to be quiet and docile and was told by others who knew the ram that it was quiet and docile, he would not have thought it necessary to place it behind a stock proof fence.

[106] Under cross examination (tp 1662) Mr Williams agreed that rams are more likely to be aggressive than ewes. Rams had attacked people. He agreed that a full grown ram of the merino breed would weigh between 70-100kg and even if poled or horned, still has a very hard head. The competition between rams for ewes is conducted by head-butting to any part of the body. His evidence is that sheep can be persistent in trying to get through a fence to graze in another area. They will tend to push out at the bottom of the fence unless it is securely tied down. He agreed if there was a patch of lucerne the sheep would find this more attractive than buffel grass. He agreed that sheep are herd animals. He agreed that if animals have learnt to escape they will persist in that behaviour. He agreed a common way of handling animals that keep escaping through a fence in a close confinement is to put a collar on them with a half tomato stake to prevent them forcing their way through a fence. Mr Williams would have recommended either that option or repairing the fence. He agreed it would be difficult to fix the fence properly with bailing twine or light wire. He agreed that if animals are put out they tend to lose their predictability until they have been retrained. He agreed there was quite a skill in moving around animals, not

to block their flight route. Mr Williams agreed even a quiet animal requires a degree of precaution. A ram does have the ability to accelerate from a standing start very quickly. They do have the potential to attack, to kill or cause serious injury. He agreed that as a broad management principle it was desirable that sheep, including a ram, be separated from people. In a confined area they can pose a danger if they do not have a flight path.

Mr Williams gave evidence that the reasons for a ram attack on a person could sometimes be because that person is there. It is Mr Williams' evidence that a hand-reared, bottle fed lamb that grows into a ram loses a natural fear of human beings. They can lose their flight reflex and tend to butt more, or demand attention, more than free ranging animals. He stated he would like to see the animal separated from the work environment.

Mr Williams said he would approach this animal as he does any animal and that is with caution. He agreed that the ram should have been separated from people. He gave evidence that when he said in his statement that he would be content, and not think it necessary to have a docile animal placed behind a stock proof fence, this was on the assumption the animal did not escape into an area where people walked. It is his evidence that no matter how quiet the ram is, it should not be permitted to be where people are, who are not necessarily aware of its presence. A ram could present a danger to a person who was aware of its presence but had both hands full carrying items. Mr Williams concluded that there should not be a ram in the work place unless you are specifically there to handle rams.

[107] Mr Wurst was a research scientist and then a wildlife officer employed by the Parks and Wildlife Commission of the Northern Territory between 1992 and June 1998. In 1994 he worked at the Arid Zone Research Institute in camel research.

[108] Mr Wurst had marked on the plan, included in Exhibit P19, the sheds where he stored his material. He attended these sheds between twice a week and twice a month. He states he observed three sheep including one ram in the vicinity of the lucerne patch marked on the plan Exhibit P19. He marked the plan now included in Exhibit P47. This observation was made at least one month before he became aware of the incident involving Mrs Bryan. He states he was aware, from his own knowledge, of the potential which rams had to charge or attack people (Exhibit P47). He observed the sheep near the carports regularly used by employees of the Commission to park vehicles, trailers and other equipment. He stated the fence created an area which did not include the lucerne patch. The fence appeared to be makeshift and not sheep proof. The fenced area he observed in 1994 is depicted in a photograph in Exhibit P3. It appeared that attempts had been made to repair the fence. Mr Wurst saw signs that the ram had broken through the fence. He complained to other staff members about the escaping sheep on occasions when at his workshed he saw sheep roaming round and not in the fenced area. Other staff members parked their cars close to where the sheep roamed. There was also evidence of sheep droppings.

[109] Mr Wurst stated that had the Commission sought to obtain advice about the behaviour of rams, there were two veterinary officers working in an area situated at the Arid Zone Research Institute.

[110] Under cross examination, Mr Wurst explained that what he meant when he referred to a secured area was the area in which the sheep were supposed to be contained. On the plan included in Exhibit P47 the north is where the sheds are at the top of the page. This does not accord with other evidence which puts these sheds on the western boundary of the compound and places the mala and bilby pens in the north east corner of the compound. Under cross examination, Mr Wurst described on one occasion seeing the sheep in amongst the carport area (tp 1221). On another occasion, they appeared to be closer to where he was working in the sheds. They were under the trees on what he described as the eastern boundaries but is shown on the plan (Exhibit P6) as the northern boundary. If the front gate had been left open they could have got out. He stated his knowledge of sheep was gained from working with sheep on a sheep property (tp 1227). He agreed that he did not closely examine the fence around the secure area for the sheep. He did observe bits of fencing wire holding the fence together. The fence was better than having no fence (tp 1235). He agreed he was concerned the sheep could get out the front gate and onto the road (tp 1235).

[111] On Exhibit P49, Mr Wurst marked the route that you would ordinarily take if you were coming from outside the compound down to the office adjacent to the bilby pens. You would enter through the gate on the north west side,

travel along the road and then turn right to travel south to the office. Other evidence would have this segment of road travelling east. He marked in yellow highlighter the area where he had seen the sheep out of the secure area. Mr Wurst stated the reasons for his concern when he saw the sheep out of a secured area was because the ram had the potential to be aggressive as well as the fact the sheep could wander off and become lost or injured.

[112] Mr Lundie-Jenkins made a statement (Exhibit P52), that between July 1986 to July 1999, he was engaged at the Wildlife Research Station of the Conservation Commission at the Arid Zone Research Institute.

[113] Mr Lundie-Jenkins attended a meeting at which it was agreed animals be allowed to graze in the area next to the mala and bilby enclosures. When Mr Lundie-Jenkins first saw sheep there were two of them. Approximately one month later he saw a third sheep. One of the three sheep was a ram. A fence was erected by Mr McKenzie around the area where the sheep grazed to contain the sheep. Mr Lundie-Jenkins identified the fenced area on the plan (Exhibit P19). He understood all the sheep were pets and none had a violent disposition. They were friendly and amenable to being touched. Mr Lundie-Jenkins said he knew one needed to be cautious in the presence of a ram as they always had the potential to attack a person.

[114] Mr Lundie-Jenkins gave evidence Mrs Bryan was attacked by a ram some months after the sheep had been introduced to the area. Mr Lundie-Jenkins

did not know that prior to the accident any sheep had escaped from the area fenced by Mr McKenzie.

[115] Mr Lundie-Jenkins stated that Mrs Bryan was not able to fulfil the contract after her accident and while receiving medical treatment. She had nominated Ms Ruth Glover, who was approved by the Commission, to maintain the mala and bilby.

[116] Mr Lundie-Jenkins gave evidence in cross examination that to his knowledge Mr McKenzie was employed as the technical officer and Mr Langford in his role as senior technical officer provided supervision and oversight of Mr McKenzie.

[117] Mr Lundie-Jenkins agreed in cross examination that he had walked through the pens where the sheep were kept. He had touched them. He understood that at least one or two of the animals had been hand-reared. The sheep showed no tendency to shy away. The ram showed no evidence of aggression (tp 1330). He stated in re-examination that he still tended to be cautious of rams, particularly in a confined space (tp 1332). He stated that he would observe where the animal was and how it was behaving in relation to his presence in the pen.

[118] Mr Donald George Langford has been employed by the Conservation Commission between 1983 and 2003. He was at the time of the ram attack a technical officer located at the Wildlife Research Station at Arid Zone Research Institute. He made a statement dated 2 April 2004 (Exhibit D65).

A major part of his work was with the reintroduction of mala. He would go to the small animal enclosures about once every six weeks. He referred to the problem with grass in the area adjacent to the small animal enclosure. He remembers a suggestion that sheep be allowed to graze in the area and thought this a reasonable suggestion. Mr Langford stated he was not aware there was a ram there until told about Mrs Bryan's accident. He was not aware of any complaints made by Mrs Bryan concerning the fencing of the area. He stated he had no knowledge or experience with rams. He was not experienced in the behaviour of rams.

[119] Mr Langford described Mrs Bryan as a very good worker, one of the best (tp 1508). She had all the qualifications needed for the job. Her work involved lifting and carrying, bending and stooping. Before the accident with the ram she had no difficulty performing any aspect of her work. Mr Langford stated he was a member of the Arid Zone Research Institute Safety Committee. This Committee met about half a dozen times a year. The Safety Committee had responsibility to see that the Commission's safety policy was carried into effect. It had fallen to Mr McKenzie to be responsible for keeping the area adjacent to the mala and bilby pens clear. Mr Langford agreed that people who entered the compound were not just going to the mala and bilby area. People periodically parked their cars there, there were other sheds and stores within the compound that people accessed.

[120] Mr Langford saw a fence behind which were the sheep. He assumed the technical people who constructed the fence had done it properly. He explained Mr McKenzie was able to build a stock proof fence. He agreed that the male species of animal are more dangerous than female (tp 1518). Had he known there had been problems containing the sheep, he would have probably consulted with Mr McKenzie to see the fence was secure and as to the nature of the sheep. Had he known there was a ram there he would have been concerned that the animals were at all times kept behind the enclosure. If he had known there was a ram there he would not have necessarily considered it was dangerous to people (tp 1519). He believed Mr McKenzie would have built a satisfactory fence as he is a competent welder. He did not inspect the fence to see if it was secure. Mr McKenzie built the fence by scrounging material that was there and as there was no budget expenditure he did not need to seek any other authority. Mr Langford agreed that had he wanted to know anything about the behaviour of rams, he could have asked a vet who was at the Institute as could anyone else employed there (tp 1520).

[121] Following the accident, Mr Langford observed Mrs Bryan with a buckled up body and face which was extremely stressed. After the accident he never saw her walk properly again. Prior to the accident he had never observed Mrs Bryan having difficulty with her gait.

[122] In re-examination Mr Langford said had Mr McKenzie told him it was a quiet ram he would probably have accepted this and not been concerned.

[123] Mr Langford stated the compound had two large gates padlocked at the middle, usually locked late in the afternoon after knockoff time and opened again the following morning at 8.00 am or sometimes earlier. There was a fence around the whole compound made of cyclone wire. There was another set of gates but they were permanently locked. The fence was a defence against intruders such as feral dogs (tp 1523).

[124] Mr Reeves QC on behalf of the defendant, submitted that liability in this case comes down to four propositions.

[125] Firstly, he argues the proposed implied terms to give this contract business efficacy do not come close to meeting the established criteria for implying a term into this contract. I have ruled that I consider there is an implied term in the contract between the plaintiff and the defendant in the terms as set out in par 4 of the plaintiff's Third Further Amended Statement of Claim.

[126] The second argument in the alternative, is that the defendant was not obligated to take any steps to avoid this ram butting the plaintiff because it was not reasonably foreseeable that this particular ram would butt the plaintiff.

[127] I have held that it is a matter of general knowledge that a large male animal weighing 70-100 kilos and 700 millimetres high, could become aggressive and should be kept away from an area where it could mingle with people. This is supported on the evidence of Mr Johnson, Mr Williams, Dr Plant, Mr Wurst and Mr Lundie-Jenkins to which I have already referred.

Mr McKenzie was repeatedly attempting to repair the fence with the idea of keeping the sheep, including the ram, contained. Unfortunately the ram escaped again on the 17th of June into an area it was not supposed to be, and attacked Mrs Bryan. The fact the ram had not previously shown aggression or that it was hand-reared by bottle does not, on the evidence, diminish the potential of the ram to become aggressive. I am satisfied on all the evidence that it was reasonably foreseeable that this particular ram would constitute a danger to the plaintiff if they were in the same enclosure as they were on the date of the ram attack. The defendant had a responsibility to prevent the ram from pushing its way out of Area A, where it was supposed to be fenced in, and escaping into Area B. Area B was traversed by Mrs Bryan and other persons wishing to go to the mala and bilby pens.

**Element of Control by the Defendant:**

[128] Thirdly, counsel for the defendant argues that alternatively even if a term can be implied into this contract, which is the equivalent of a duty of care in tort, and even if this particular ram butting the plaintiff was reasonably foreseeable, the foreseeability of that risk was not sufficient in the circumstances to require or impose a duty of care on an occupier of land in relation to that contract. This is because, on the defendant's argument, animate agents involve different considerations than the traditional approach to occupier's liability when dealing with inanimate objects. The defendant's submission is that the essential difference revolves around the question of

control, that different considerations arise where the case involves a person or animal that has a will of its own, as distinct from an inanimate object that does not have free will e.g. a machine or building. On the defendant's argument, this approach is dictated by the fact that an animal is a living creature capable of spontaneous action (*Aldham v United Dairies (London) Ltd* [1940] 1 KB 507 at 511 per Greene MR and 513–514 per du Parcq LJ. I note that in this case, although du Parcq LJ made comments as to the disposition of the pony committing an act which was contrary to its previous nature, the Court ultimately concluded that a driver who knowingly leaves a restless pony unattended is justly held guilty of negligence. See also *Draper v Hodder* [1972] 2 QB 556 at 566 and 569 -570 per Edmund Davies LJ. The rule that applied in this case “is that the defendant is to be held liable only for such consequences of his negligence as a reasonable man could have foreseen” – Edmund Davies LJ at 571. In this case the defendant was held liable in negligence because he ought reasonably to have foreseen that by failing to confine his pack of Jack Russell Terrier puppies they might inflict substantial harm on the infant plaintiff.

[129] Counsel for the defendant refers to the principles established in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254. In this matter the High Court held that the operator of a video shop business was not liable to an employee of his who was attacked by other persons and badly injured while walking to his car in the carpark. It was held by the majority of the Court that the landowner's duty as an occupier of the land

did not extend to taking reasonable care to prevent physical injury to the injured employee resulting from the criminal behaviour of third parties on that land. At par 35 Gleeson CJ:

“The most that can be said of the present case is that the risk of harm of the kind suffered by the first respondent was foreseeable in the sense that it was real and not far-fetched. The existence of such a risk is not sufficient to impose upon an occupier of land a duty to take reasonable care to prevent harm, to somebody lawfully upon the land, from the criminal behaviour of a third party who comes onto the land. To impose such a burden upon occupiers of land, in the absence of contract or some special relationship of the kind earlier mentioned, would be contrary to principle; a principle which is based upon considerations of practicality and fairness. The principle cannot be negated by listing all the particular facts of the case and applying to the sum of them the question-begging characterisation that they are special. There was nothing special about the relationship between the appellant and the first respondent. There was nothing about the relationship which relevantly distinguished him from large numbers of members of the public who might have business at the Centre, or might otherwise lawfully use the car park. Most of the facts said to make the case special are, upon analysis, no more than evidence that the risk of harm to the first respondent was foreseeable.”

[130] In the case before this Court, there was a risk of harm to the plaintiff from this ram butting her, in the sense of it being real and not far fetched. There was no special relationship between the plaintiff and the defendant such as employer and employee, parent and child or hospital and patient. Counsel for the defendant submits that the essential question is whether the defendant had control over the ram such that it should be held liable to the plaintiff for its actions. I am satisfied that on the evidence the defendant did exercise control over the ram to the extent that it had a responsibility to keep the ram in a secured area or take such other steps as were necessary to ensure the ram could not attack Mrs Bryan.

[131] In this context it is further submitted that reliance by the plaintiff and assumption of responsibility by the defendant are relevant.

[132] The evidence on who was the owner of the ram and who could and did exercise control over it comes firstly from Mrs Bryan and Ms Pulford.

[133] Exhibit P13 is the statement of Ms Andrea Pulford dated 27 February 2003. Ms Pulford explains the reasons why in late 1993 or early 1994 it was convenient for her to give away a ram that she owned. Ms Pulford states that Mrs Bryan had spoken with her and mentioned that Mr Brian Gill, a stock inspector with the Department of Primary Industry and Fisheries, was looking for a ram to breed with a ewe kept by him. The evidence is, that it was Mr Gill who owned the ewe that was depastured at the Arid Zone Research Institute. The evidence is the Department of Primary Industry and Fisheries shared facilities with the Arid Zone Research Institute. There is also evidence Mr Gill lived very close to the Arid Zone Research Institute. Ms Pulford states that subsequently Mr Gill telephoned her and between them they arranged that Mr Gill would keep the ram on a permanent basis and it would be kept at the Arid Zone Research Institute. Ms Pulford stated the ram would have been 12–24 months old when Mr Gill received him. The ram had been bottle fed, weaned and then hand-fed by Ms Pulford until it was given to Mr Gill.

[134] Ms Pulford drove the ram onto the site at the Arid Zone Research Institute.

At the time Ms Pulford delivered the ram, Mrs Bryan was on her way out of

these premises with her husband Ross Bryan. Ms Pulford asked where the ram should go. Mrs Bryan had suggested the old nursery enclosure, an area Ms Pulford was familiar with as she had been there before.

[135] In her statement (Exhibit P1) Mrs Bryan referred to the problem with the buffel grass growing out of control near the mala and bilby pens (pars 44-49). Mrs Bryan stated she recalled a meeting was scheduled at the Wildlife Division of the Conservation Commission about getting calves to eat the grass rather than incurring the cost of mowing. Mrs Bryan was not consulted about this, nor was she invited to attend the meeting where this decision was made, but was not surprised when a ewe eventually arrived (par 51).

[136] Mrs Bryan stated that Mr McKenzie built a fence around the enclosure. She stated this was important given the school groups and tourists who frequently visited the area to view the bilby and the mala (par 52).

[137] The fence constructed by Mr McKenzie comprised two rows of wire. The wire consisted of three strands connected together. There was a gap between the bottom and the second row where the sheep used to get through (par 53). Mrs Bryan's statement then goes on to state that late February or early March she arrived at work and there was a ewe in the paddock. In mid-March a lamb was put into the greenhouse with the ewe. Mr Gill advised her that the ewe was there to keep the grass levels down (par 54). The ewe and lamb kept getting out of that area which allowed them access to

the carpark and in front of Mrs Bryan's office. Consequently, Mr McKenzie built an additional fence running from the northern end of the old nursery to a fence further to the north and directly across the front of Mrs Bryan's office. The fence was 25 metres from the office door. It had a gate to allow access to Mrs Bryan's office (par 55).

[138] Mrs Bryan continues in her statement to say that Mr Gill asked if she knew anyone who had a ram as he wanted to start breeding. She told him she knew Andrea Pulford who may have a ram (par 56). A few weeks later, Ms Pulford came to the Alice Springs Saddlery, a business in which Mrs Bryan had an interest. Mrs Bryan said she told Ms Pulford that Mr Gill was looking for a ram. Ms Pulford advised that Mr Gill could have the ram for breeding purposes as long as he didn't kill and eat it (par 57). Mrs Bryan did not see the ram placed in the enclosure. It arrived there approximately mid-May 1994 (par 58).

[139] The ewe and lamb started escaping through the fence again in front of Mrs Bryan's office by pushing through the temporary fence. Mr McKenzie was required to repair the fence on several occasions (par 54).

[140] After the ram had been there a short time, Mr Gill asked Mrs Bryan to keep the bathtub of water in the enclosure topped up. She did this by pushing a hose through the fence. At no time did she ever enter the enclosure where the sheep were kept, being Area A.

[141] In the wintertime of 1994 the grass was low. Mrs Bryan asked Mr Gill if he was going to feed the sheep. He replied “No, I’m going to move them after the show” (par 64).

[142] Several weeks later Mr Gill came out to check on the animals and ask if everything was okay. Mrs Bryan replied “No, they are escaping”. She asked him to do something about the fence because she was concerned about the dogs attacking the sheep. She was aware Mr McKenzie would fix the fence where the sheep had squeezed through using whatever materials were available (par 65).

[143] Mrs Bryan stated she recalled Ms Pulford pulling up near the Arid Zone Research Institute office front gate and asking where Mr Gill’s sheep were located. At this time Ms Pulford had the ram in a horse float. Mrs Bryan told her where the sheep were and then went home. Mrs Bryan stated she recalled saying to Ms Pulford before leaving “make sure he is behind the gate”. Ms Pulford had replied “okay”. Mrs Bryan did not participate with unloading the ram into the temporary compound (par 67).

[144] Mrs Bryan stated in the subsequent paragraph of her statement that she had not observed the ram becoming aggressive or that it was ready to mate. She stated she had not seen any indication of their mating. Mrs Bryan said for the 20 hours a week that she was at the site she did not have much opportunity to make observations of the ram. She was very busy with her own work and not in a position to watch the behaviour exhibited by the three

sheep. Mrs Bryan said that staff from the main office complained about the sheep getting out and walking around private vehicles and work vehicles.

[145] Under cross examination, Mrs Bryan agreed that by the time the ram arrived, the ewe and the lamb had eaten a fair bit of the grass in Area A as depicted on the plan annexured to her statement IDB8 (Exhibit P1). There was a lucerne patch. This was not to feed the sheep but to take for the mala out bush (tp 193). Mrs Bryan agreed that on two occasions she saw the ram get out of Area A as marked on the plan, and into Area B, prior to 17 June 1994.

[146] It is the contention of Mr Reeves QC on behalf of the defendant, that the defendant did not exercise control over the ram because the defendant assumed no responsibility to contain the ram in order to protect the plaintiff from it. Most of the defendant's responsible officers did not know it was there and the two that did, did not know where it came from or why it was there. It is submitted for the Defence that Mr McKenzie's fencing was not erected to control the ram for the protection of the plaintiff, but to constrain all the sheep from escaping, for their own safety. It was submitted on behalf of the Defence that Mrs Bryan had not sought permission from the defendant to bring the ram into the Arid Zone Research Institute.

[147] I agree that on the evidence, Mrs Bryan did not seek permission for the ram to be there. I accept on the evidence that Mr Langford, Mr Johnson and Mr Fleming had no knowledge a ram was there prior to the date Mrs Bryan was attacked by the ram. I accept Mr McKenzie had no prior knowledge of

the arrival of the ram. However, Mr McKenzie was certainly aware of the presence of the ram after its arrival as on his own evidence he had attempted repairs of the fence to try to prevent the sheep, including the ram, escaping from Area A on the plan (Exhibit P19). Paragraph 5.5 of the Second Further Amended Defence states as follows: “the Defendant admits that Mr G. McKenzie knew the ram was in the old nursery area of the Institute after it was placed there and prior to 17 June, 1994”.

[148] I am not persuaded it was either necessary or appropriate for Mrs Bryan to seek permission to place a ram in with other sheep. It was not her ram or her decision to place the ram where it was. On the evidence I find Mrs Bryan did not arrange for a ram to be delivered to the Arid Zone Research Institute. Mrs Bryan was merely a go between for Mr Gill who was the person who wanted the ram placed with the ewe so that the ram would mate with the ewe. Mr Gill was the owner of the lamb and the ewe. Mrs Bryan had merely facilitated a contact between Mr Gill who wanted a ram and Ms Pulford who possessed a ram. Mrs Bryan had not been consulted by the members of the Committee at the Arid Zone Research Institute who had decided to place animals in the area next to the mala and bilby pens to keep down the grass. She had no say in whether or not this procedure should be adopted and implemented. She had no part in the decision making process relating to the placement of animals, in particular, sheep, in the area adjacent to where she was working.

[149] The evidence is that Mr McKenzie had the authority and responsibility for keeping the grass down in the area adjacent to the mala and bilby pens. This authority extended to allowing him to place animals in the area to keep the grass down. Mr McKenzie was not required to consult with his superiors on this issue. He had authority to effect repairs to the fence. He did not have to take up the matter with his superior officer provided he was not expending any money. The responsible officers of the Commission, having delegated such authority to Mr McKenzie, cannot simply say we personally did not know about the existence of the ram so the Commission is not responsible for it.

[150] I agree with the submission made by Mr Meldrum QC that the responsible officers are the officers responsible for the administration of the Commission, not just the officers responsible for administering the contract with Mrs Bryan, as argued by counsel for the Defence.

[151] Once Mr McKenzie became aware of the existence of the ram and allowed it to stay then the defendant assumed control of the ram and took over responsibility for preventing the ram from becoming a danger to the plaintiff. Minutes of meeting dated 18 March 1994 (Exhibit P72) also indicate that Mr McKenzie, referred to in the Minutes as "Macca", was delegated responsibilities as the Safety Officer committee member.

[152] I agree with the submission made by Mr Meldrum QC that it was Mr McKenzie who elected to use sheep to keep the grass down in the old

nursery area. When the grass in that area was getting low he could have asked Mr Gill to take his sheep away, as the job Mr McKenzie wanted them to perform had been completed. The evidence is Mr Gill was a stock inspector with the Department of Primary Industries and Fisheries which is associated with Arid Zone Research Institute and shares facilities. There is also evidence Mr Gill lived very close to the Arid Zone Research Institute. There is no evidence as to why Mr Gill could not have been contacted by an officer of the defendant and asked to remove the sheep, including the ram.

[153] Mr Reeves QC further argues that the purpose of the fencing was for the protection of the sheep. I agree there is evidence from Mrs Bryan and Mr McKenzie that the fence was to prevent the sheep being injured if they escaped. Mr McKenzie gave the following evidence (tp 479):

“All right, so when you built C, is it correct that it was not really to prevent the sheep getting into the area you have marked D but to prevent them going out onto the road?---Yes, that is correct. It was to keep them housed in that area down the – that bottom end of the complex then it would stop them going out through the front gates up near the nursery offices.”

[154] Mr Wurst also gave evidence that when he observed the sheep out of the area where they were supposed to be, he was concerned they could get out onto the road and be attacked by dogs or hit by a car. He was asked in re-examination (tp 1250) to add any other concerns and stated, the fact that it was a ram and had the potential to be aggressive.

[155] I have referred to the evidence of others who did not know of the existence of the ram but stated they would have been concerned to ensure the ram was kept separate from an area where it could mingle with people and the caution that should be exercised in the presence of a ram of this weight and size.

[156] I have concluded that it was reasonably foreseeable that a ram the size and weight of this ram could become aggressive and pose a risk of causing injury.

[157] Counsel for the defendant further argues that if anyone assumed responsibility for the ram it was the plaintiff – she arranged to obtain the ram, directed where it was to be put and thereafter she cared for it – she watered it and raised the question of feed for it with Mr Gill when the grass was low and she raised the question with Mr Gill of it escaping.

[158] I reject this argument. I have found the evidence does not support a finding that Mrs Bryan obtained the ram, she was merely a go-between for Mr Gill and Ms Pulford. It was Mr Gill who obtained the ram and became the owner of the ram that he wanted to mate with the ewe, he also owned. The arrangements for obtaining the ram and where it was to go were made between Mr Gill and Ms Pulford. Mrs Bryan was not party to these arrangements. She merely gave Ms Pulford some directions as to where Mr Gill's ram was to be housed which was with the other sheep. I do not accept that Mrs Bryan was the person responsible for caring for the ram.

She was in an invidious position. She was the person nearest to the area where the ram was to be contained. It is clear on the evidence that Mrs Bryan is an animal lover and understandable that she would relay to Mr Gill the fact that the grass in Area A was getting low. She did give water to the ram by pushing the hose through the fence and topping up the water tank. She responded to a request from Mr Gill, to keep the ram's water tank topped up, as an act of kindness not because she was assuming care of the ram. Arguably Mr Gill and Mr McKenzie should have been taking a more active interest in the welfare of the animals being the sheep, including the ram, which Mr Gill owned and the Commission had assumed responsibility for.

[159] The next point argued by the defendant is that there is no evidence the plaintiff relied upon the defendant to contain the ram. I have already held it to be an implied term of her contract with the defendant as set out in par 4 of the Third Amended Statement of Claim. The defendant was required to prevent the ram from being a source of danger to the plaintiff. The fact that she did not complain to anyone that the ram posed a risk to her is irrelevant to the defendant's contractual obligation. There is evidence Mrs Bryan had requested Mr McKenzie to effect repairs to the fencing to ensure the sheep were contained in Area A. Mr McKenzie was an employee of the defendant and responsible for maintenance of the fence.

[160] Counsel for the defendant argues that conversely, in terms of reliance, the plaintiff knew most about the ram, she knew it was a pet, she knew it was

there for breeding purposes and she had general knowledge about the behaviour of animals from her experience as an animal carer.

[161] The evidence is that the ram arrived some 3–4 weeks before the attack upon Mrs Bryan. It was argued that Mrs Bryan was there and able to see the ram 20 hours per week. However, I accept the evidence of Mrs Bryan that she was fully occupied during the 20 hours of her contract in caring for the mala and bilby and did not have time to take a great deal of notice of the ram. She did give evidence in her statement that the ram had never previously demonstrated aggression toward her or indicated that it was ready to mate with the ewe. However, in her statement she says she never went into Area A where the sheep were supposed to be contained. She also said in her statement that she had no expertise in the management of sheep.

[162] I reject the argument that the plaintiff knew most about the ram or that the defendant can sustain the position that reliance should be placed on Mrs Bryan's knowledge of the behaviour of rams.

[163] I reject the argument by counsel for the defendant that even if there was a reasonably foreseeable risk of the plaintiff suffering an injury from this ram butting her, in all the circumstances – control, reliance, assumption of responsibility, the defendant's duty of care as an occupier would not extend to require the defendant to take any steps to avoid an unexpected and spontaneous act by this ram. I have concluded there was a reasonably foreseeable risk of injury to Mrs Bryan by the defendant's failure to contain

the ram behind the secure fence and prevent it from escaping into the area Mrs Bryan had to traverse to arrive at her office.

### **Did the Defendant Breach the Duty of Care?**

[164] In the plaintiff's Third Further Amended Statement of Claim the plaintiff has set out the particulars of breach of contract. These are as follows (par 10):

“10. The Plaintiff's injury and consequent disabilities were caused by a breach or breaches of the implied terms of the contract on the part of the Defendant pleaded in paragraph 4 thereof

Particulars of breach of contract

- 10.1 failing to take all reasonable precautions for the safety of the Plaintiff while she was engaged at the Institute in carrying out the work contracted for by her;
- 10.2 failing to take all reasonable precautions for the safety of the Plaintiff while she was a visitor at the Institute in order to carry out the work contracted for by her;
- 10.3 failing to provide and maintain at the Institute a safe working environment for the Plaintiff to carry out the work contacted for by her;
- 10.4 exposing the Plaintiff to a risk of damage or injury at the Institute of which the Defendant knew or ought to have known, namely an attack by the ram;
- 10.5 failing to keep the ram securely fenced-in or enclosed at the Institute so as to prevent it entering the area where the Plaintiff worked;
- 10.6 failing to inspect the Plaintiff's workplace and/or working area at the Institute to assess the risk posed by the presence of the ram;
- 10.7 failing to inspect and maintain at the Institute the fencing or other arrangements made to contain the ram;
- 10.8 permitting the ram to be in a through-traffic area at the Institute.”

[165] Fourthly, it was argued on behalf of the defendant that if a term is implied into this contract, which is the equivalent of a duty of care in tort, and that duty required the defendant to avoid a risk that the ram may butt the plaintiff, the defendant did not breach that duty, and even if it did, that breach did not cause the plaintiff's accident.

[166] It is the submission on behalf of the defendant that because the plaintiff was not an employee, and absent any special relationship, there was no equivalent obligation on the defendant to take positive steps for the safety of the plaintiff (10.1) and (10.2) or to inspect the plaintiff's workplace (10.6) and (10.7).

[167] It was further submitted for the defendant that the defendant's equivalent duty of care as an occupier would not extend to taking reasonable precautions for the safety of the plaintiff (10.1 and 10.2) to maintaining a safe system of work (10.3) or to inspecting the plaintiff's workplace or the fencing (10.6 and 10.7) because in the circumstances the defendant did not assume responsibility for the safety of the plaintiff and neither did the plaintiff rely upon the defendant to attend to her safety or to inspect the ram for that purpose.

[168] I have already concluded from the evidence that the defendant did assume responsibility for the ram and that it cannot abrogate its responsibility by attempting to foist blame or responsibility onto Mrs Bryan for the presence and behaviour of the ram. Mrs Bryan was a passive bystander with respect

to all of the arrangements made for the ram including the care of the ram. She was entitled to rely on the implied term of the contract that the defendant would provide and maintain a safe working environment at the Institute for the plaintiff to carry out the work contracted and not expose the plaintiff to any risk of damage or injury at the Institute of which the defendant knew or ought to have known, as set out in par 4 of the Further Amended Statement of Claim.

[169] The submission on behalf of the defendant is that even if the defendant's equivalent duty of care in tort extended to take reasonable precaution for the safety of the plaintiff and the other matters raised in par 10 of the Third Further Amended Statement of Claim, the defendant had complied with all of those obligations by: security fencing and enclosing all the sheep in Area A and soon after the additional fence was constructed in the north west corner.

[170] I do not accept this submission. In her statement (Exhibit P1 par 59), Mrs Bryan describes how she observed the ewe and the lamb escaping from Area A. In her examination in chief she gave evidence that the ewe and the lamb used to escape quite frequently. She described how they would escape through the fence. There is evidence the ram escaped from Area A after the additional fence had been built.

[171] On the day of the accident, Mrs Bryan saw the ram out of Area A wandering onto the road in front of the northern fence around Area A in Area B.

Mrs Bryan gave evidence that apart from this occasion there was only one or two other times that she had seen the ram out of Area A. Mrs Bryan gave evidence she saw Mr McKenzie constructing part of the fence on the northern side of Area A using shelving. This was in late February early March 1994. Mrs Bryan gave evidence she observed Mr McKenzie repairing the western boundary fence. She also saw Mr McKenzie do repairs to the fence to the area of the 33 metres at the northern boundary of the shaded area (Exhibit P6). Mr McKenzie was doing these repairs on and off over the two months prior to Mrs Bryan's accident. It is Mrs Bryan's evidence that on some occasions she had put the sheep back into the paddock when they had escaped. She did not know who put the sheep back on other occasions. When the sheep were first placed into Area A the buffel grass was high. By the date of the accident there were just clumps of dried bristly grass. From this I would conclude the sheep had good reason to push their way out of Area A to reach a better food supply.

[172] Under cross examination Mrs Bryan agreed that the fence was partially erected before the ewe arrived and roughly finished before the lamb arrived. Mrs Bryan described the temporary fencing enclosing Area A. She said the fence where the ewe and the lamb were able to get out was either on the north or west side of the old nursery area. They could push through into the area referred to as the 33 metre side on the plan, being Exhibit P6. Mrs Bryan saw them push through several times. Mrs Bryan knew the ram was hand-reared because Ms Pulford had told her this. Mrs Bryan stated

that the ewe and the lamb would escape out of Area A about two or three times a week after mid-March. Mrs Bryan gave evidence she had spoken to Mr McKenzie about this because she did not like to see the sheep get run over or be attacked by dogs. This could cause a disturbance in Area B which could adversely affect the mala and bilby. It also meant the sheep were not in Area A doing their job of keeping the grass down. She gave evidence she did express her concern about this to Mr Langford in March or April of 1994. This was before the additional fence was erected by Mr McKenzie. Mrs Bryan gave evidence she did raise with Mr McKenzie her concern about the lamb and ewe escaping. Mr McKenzie undertook repairs to the northern fence. This was not working effectively.

Mr McKenzie built an additional fence running from the northern end of the old nursery to a fence further to the north and directly across the front of Mrs Bryan's office. Mrs Bryan made relevant markings on photograph 13. Mrs Bryan agreed that when the additional fence was constructed, the area marked Area B was bounded in the south by the northern boundary of Area A, that is, the area referred to as the 33 metre area and in the west by the additional fence across the road, connecting with the existing fence of the race, leading up to the northern boundary of the Commission compound. The area where the sheep could escape was by pushing through the fence between Area A and Area B. Once the additional fence was constructed the sheep remained within Area A and Area B. Mrs Bryan agreed the additional fence was inconvenient because she could not park her car in front of her

office. She had to park 25 metres away and climb over the fence or go through the shelving wire. Mrs Bryan had complained to Mr Langford about the inconvenience of having to carry the food and other items from her car to her office. Mrs Bryan stated she would have preferred some other arrangement to keep the sheep in. Mrs Bryan said she wanted the sheep confined to Area A on plan Exhibit P19.

[173] Mrs Bryan agreed that after the additional fence was built she did not complain about the sheep escaping. She did complain that the new fence was an inconvenience to her. She agreed that when she said in par 61 of her statement that the ewe and the lamb were outside the enclosure she was talking about them being in Area B. Similarly, when she stated in par 63 of her statement that she put three animals, including the ram, back into their enclosure she was referring to moving them from Area B into Area A. Mrs Bryan stated in cross examination that she had seen the three sheep together in Area B on the day of the accident and once or twice before. It is Mrs Bryan's evidence that after the initial settling down period following the arrival of the ram, the sheep did not get through the fence between Area A and Area B. She had only seen them in Area B on a couple of occasions following the arrival of the ram. The ram arrived in the third or fourth week of May. It is Mrs Bryan's evidence that by this time the sheep had eaten the grass in Area A and there was not much feed left. The sheep were attracted to the lush grass near the dripper system in Area B. Mrs Bryan stated in cross examination that after Mr McKenzie had repaired

the fence and built the additional fence, the sheep still got through the northern boundary fence including two occasions after the ram arrived.

Mrs Bryan agreed she knew the ram could get through the fence between Area A and Area B. She agreed that she knew it was possible the ram could be in Area B at any time.

[174] Mr Reeves QC submits in his written document titled “Defendant’s Outline on Liability” (p 28) that the conclusion to be drawn from this is:

“By the time the ram arrived, or shortly thereafter i.e. ‘earlier in the piece’, McKenzie had fixed the fence so it successfully contained the sheep in area A. The Plaintiff saw the sheep outside area A on one or two occasions earlier in the piece after the ram arrived. Conversely, the effect of the Plaintiff’s evidence is that, apart from the early period after the ram arrived, the Plaintiff did not see the sheep outside area A in the weeks leading up to the accident. Thus if the sheep were outside of area A on the day of the accident it does not follow that they were there because of a deficiency in the fence. It could equally be inferred they got out through the gate – unintentionally or deliberately e.g. to allow them to feed on the lush green grass. So even if there were an obligation to fence or enclose the ram, that was done soon after it arrived and there was therefore no breach of any implied term of the contract (if there were one).

Alternatively, if the court concludes the sheep did ‘escape’ through the fence on the day of the accident, in all the circumstances, particularly since it was not intended that the sheep would be there permanently (only until the Alice Springs show), the Defendant was only obliged to build an adequate fence, not a stock proof fence. Further, in all the circumstances, it was reasonable to deal with the odd occasions when the sheep ‘escaped’ from area A by simply putting them back in – as the Plaintiff did on at least one occasion. Thus the ‘escape’ of the sheep on the day of the accident did not constitute a breach of any implied term of the contract (if there were one) because any such implied term did not require the Defendant to build a stock proof fence.

Finally, if the court concludes the sheep did ‘escape’ through the fence on the day of the accident, and if the Defendant was obliged to build a stock proof fence, the breach of any implied term to build a stock proof fence, and, therefore, the escape of the sheep, was not a

cause of the Plaintiff's accident. The sole cause of the Plaintiff's accident was the unexpected and spontaneous act of this ram butting the Plaintiff – that act was not caused by the escape of the example of the escape of a horse of quiet disposition in Aldham's case.”

[175] On the day of the accident the evidence of Mrs Bryan is that she became aware of the presence of the ram after it attacked her from behind.

Obviously the ram had escaped out of Area A and entered Area B without Mrs Bryan's knowledge. I would conclude that it did this by pushing its way through the fence between Area A and Area B. The fence was not adequate to contain the ram in Area A. The defendant, having assumed responsibility for the ram, also had a responsibility to ensure that a male animal which could become aggressive, was not able to escape into an area and mingle with people who could be put at risk of injury. In particular, the defendant should have prevented the ram from being able to enter Area B and cause a reasonably foreseeable risk of injury to Mrs Bryan. The defendant had breached an implied term of the contract between the plaintiff and the defendant as set out in par 4 of the Third Amended Statement of Claim.

[176] It is the submission for the defendant that in the alternative, if there is an implied term placing an obligation on the defendant, the plaintiff is required to indemnify the defendant to the extent of her negligence or default.

[177] This default is pleaded in par 4A of the Second Further Amended Defence. The contract (Exhibit P60) contains Clause 3 which states as follows (also on p 13-14 of this decision):

“3. The contractor shall be liable for and keep the Conservation Commission of the Northern Territory indemnified against any legal liability, loss, claim or proceedings for personal injury to or death of any person or for injury or damage to property arising from the carrying out of the works, other than that which may arise from the negligence, omission or default of the Conservation Commission, its servants or agents.”

[178] Paragraph 4A of the Second Further Amended Defence provides as follows:

“4A In the alternative, if there was an implied term of the contract between it and the Plaintiff as alleged in paragraph 4 of the third Further Amended Statement of Claim or at all.

4A.1 the contract contained an express term that the Plaintiff would be liable to indemnify the Defendant against any legal liability, loss claim or proceeding for personal injury to any person arising from the carrying out of the works other than that which may arise from the negligence, omission or default of the Defendant, its servants or agents.

4A.2 the Defendant seeks an indemnity from the Plaintiff for so much of any judgment the Plaintiff may obtain against the Defendant in these proceedings that arises from the negligence, omission or default of the Plaintiff.”

[179] Counsel for the defendant referred to the decision of *Hi-Fert Pty Ltd v*

*Kiukiang Maritime Carriers Inc (No. 5)* (1998) 90 FCR 1 at 22 per Emmett J who compared the term “arising from” with the term “arising out of”. It is the submission on behalf of the defendant that the expression “arising out of” has usually been given a wide meaning – see *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, NSW Court of Appeal at 165 per Gleeson CJ.

[180] The argument for the defendant is that the plaintiff’s injury arose out of the carrying out of the works under the contract. This is because she was head-butted by a sheep that was, on the plaintiff’s case, within the old nursery

compound for the purpose of eating buffel grass for the protection of the endangered species for whose safety the plaintiff was responsible under the terms of the contract.

[181] I do not accept that the injury to Mrs Bryan could either be described as “arising from” or “arising out of” the works under the contract. Mrs Bryan was contracted to maintain and care for the mala and bilby, that was “the works”. She was not responsible for the care of the sheep the defendant was utilising to keep down the buffel grass in the area next to the mala and bilby pens. Mrs Bryan was neither part of, or consulted about, a decision made by the defendant to have animals graze in this area to keep the grass down, in preference to having a person or persons mow the grass and maintain the area. Mrs Bryan did not request or initiate arrangements to have a ram added to the sheep in the area. There was no necessity for her to seek permission from any of the Directors or officers at the Commission, it was not her ram and not her idea. The maintenance, care and control of the sheep was not part of Mrs Bryan’s contract with the defendant. Her contract was limited to the maintenance of captive wallabies and bandicoots.

[182] In the Second Further Amended Defence, the defendant in par 8A.2 “admits that it controlled and managed ... the compound at the Institute which included the land where the sheep were depastured”.

[183] I do not accept that the defendant can hold Mrs Bryan responsible in any way for the actions of the ram.

[184] In par 8 of the Second Further Amended Defence the defendant has pleaded as follows:

“8. Further, or in the alternative, if, which is denied, there were implied terms to the contract as alleged in paragraph 4, and if, which is not admitted, the Plaintiff was butted by a ram as alleged in paragraphs 6, 7 and 8 of the third Further Amended Statement of Claim, the Defendant says there was an implied term of the contract that the Plaintiff would take all reasonable precautions for her own safety while she was performing the works the subject of the contract. Further, the Defendant says that the injuries, loss and damage, if any, suffered by the Plaintiff, which are not admitted, were caused wholly or in part by her failure to take all reasonable precautions for her own safety in breach of the implied term of the contract.

#### Particulars

8.1 The Plaintiff caused the ram to be placed in the Old Nursery area of the Institute without the Defendant’s request, permission or prior knowledge, by negotiating the introduction of the ram with the owner of the ram, Ms Andrea Greaves, and the owner of the other sheep depastured at the Institute, Mr Bryan Gill, and giving directions to Ms Andrea Greaves as to where the ram was to be placed.

8.2 The Plaintiff knew or ought to have known that the ram was likely to butt or attack humans, but took no measures to avoid such risk nor to bring such risk, to the knowledge of the Defendant.

8.3 Further, on the date and at the place alleged in paragraph 6 of the Third Further Amended Statement of Claim, the Plaintiff entered into the area where the ram was located, or likely to be located, without taking any precautions for her own safety, when she knew or ought to have known that the ram was likely to butt or attack humans.”

[185] It may well be that there could be a term implied into the contract that

Mrs Bryan take all reasonable precautions for her own safety, as the defendant suggests. However, whether the plaintiff breached such implied term is another matter.

[186] In his written submission Mr Reeves QC has listed a number of extracts from the evidence in support of his argument that Mrs Bryan breached this implied term of the contract. I have already referred to these extracts in respect of earlier arguments put forward on behalf of the Defence. For that reason I will not repeat them all.

[187] The evidence is the ram arrived about 3-4 weeks before the accident. In this time the ram escaped from Area A two or three times, to the knowledge of Mrs Bryan. Mrs Bryan worked at the mala and bilby pens 15-20 hours a week. I have accepted her evidence that this 20 hours a week she was occupied with the care of mala and bilby. I accept her evidence that she did not pay a great deal of attention to the sheep, other than the time she put them back into Area A when they had escaped. Mrs Bryan pushed a hose through the fence to top up the water tank in Area A as Mr Gill requested. She did know the ram had been a pet. There is no evidence that she had any particular expertise or knowledge about sheep. I do not accept that she was necessarily in the best position to observe the sheep or that she had any knowledge of sheep greater than that of many other persons at the Commission who gave evidence about their knowledge of these animals.

[188] The evidence is she did not observe any signs of the ram and the ewe breeding or that the ewe was “in season”. There is evidence from Mr Ross Bryan and Mr Lundie-Jenkins that Mrs Bryan had an affinity with animals and was a qualified carer of animals. However, her work and focus of her attention at the defendant’s premises was the care and maintenance of the

mala and bilby. The maintenance and care of the sheep was not her responsibility. Mr McKenzie, the officer with the defendant Commission who had been delegated the responsibility for maintenance of the old nursery area, was well aware of the presence of the ram. Whether or not he conveyed this information to his superior officers was a matter within his own discretion under the terms of the authority delegated to him. This is confirmed by the evidence of Mr Johnson and Mr Fleming. There is evidence Mrs Bryan had complained to Mr McKenzie a number of times that the sheep had been escaping from Area A. Mr McKenzie had made attempts to repair the fence and also built an additional fence in an effort to contain all the sheep.

[189] I have previously dealt with Mrs Bryan's involvement in the placement of the ram in the old nursery area and the evidence relied on by the defendant to support their argument that she was responsible for the ram being there in the first place. I have rejected this argument and found that Mrs Bryan was merely a go-between Mr Gill, who wanted to acquire a ram, and Ms Pulford, who owned a ram.

[190] For reasons already outlined, I do not consider Mrs Bryan had any obligation to seek permission from the defendant to place the ram in the old nursery area.

[191] There is evidence that Mrs Bryan knew the grass in Area A was getting low. There is evidence she knew there was an attractive patch of grass in Area B.

There is also evidence (par 64 of her statement Exhibit P1), that Mrs Bryan asked Mr Gill if he was going to feed the sheep and he had replied “No I’m going to move them after the show”. There was evidence to the effect that that would be within a few weeks. In par 65 Mrs Bryan states she had told Mr Gill the sheep were escaping and asked him to do something about the fencing because she was concerned about the dogs attacking them. More importantly, Mr McKenzie had been required to repair the fence on several occasions. Mr McKenzie was aware of the presence of the ram and that Area A was where the three sheep were to be contained.

[192] It is argued on behalf of the defendant that when she arrived at work on 17 June 1994, Mrs Bryan should have checked that the sheep were not in Area B and if they were, put them back into Area A.

[193] On the evidence of Mrs Bryan she travelled between her car and her office twice on her arrival at her place of work on the morning of 17 June 1994. On her second trip she was carrying bags of paper to be used as bedding for the mala and bilby. She climbed the fence to enter her area. There is no evidence she saw the sheep in her area. The first indication she had of the presence of the ram was when it head-butted her from behind. I do not accept that in failing to take the precaution of checking for sheep within Area B, Mrs Bryan failed to take reasonable care for her own safety. The defendant had the responsibility for containing the sheep, including the ram, within an area where they could not constitute a danger to Mrs Bryan. Where exactly the ram was in Area B prior to the attack is not known.

There is no evidence his presence was obvious to Mrs Bryan as she travelled back and forth twice between her car and her office. She has given evidence she was in a hurry this morning. She was entitled to rely on the implied term of the contract that the defendant provide and maintain a safe working environment at the Institute for the plaintiff to carry out the work contracted for by her. She did not wander into the ram's area, being Area A. Further, that the defendant would not expose her to any risk of damage or injury at the Institute of which the defendant knew or ought to have known. The ram had escaped from the area where he should have been contained and entered an area utilised by Mrs Bryan to get to her office and utilised by other persons who may be visiting the mala and bilby pens. Mrs Bryan did all in her power to keep the ram away from herself. If the sheep or ram escaped out of Area A into Area B, she would move them back into Area A through the gate. She never went into Area A. The repairs to the fence had not been effective and the defendant had not tried other alternatives such as placing a yoke around the neck of the ram to prevent his getting through the fence. I do not accept that the evidence supports a finding that Mrs Bryan breached an implied term of the contract in that she failed to take reasonable care for her own safety.

[194] Mr Reeves QC submits that Mrs Bryan's breach of the implied term of the contract to take reasonable care for her own safety was the sole cause of the ram being able to head-butt her. I do not accept the argument that if there was any such breach it was the sole cause of the ram attacking her.

[195] Counsel for the defendant relied on a decision of the Queensland Court of Appeal in *Wylie v The ANI Corporation Limited* [2002] 1 Qd R 320 in support of his argument relating to the allegation the plaintiff had breached an implied term of the contract.

[196] In the authority referred to above, McMurdo P, with whom Thomas JA and Ambrose J agreed, held at 333 that:

“There was an implied term in the contract of employment that the [respondent] employee would carry out the employment with due care and skill and that the employee breached that implied term.”

[197] However, the Court also held that the employer breached the contract of employment by failing to take reasonable steps to provide a reasonably safe system of work, that this breach was a cause of the employee’s injuries and the employer was liable in damage for breach of contract which could not be reduced for the employee’s contributory negligence.

[198] In the matter before this Court, the evidence does not sustain the argument that the alleged breach of the implied term of the contract by the plaintiff was the sole cause of the ram being able to head-butt her.

[199] The cause of the accident was the failure on the part of the defendant, once it became aware of the existence of the ram within the area which it managed and controlled, to adequately contain the ram within a secured area and not able to escape into an area used by people. Alternately, the responsible officers within the defendant’s organisation must have been

aware, either personally or through Mr McKenzie, that the grass in Area A was very low. This was an added incentive for the ram to escape from Area A into Area B where the evidence is there was some green grass. Persons including Mrs Bryan traversed Area B to reach the mala and bilby pens. The ram in Area A was a potential danger if it escaped from that area. It would appear that the ram and other sheep had done the job of keeping down the grass in Area A, being the objective the defendant's were seeking to achieve. The ram could have been returned to its owner or sufficient interest taken in its welfare to be pastured elsewhere. The defendant had a number of alternatives it could have utilised to ensure the ram could not get into an area where there was a risk it would come into contact with people and could attack them as it did Mrs Bryan.

[200] I find the defendant did breach the duty of care owed to the plaintiff and that it was this breach which was the sole cause of her accident with the ram.

[201] In accepting the evidence of Mrs Bryan as I do, I find that as a consequence of the attack by the ram upon her on 17 June 1994, she suffered injury. As a result of these injuries she has suffered severe and debilitating pain. She was required to undergo extensive medical treatment, she has suffered loss of earning capacity, medical and pharmaceutical expenses, damages and the need for services both in the past and in the future.

[202] I will now deal with Mrs Bryan's condition prior to the incident with the ram.

### **Mrs Bryan's Medical History (prior to the ram incident):**

[203] In 1960 Mrs Bryan was admitted to Alice Springs hospital and operated on for a fractured right femur. In 1969 she was treated at the hospital for a urinary tract infection, whilst she was pregnant with her second child. In 1971 Mrs Bryan spent some time in the Alice Springs Hospital due to an infected gall bladder, which was removed. Also in that year, Mrs Bryan was treated with physiotherapy and a built-up shoe for back pain thought to be related to a leg-shortening.

[204] Between 1972 and 1994, she had the following admissions to hospital for back-related and other problems:

- In April 1972 Mrs Bryan had an L4/5 level spinal fusion operation, due to spondylolisthesis, and stayed in the Alice Springs Hospital until 30 May 1972. This was followed by an admission to the Alice Springs Hospital a few weeks later, being May 1972.
- In March 1973, whilst pregnant, she was admitted to the Alice Springs Hospital for 4 days due to sciatica in the right and left groin area.
- Her third child was born in June 1973 and she had a "D & C" in November of that year and another in April the following year.
- On 9 October 1974 Mrs Bryan had a total hysterectomy.

- On 20 January 1978 she was admitted to the Alice Springs Hospital for ten days due to lower back pain, and treated with traction and bed rest.
- She was admitted again on 19 February 1978 for lower back pain, and was treated with traction and bed rest, as well as advised to wear her built-up shoe. Mrs Bryan was discharged on 3 March.
- On 25 November 1979 she was admitted to hospital for four days due to a bout of gastroenteritis.
- In February 1984 Mrs Bryan underwent a laparotomy due to an ovarian cyst which was subsequently discovered to have endometriosis.
- In March/April 1988 – she consulted a specialist gynaecologist in Adelaide (Dr. Selva-Nayagam)
- On 5 April 1988 she was admitted to Alice Springs Hospital, where she was diagnosed with right sciatica and L5 entrapment, which was treated with bed rest, pelvic traction and analgesics. She was discharged on 12 April.
- In 1988 she went into the Western Community Hospital for traction.
- In 1990 she was admitted to the Alice Springs Hospital.
- On 23 March 1990 Mrs Bryan went into the Western Community Hospital in Adelaide. When Mrs Bryan was a patient at the Western

Community Hospital between 23 and 30 March 1990 she received physiotherapy, traction and drug therapy, which included a course of pethidine.

- Between 9 and 15 April 1990 Mrs Bryan was again treated with traction as an in-patient at the Western Community Hospital.

[205] When not in hospital, Mrs Bryan was not restricted by any back problems and could carry out normal work duties.

[206] Finally, Mrs Bryan was asked if she had ever suffered depression and she said that it had played only a very small part in her life, and that was after the birth of one of her sons. She was also subject to some depressive illness around the time of her menopause in February 1994. She was placed on hormone replacement therapy and had no further problems. She did not receive any treatment. She had not consulted a psychiatrist for any other reason.

[207] Mrs Bryan had not missed a day of work through ill health from the date she commenced the contract with the defendant in 1991 to the date of the ram attack on 17 June 1994.

[208] Her work under contract with the Commission required a reasonable level of fitness, she had to stoop and bend, lift and carry and generally be able to handle and care for the mala and bilby. Included in the qualifications, required under the Schedule for Quotation in her contract, was a “good

general level of physical fitness is important as some aspects of the work are quite strenuous”.

[209] As at the date of the accident on 17 June 1994, Mrs Bryan was an active and healthy woman able to perform the demands of the job she was contracted to do which was care of the mala and bilby. Mrs Bryan was a keen gardener. She had built up the garden of the family home from nothing to a garden as depicted in photographs 15, 16, 17 and 18 of Exhibit P3. This involved using a wheelbarrow and shovel to establish the garden between 1988-1990. Photograph 19 is an aerial view of Mrs Bryan’s home and garden taken approximately 2½ years prior to Mrs Bryan giving evidence on 4 November 2003. Photograph 20 was taken in 1999. Photograph 21 was taken at about the same time. Photographs 22 and 23 were taken in 1988-1989 at the time Mrs Bryan was establishing the garden. Photograph 24 was taken in 1991 after the ground covers had started growing. It was Mrs Bryan who did the planting and propagating in the garden and took a keen interest in the general maintenance of the garden. Since the accident she has not been able to pursue this interest.

[210] Photograph 25 was taken in 1990 and depicts Mrs Bryan participating in vigorous dancing with her brother. It was the occasion of her niece’s wedding. Prior to her accident, Mrs Bryan did a lot of dancing and would be on the dance floor at various functions participating in rock and roll about six times a year. Since the accident she has not been able to participate in this form of dancing.

[211] Photograph 26 depicts Mrs Bryan holding a horse. This photo was taken about six years prior to the accident. Mrs Bryan gave evidence that her son and her husband were both involved in training horses. Prior to the accident, Mrs Bryan would be at her son's stables most evenings cleaning out the stables and generally assisting with the horses at the stables and at race meetings.

[212] Photograph 27 is a photo of Mrs Bryan's daughter Selena seated in at the saddlery stall. Mrs Bryan gave evidence that she would go to help in the saddlery business at times of the day she was not involved in caring for the mala and bilby.

[213] Mrs Bryan stated she is no longer able to wear the narrow heeled open shoes that she is photographed wearing in photos 24 and 28.

[214] I accept the evidence given by Mrs Bryan, which is supported by her husband, Mr Ross Bryan, and her daughter Selena Matthews, that prior to the accident Mrs Bryan was very fit and agile. In addition to the activities already referred to, she participated in a number of other physically demanding activities, including bush walking, camping and driving for long periods of time.

[215] Whilst Mrs Bryan had a number of medical problems and admissions to hospital prior to the attack on her by the ram, this had not prevented her from carrying out her work or pursuing the many physical activities she enjoyed.

[216] The medical history does indicate admissions to hospital with lower back problems. These admissions were for the most part of short duration. Mrs Bryan was always able to return to continue a physically active life. Doctors Osti, Pohl, Burvill and Mr Guglielmin have each stated when asked that it is only to be expected that following a spinal fusion as Mrs Bryan had in 1972, there would be some incidents of low back pain. The important aspect emphasised by Doctors Thompson, Osti, Pohl and Reilly, is that Mrs Bryan had not experienced any problems at all with her back for four years prior to the ram attack. Dr Reilly emphasised the importance of the fact that since the incident with the ram, Mrs Bryan has complained of severe and constant pain.

[217] Mr Langford described Mrs Bryan as being a good worker (tp 1508). After the accident, he describes Mrs Bryan as being buckled up and having a problem with her gait. This was not a problem before the accident.

[218] Mr Johnson gave evidence that he did not observe Mrs Bryan to have any sign of physical limitations or difficulties before the ram attack (tp 1559). He stated that after the ram attack, Mrs Bryan did show signs of injury.

[219] I accept the evidence given by Mrs Bryan that when she was head-butted by the ram the following occurred: Mrs Bryan was thrown forward 2.5 metres and landed face down. She felt immediate and severe pain in her back and down both legs and her groin. At the time of impact, she heard a loud crack. She lost control of her bladder. The pain in her back was so severe she

could not get up. She called for help for some 30 to 40 minutes. She managed to pull herself to a standing position. The pain was in her back and down both legs. She managed to struggle out to her vehicle and drive to a nearby building to obtain help.

[220] The test of causation in tort, the “but for” test, is the same test to be applied in contract (*Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 per McHugh J at 352).

[221] In *Walls v Rake* (1960) 108 CLR 158 at 163 – 164, the High Court has established the following principle:

“It was for the appellant as plaintiff to prove his damages, and merely to prove his present condition and his incapacity to work would not prove that these things resulted from the accident. It was not, however, for the plaintiff to disprove that his pre-accident ill health would eventually cripple and incapacitate him. Prima facie, where a plaintiff was in apparent good health before an accident and is in bad health thereafter, the change would be regarded as a consequence of the accident and it is for the defendant to prove that there is some other explanation for it, eg, that the plaintiff has aggravated his condition by some unreasonable act or omission. Similarly, although it is of course material to ascertain what was the pre-accident condition of the plaintiff who alleges that his post-accident ill health is due to the accident, it is for the defendant to prove that before the accident the plaintiff was in a condition that, without the accident, would have led to his post-accident state of health. Such a case is not unlike that of a defendant in a defamation action proving in reduction of damages that the plaintiff had a bad reputation. ...”

See also *Purkess v Crittenden* (1965) 114 CLR 164 Winderyer J at 171.

[222] It is for this Court to decide, based on the evidence, what were the injuries sustained by Mrs Bryan that flowed from the attack on her by the ram (*Dahl v Grice* [1981] VR 513).

[223] I find that as a consequence of the ram attack, Mrs Bryan has suffered severe and debilitating pain to her lower back and into her legs which continues into the present time. I find that this would not have occurred but for the ram attack.

**Evidence as to the medical treatment given to Mrs Bryan following the ram attack:**

[224] The plaintiff claims significant long term consequences of the ram attack upon her, resulting in a substantial claim for damages.

[225] The defendant asserts there is no objective evidence that the plaintiff suffered any injury in the ram incident. Mr Reeves QC, counsel on behalf of the defendant, submits that the plaintiff's subjective complaints are (1) contradicted by the contemporaneous record; (2) not likely; and (3) so inconsistent, exaggerated and untruthful as to be completely unreliable.

[226] Alternatively it is the defendant's position that if Mrs Bryan did suffer any injury in the ram incident, the reliable evidence disclosed that the only injury she may have suffered was an injury that would have resulted in pain and disability for a short period – a matter of months at the most and this must limit the amount of compensation. It is the assertion, on behalf of the defendant, that Mrs Bryan has grossly exaggerated the quantum of her claim.

[227] The evidence is that immediately following the accident on 17 June 1994, Mrs Bryan was taken by car from Arid Zone Research Institute to the Bath Street Medical Clinic. She then travelled by ambulance to the Alice Springs Hospital. The Alice Springs Hospital records, with respect to Mrs Bryan subsequent to the ram attack, were tendered (Exhibit D12).

[228] Exhibit D12-2 contains a letter from the general practitioner to the hospital dated 17 June 1994 stating: “ .... She is tender posteriorly L4 L5 but chiefly tender on lateral of the pelvis. Diagnosis (DX query pelvic fracture)”.

[229] There is a note in the progress notes of the hospital for 17 June 1994: “Butted by a ram at site of previous lumb. fusion – see letter”.

[230] These progress notes also stated 27 June 1994 that “patient had pain in the lumbosacral and right hip area which continued radiating posteriorly to her knee. She was constipated. She was tender on the right sacroiliac joint and pelvic pubis and right hip area on all movements. Her straight leg was restricted to 15°. She was treated with rest, Indocid and Zantac”. On 28 June she was referred for physiotherapy for right hip exercises.

[231] Exhibit D12-3 is a report of an X-ray taken on 17 June 1994 of Mrs Bryan’s lumbosacral spine and scaro-illiac joints. At Exhibit D12-4 is a report relating to a further X-ray dated 15 August 1994.

**a) Evidence of Dr Thompson:**

[232] Exhibit P14 is a statement by Dr Geoff Thompson attaching reports prepared by him. Dr Thompson was Mrs Bryan's treating physician. She first saw Dr Thompson on 11 August 1994 having been referred by her physiotherapist. Dr Thompson states in the opening paragraphs of his report dated 13 February 2002:

“... Mrs. Bryan told me that in 1972 she had had an L4/5 level spinal fusion at the hands of Dr. Michael Hone and Jeffrey Jose in Adelaide. She stated that she had recovered well from this procedure and that she had continued to be well until 17/6/94 when, in the course of her work, she was struck a vigorous blow to her low back by a ram. Mrs. Bryan immediately developed disabling back pain which radiated to her buttocks, (R) groin, (R) leg and down to her (R) foot. She was unable to walk and was taken to her general practitioner who recommended rest and analgesia followed by physiotherapy. Despite this she failed to improve and spent some time in hospital under traction.

On failing to improve, an M.R.I. was carried out on 25/10/94, and she saw Dr. Brian North for assessment of the feasibility of spinal surgery. He did not feel that 'surgical treatment was appropriate' and suggested she take Amitriptyline, an antidepressant.

Mrs. Bryan then sought the opinion of Dr. Orso Osti, a spinal surgeon in Adelaide, and, on 9/3/95, at St. Andrews Hospital, had surgery. Initially postoperatively, Denise experienced significant reduction in her (R) leg pre-operative pain. This pain, however, never fully settled and in fact with time worsened. Because of ongoing disability, further surgery was carried out at Calvary Hospital on 28/9/95, when bone grafting was carried out to enhance the healing process and to provide stabilisation of the vertebral units. Mrs. Bryan felt that the second operation resulted in significant improvement of her symptoms initially. Approximately 6 weeks after the 2<sup>nd</sup> operation, however, following a forward flexion movement, she felt a tearing sensation in her low back and the sudden return of her pre-operative pain with radiation down the full length of her (R) leg. It was felt that Mrs. Bryan could possibly benefit from the removal of the metal instrumentation used to stabilise her L5/S1 spondylolisthesis, and Dr. Osti felt that further time was important to allow ongoing pain resolution.

Dr. Osti reviewed Denise on 26/2/01. She continued to present with low back pain, (R) worse than (L), with (R) leg weakness and

occasional collapsing. In addition she experienced chronic bowel and bladder function disturbances because of spinal nerve involvement. Investigations suggested that her L5/S1 fusion was in fact solid, but that there was a moderate degree of epidural fibrosis around the lower spinal nerves along with L4/5 disc degeneration as yet without any mechanical effect of the neural structures. It was the surgeon's view that at the time further management via surgery was not indicated. Mrs. Bryan has required continuous medication by way of Endone, Prothiaden and Diazepam to control her symptoms, and even with these she rarely has a pain free day or night.

Denise was referred by both myself and Dr. Gus Matarazzo to noted pain management physician, Dr. David Cherry at Flinders Medical Centre in Adelaide. We felt along with Dr. Osti, that dealing with her chronic pain would be the most appropriate next step.

Denise's experience at the pain management unit was anything but pleasant. She feels she was not received well, that her overall clinical scenario was not considered carefully, and that purely pain management via more and more medication was suggested.

Dr. Cherry carried out a diagnostic epidural block. The reason for this was to determine whether or not an implanted opioid spinal pump would help. The results were discouraging regarding the pump. Dr. Cherry felt that twice yearly epidural steroid injections, quite traumatic in their own right, could be provided by an anaesthetist in Alice Springs. Indeed it seems that the vigorous forced flexion required for the low back injection has in fact damaged her spine in the thoracic level. One would hope that this settles quickly to try and reduce the already high pain levels experienced by Mrs. Bryan."

[233] The reference to Dr Cherry in this report contains some hearsay but was allowed to stand for the limited purpose that it was information upon which Dr Thompson acted in the management of Mrs Bryan.

[234] In his report dated 8 January 2003, Dr Thompson stated inter alia:

"On review on 22/8/02, Denise reported increased back pain and stiffness with numbness, which is frequent although intermittent in the upper lateral aspect of her (R) thigh. The cause of this numbness is likely to be nerve root pressure in her spine, consequence of her injury. ..."

[235] Dr Thompson explained and interpreted the X-rays and Cat Scans of Mrs Bryan's spinal cord in particular at the L4/L5 and L5/S1 vertebrae. The three X-rays are Exhibit P15. The seven Cat Scans tendered are Exhibit P16. The MRI sheets are Exhibit P17.

[236] Dr Thompson gave evidence that based on what is shown in the CT Scan and the MRI he had ruled out his earlier diagnosis that there had been a fracture of the earlier spinal fusion. He stated there was "absolutely no doubt there's been nerve root irritation" (tp 437).

[237] Dr Thompson gave evidence that the CT Scan showed a mild discal bulging backwards at the L4-5 level. He stated that the MRI showed at the L4-5 and L5/S1 discs there was a significant difference. The L4/L5 disc is much darker which in MRI terms means it has become dehydrated, that it is degenerating, causing pain and losing its effect as a shock absorber and that is the beginnings of the deterioration of that disc (tp 430). He stated that between the L4/L5 the disc is flatter, it is darker and there is a bulge at the back which is not present in the three discs above. He said the MRI showed it was touching one of the spinal nerves. Dr Thompson further described the MRI as showing spondylolisthesis or spinal slippage at L5/S1 (tp 431). He gave further evidence (tp 432) that the MRI also showed at both L4/L5/S1 the exit foramen is significantly narrow, by more than half of its diameter. He said you can see the nerve sitting in the canal, and that by comparison to the ones above it, is squeezed. At L5 the foramen is virtually closed around the nerve. He further stated (tp 436) the MRI of L5/S1 shows the spinal

cord being touched by the disc all around its circumference where there should be a gap. Dr Thompson stated that in his report dated 13 February 2002 he had expressed the opinion that “investigations suggested that her L5/S1 fusion was in fact solid, but that there was a moderate degree of epidural fibrosis around the lower spinal nerves along with L4/L5 degeneration as yet without any mechanical effect of the neural structures”. Dr Thompson explained that what impingement on a nerve does (tp 441):

“... is prevent it from sliding freely within the intervertebral foramen and it tethers or anchors it in the one place, so that when the nerve is dragged, because there’s some pressure, as the nerve is dragged through that foramen, this generates within the nerve an electrical impulse which produces pain, electrical like in nature, so we often refer to neuralgia, going down wherever that nerve tends to go. ...”

[238] Dr Thompson described the nerves as essentially biological electrical wires.

He states that pressure on any of the number of roots that form in total the sciatic nerve, of which the L5 nerve is one, affects the lower limb.

[239] It is Dr Thompson’s evidence that he saw Mrs Bryan about six times a year over six years. He referred to the objective signs that he had observed neurological damage in the L5/S1 nerve being:

- (1) weakness of two muscle functions in her leg, both of these signs he had noted early on in his care of Mrs Bryan;
- (2) an impaired or absent reflex at the Achilles tendon;
- (3) observations he made when doing the straight leg raising test;

(4) evidence of nerve root irritation as she demonstrated impaired reflexes and markedly positive nerve stretch sign.

[240] Dr Thompson described the “slump test” he had performed which also produced obvious nerve root signs. Dr Thompson commented on the muscle wasting he had observed in Mrs Bryan’s thighs and calves. He also noted the lack of ability to balance which is a test of fine muscle tuning and good nerve control.

[241] Dr Thompson described the epidural steroid injections that had been administered by Dr Cherry at the Flinders Medical Centre Pain Clinic, their short and long term effect and that Mrs Bryan had reported to him it was very painful. He gave evidence that he had found an area of numbness. He did this by looking for numbness by using the back of his hand-over areas the patient described to him as numb. He found that the complaints of numbness coincided with the distribution of the L5 nerve.

[242] Dr Thompson gave evidence about Mrs Bryan’s complaints of hip pain.

Dr Thompson considered this was due to minor inflammation within the hip and in his opinion was probably because of her persistent altered gait. Her pain could be modified with injections of cortisone. Dr Thompson made appropriate arrangements for a specialist to give these injections.

[243] Dr Thompson was referred to the findings of Mr Osti which had assisted Dr Thompson in his own diagnosis and management of Mrs Bryan. Mr Osti found scar tissue encompassing and trapping the nerve. It is Dr Thompson’s

evidence that scar tissue is often seen to reform after surgery which afterwards becomes an irritant. Dr Thompson stated he suspected from the continued nature of the symptoms that there is some permanent nerve damage. He said this is because even though she was operated upon soon after the injury in June 1994, there is sufficient crush injury to the nerve for it not to be able to fully recover (tp 448).

[244] Dr Thompson described the muscle spasm he observed in Mrs Bryan. He had prescribed medication over a number of years for the spasms which are very painful for Mrs Bryan.

[245] Because of an adjournment in the proceedings, Dr Thompson resumed his examination in chief and was cross examined some five months after he had given a substantial amount of his evidence in chief.

[246] Dr Thompson also gave evidence as to the importance of nerve function to bladder and bowel function leading to poverty of sensation. Mrs Bryan would spontaneously and without personal awareness, empty her bladder or bowel. This is indicative of nerve dysfunction.

[247] It is Dr Thompson's evidence that the most important source of information concerning the state of Mrs Bryan's back is the surgeon's observations at the time of surgery. The second most important are clinical findings which the doctor tries to correlate with the history given by the patient. This is followed in importance by the MRI, Cat Scan and X-ray.

[248] It is Dr Thompson's evidence that in all of his findings from various investigations they were all consistent with the history he was given by Mrs Bryan.

[249] Dr Thompson agreed in cross examination that Mrs Bryan had reacted against the opinion of Dr Molloy who advised that Mrs Bryan should not undergo further surgery. Mrs Bryan had been referred to Dr Molloy in July 2000. Dr Molloy's opinion was the same as that expressed by Dr Fry and Dr North.

[250] Dr Thompson stated that he was aware that Mrs Bryan had a spinal fusion in 1972. He was aware that she had subsequent admissions to hospital and treatment for back problem. He considered it significant that for four years prior to the attack by the ram she had been symptom free. He agreed in cross examination that he had advised Mrs Bryan to avoid sitting and driving for long periods. He stated that Mrs Bryan's clinical signs had been hard to assess but he did not believe them to be inconsistent.

[251] Under cross examination Dr Thompson stated that the report dated 25 October 1994 (Exhibit D12-7) is qualified by a subsequent report dated 27 October 1994 also at Exhibit D12-7. In the first report the radiologist reports a disc protrusion with nerve root compression at the L5/S1 level. In the second report the radiologist says the protrusion is mainly composed of bone and he is unable to identify any protruding soft tissue. It is

Dr Thompson's evidence that compression on a nerve is a clinical finding, it is not an objective radiology finding only (tp 690).

[252] Dr Thompson agreed he had received a report from Mr Osti in about 1998 indicating that Mr Osti formed the view, based on the MRI's, there was no evidence of mechanical nerve root compression. Dr Thompson agreed he had made a provisional diagnosis that the ram attack broke the earlier spinal fusion. He stated this remained his opinion until it became apparent that there was no breach of the spondylolisthesis fusion. He stated this opinion had never been his major concern in his management of Mrs Bryan. He subsequently agreed that he had earlier given evidence that a different diagnosis meant the management would be different. Dr Thompson agreed that the report on the MRI's and the observations of Mr Osti ruled out nerve root compression. He stated that nerve root compression was not ruled out on clinical grounds for which he had evidence. He continued to treat Mrs Bryan on the basis that she has nerve malfunction. He agreed Mrs Bryan has damage to the nerve and he cannot point to when this occurred and whether it occurred in 1972 when she had the original fusion or on later dates when she had episodes of back pain. His evidence is that this is so, except for the fact that Mrs Bryan had been symptom free for four years prior to the ram attack. The clinical signs he described in examination in chief were signs of nerve root damage. He agreed that in his report dated 26 February 2001, Mr Osti had found no evidence of muscle wasting in either lower limb and all reflexes were present and symmetrical. He also

agreed the observations made by Dr Peter Reilly are inconsistent with his, Dr Thompson's, findings. Dr Thompson confirmed his belief that Mrs Bryan is suffering from nerve root damage caused by scar tissue in and around the nerve at the foramen. It is Dr Thompson's evidence that L5 nerve root rarely give actual back problems. It does give buttock, leg and foot problems. Dr Thompson gave evidence under cross examination as to the medication he had prescribed for Mrs Bryan for pain. He stated he had prescribed antidepressants because they do settle nerve pain and are used by pain management units for helping with people with chronic pain of a nerve type. He had never prescribed antidepressant medication for depression. In his notes dated 4 September 1995 he had recorded a new symptom, reported by Mrs Bryan, which was poor bladder control. This was the first time there had been any mention of bladder problems. On 11 August 1998, there was the first mention of bowel problems.

[253] Dr Thompson agreed in cross examination that he was relying on the accuracy of the history given to him by Mrs Bryan that she had been symptom free for four years prior to the attack on her by the ram. It was on this history that he assessed the sudden increase in her symptoms were due to the changes that occurred when she was attacked by the ram.

Dr Thompson agreed that if this history was not accurate he would have to review his assessment (tp 712) and it would increase the likelihood that the nerve root damage talked about by Mr Osti was caused by the original surgery in 1972. It is Dr Thompson's evidence that the symptoms from

nerve root damage at the L5/S1 level are the same as nerve root compression at the L5/S1 level. These symptoms include pain down the leg, pins and needles, loss of sensation, a weakness of first toe extension, muscle wasting and altered gait. One reason for which can be poor function of the nerve with the muscles it supplies.

[254] In re-examination Dr Thompson was asked a series of questions relating to any difference in the length of Mrs Bryan's two legs. The result of the measurement of her two legs is that there was less than a centimetre difference between the length of her two legs which is within a normal range. Dr Thompson reiterated in re-examination, that because Mrs Bryan had been symptom free for four years prior to the date of the attack upon her by the ram, he concluded there was no continuing and persistent nerve damage or any consequence from the spinal fusion in 1972 (tp 737)

**b) Evidence of Dr Kenneth Leahey:**

[255] Dr Leahey is a qualified medical practitioner and surgeon. Dr Leahey made a statement to which is annexed a report he prepared on 3 October 1997 (Exhibit P28). Mrs Bryan had consulted him professionally in March 1990. He had not seen her professionally since he left the Northern Territory in 1991. Dr Leahey described the times he had seen Mrs Bryan which was in March 1990 when she was admitted to Western Community Hospital and settled after a number of days in hospital. His next contact with her was in October 1994 some four months after the accident with the ram. She was

transferred to Adelaide, by her doctors in Alice Springs, because of her failure to improve. He referred to her consulting Dr North and Mr Osti. In August 1996 she was admitted under his care with increasing low back and leg pain that was not resolving with treatment in Alice Springs. She was undergoing pain management and also being treated by other doctors.

Mrs Bryan spent a further 16 days in the Western Community Hospital from 10–27 June 1997. Dr Leahey noted that she was becoming very depressed enduring the chronic pain.

[256] In his report Dr Leahey states: “There is no doubt Denise has suffered severe disabling pain since the aggravation of her back condition, precipitated by the incident with the ram in 1994”. He noted that he had seen Mrs Bryan change from a bright, happy, outgoing person, to one drained and dejected to the point of absolute despondency on occasions.

[257] Dr Leahey gave evidence in re-examination that the apparent level of pain after the ram incident was much more consistent. She did improve with treatment but overall since the second half of June 1994 there had been much more consistent complaints of pain. The intensity of the pain was also greater. She did improve with treatment and then it would worsen again. He stated that he had seen her in pain.

[258] The evidence of Dr Leahey is put in context by the medical documents (Exhibit D12). Exhibit D12-6 is the patient summary from Western Community Hospital showing Mrs Bryan was admitted on 25 October 1994

with respect to back pain. She was admitted for traction. It was noted that first thing in the morning she finds it quite hard to mobilise due to back pain. It also noted under sleep patterns that she woke every two hours due to the pain in her back. Mrs Bryan was discharged from the Western Community Hospital on 11 November 1994.

[259] Exhibit D12-8 is a letter from Dr Leahey to Dr Butcher in Alice Springs dated 15 November 1994. Under cross examination Dr Leahey was asked to read the contents of this letter onto the record as follows (tp 584):

“... ‘Denise came down with exacerbation of her LBP’ – lower back pain – ‘since the ram accident in June. Paraesthesia down the left leg: foot. Clinically limited straight leg raise left and right, soft L5 and S1 sign sensory signs in the left leg. I put her in the Western Community Hospital’ – Western Community Hospital, ‘traction, physio etcetera. MRI arrow shows known L5/S1 discopathy L4-5 discopathy, old posterior fusion or old post fusion changes at the L5 or L/S’ – is lumbosacral – ‘at the lumbosacral level. Basically, nothing new. We had a corset fitted: a built up right shoe with inner soles (1¼" shortening). And overall she is much happier. She has certainly got a “secondhand back” ...”

Mrs Bryan was given traction and physiotherapy at the Western Community Hospital.

[260] Exhibit D12-1 is the Outpatient Clinical Progress Sheet from Alice Springs Hospital. The Progress Sheet notes state as follows:

“13 Oct 1994 Pain Clinic Ref by Dr Butcher. Back pain. Hit by a ram 17/6/94 at work → back pain rest at home 4/7; Return to work + physio → bit difficult.

Admit to Alice Springs Hospital in traction but technical difficulties but little relief after this.

....

Spinal fusion 22 years ago L5/S1. Effective for 12 years but occasional episode of back pain responding to traction.  
Spondylolisthesis.

....

Currently back at work. Occasional episodes of pins/needles in legs bilaterally and unilaterally but for short periods only.”

[261] The next note on Exhibit D12-1 is dated 17 November 1994 and records that she had severe exacerbation of back pain when travelling by car to Adelaide. She had been admitted to hospital. She had traction which provided some relief. It was noted the medication she was on that she did not want to have epidural steroids and there was little else to offer.

[262] I agree with the submission made by Mr Meldrum QC that this history of treatment and attendance at the Western Community Hospital in Adelaide in October 1994, refutes the submission made by Mr Reeves QC that by October 1994 Mrs Bryan was well enough to travel the 14 hours to Adelaide and accordingly this date marks the end point of any effects upon her by the ram attack.

**c) Evidence of Dr Augustus Matarazzo:**

[263] Dr Matarazzo is a qualified medical practitioner and is currently Mrs Bryan’s general practitioner. Dr Matarazzo prepared a statement which included a report prepared by him dated 21 April 2002 (Exhibit P24). In this report Dr Matarazzo detailed what had occurred over the previous 2½ years that he had been seeing Mrs Bryan regularly. Dr Matarazzo referred

also to the contact she had with Dr Thompson and stated, referring to Dr Thompson:

“... Together we felt that not all had been explored in relation to her condition, although we both feel that she has definite symptoms of nerve entrapment and injury in her lower spine at the site of the injury of 1994. ...”

[264] Dr Matarazzo then states in summary (Exhibit P24):

“All in all, we still have major problems in spite of all the various specialists inputs over the years. She still has a severe pain (requiring high doses of Morphine) and physical disabilities which include limping and poor neural control of bladder, bowel and pelvic function. Although the secondary depression will be helped by the antidepressant medication, she is still left with the very physical effects which I believe are caused by the entrapment of the delicate spinal nerves within the scar tissue resulting from the physical injury. I believe this process is not amenable to surgical correction. I believe Mrs. Bryan is very genuine.”

[265] Dr Matarazzo gave evidence that the nerves that were entrapped were the lower sacral plexus nerves emanating around the lower part of the lumbar region. He assessed them to be around the area of the previous surgery and affecting the lower aspects all the way down the sacral plexus areas. He considered the cause of this primarily related to the scarring of and the contraction of the scarring over the subsequent years, which traps and squeezes those nerves which therefore creates problems with their function. He gave evidence that the previous surgery to which he was referring was to the surgery from 1995 to 1997. Dr Matarazzo has qualifications in gynaecology and obstetrics. He stated that the reference in his report to Mrs Bryan's poor neural control of pelvic functions was with reference

primarily to her sexual function. It is Dr Matarazzo's evidence that there were some objective as well as lots of subjective signs of decreased sensation in the area, particularly in the areas of the vagina. Dr Matarazzo started to treat Mrs Bryan on 17 November 1998.

[266] Under cross examination Dr Matarazzo agreed that when he referred to her previous surgery, he included the spinal fusion in 1972 as a factor, but not the primary factor. Dr Matarazzo agreed that he observed signs of Mrs Bryan's pelvic condition but most of his opinion was based upon her subjective complaints. Under cross examination Dr Matarazzo was referred to the progress notes D12-2. The note for 28 June 1994 reads "no fracture referred physiotherapy for right hip exercises". Under cross examination Dr Matarazzo disagreed with the proposition that he would accept the opinion of specialists in the field of neurosurgery if their opinion of Mrs Bryan's condition varied from his.

[267] Dr Matarazzo was cross examined concerning his interpretation of a report prepared by Dr Cherry dated 26 November 2001 (Exhibit P25). Dr Cherry was the doctor who attended Mrs Bryan at the Pain Management Unit in South Australia. It is Dr Matarazzo's evidence that he had inferred from the report, and Mrs Bryan's statement to him, that the epidural block was not delivered exactly where it was initially intended. He stated the difference could be a millimetre or two. The chest symptoms described by Mrs Bryan following the procedure with Dr Cherry, suggested to Dr Matarazzo that the drug had radiated further up into the thoracic area and this was corroborated

by the X-ray evidence. Dr Matarazzo said he did not check these concerns with Dr Cherry.

[268] Dr Matarazzo was cross examined on a letter he had forwarded to Dr Cherry dated 12 July 2001 (Exhibit D26). This letter is a referral to Dr Cherry and stated that Mrs Bryan has quite a terrible back pain in spite of the medication prescribed for her. All avenues of surgical or physical treatment had been exhausted and they were reconciled to essentially managing the pain. He also referred to the unwanted side effects of MS Contin but that without it her pain was unbearable. Dr Matarazzo then set out her history as follows:

“She had a spinal fusion (L5S1) with quite good results until 1994 when she was struck in the lower back by a large ram, causing disruption of the fusion. Dr. Orso Osti performed another L5S1 fusion operation in 1995 and then a removal of screws in Oct 1997. Since the injury with the ram, her life has been a total misery. Dr. Geoff Thompson has commented that he recalls her being a ‘vibrant, energetic and ambitious woman’ but who is now virtually crippled by pain, physical incapacity and medication side-effects. Following her second surgery, she developed lots of scarring in the spinal canal area (shown on MRI) and has gradually developed neural symptoms (presumably from entrapment) with diminished rectal, vaginal and lower urinary sensation. These, I believe, are further exacerbated by her morphine. She now has to manually evacuate, has no control of flatus and occasionally needs to self-catheterise her bladder. Medication has not been helpful. Needless to say, she hides indoors most of the time.

Although there are ongoing legal proceedings regarding the accident (while self-employed), those of us who know her, do **not** believe they play any significant role in her symptoms.

I enclose some recent letters that may contain useful information, but I refer you to the second paragraph in Dr. Thompson’s letter, which says in part: ‘Dave Cherry’s clinic would be the most appropriate for her regarding the management of her pain’.”

[269] Dr Matarazzo states that the doses of pain-killing drugs that Mrs Bryan was receiving were very high comparable to the doses given to persons with terminal cancer. He believed her bowel and bladder problems were side effects of these drugs.

[270] (tp 551) Dr Matarazzo gave evidence that Mrs Bryan had reported to him that after the spinal block was inserted by Dr Cherry, she had a massive headache for a few minutes after the procedure. Overall she felt some improvement after the procedure. Dr Matarazzo thought it uncommon to get a headache from a true epidural injection. On 13 January 2002, Mrs Bryan presented with upper respiratory infection with infective exacerbation of asthma. He explained the basis for his opinion that the nature of the treatment and her resistance to ordinary infection caused her chest infection. When asked if he was concerned that the view he expressed, being the delivery method by Dr Cherry was wrong, differed from the thesis of Dr Cherry, Dr Matarazzo stated he was not concerned about this. He pointed out that he had the advantage of seeing the patient on several occasions, eliciting a history and collating a large body of evidence. Whereas Dr Cherry had only seen Mrs Bryan for a small amount of time. Dr Matarazzo stated he was trying to reduce Mrs Bryan's need for strong pain-killers. He agreed with his patient that high doses of morphine were having deleterious effects upon her, such as bowel function, mentation, motivation and numerous other things. He applauded her wish to reduce the amount of narcotics she was receiving. It is Dr Matarazzo's evidence that

he has seen Mrs Bryan on many occasions. He has had quite prolonged consultations on each occasion because she had so many facets to her story. Dr Matarazzo stated he personally had always been impressed that there has been no major incongruence between Mrs Bryan's symptoms as she presents and the objective evidence he could see before him (tp 555).

**d) Evidence of Mr Orso Osti:**

[271] (tp 1083) Mr Osti is a qualified medical practitioner. He is an Orthopaedic Surgeon. His practice is confined to orthopaedic surgery. Mr Osti prepared a statement annexing a number of reports relating to Mrs Bryan (Exhibit P45).

[272] Mr Osti prepared a report dated 8 February 1996. Mr Osti examined Mrs Bryan initially on 5 January 1995 and subsequently reviewed her on six occasions. Mrs Bryan gave Mr Osti a history of disabling low back pain radiating to both legs which she related to an injury at work on 17 June 1994. On that date she had been attacked by a ram while attending to some sheep. She had been hit with a severe blow to her lower back. She was immediately aware of disabling pain radiating to both buttocks, the right groin and the right leg, down to the foot.

[273] Mr Osti then made reference to Mrs Bryan's subsequent treatment prior to being referred to him. Mr Osti performed operations on the plaintiff's back. The first operation was on 9 March 1995. Mrs Bryan continued to suffer disabling pain. A second operation was carried out by Mr Osti on

28 September 1995. This operation was supplementation of the fusion at L5/S1 with autologous bone graft posterior laterally to enhance the healing process. The second operation resulted in almost immediate improvement of her post operative symptoms. Mrs Bryan reported that six weeks after the operation, whilst bending forward she had experienced a tearing sensation in the back with sudden exacerbation of her pre-existing back pain with irradiation to the right leg. Mr Osti arranged for her to be admitted to Calvary Hospital in Adelaide on 26 January 1996. As at 3 February 1996, Mrs Bryan appeared to have made satisfactory improvement with rest and analgesia. Mr Osti then reviewed her past medical history as told to him by Mrs Bryan. He recorded his clinical findings, other tests and his surgical findings.

[274] Under the heading *Assessment* in his report dated 8 February 1996, Mr Osti stated as follows:

“Mrs Bryan’s spinal condition is in keeping with a Grade 2 L5-S1 isthmic spondylolisthesis with marked degeneration of the L5-S1 intervertebral disc and ongoing involvement of the right L5 nerve root.

Mrs Bryan’s condition should be considered developmental and degenerative and therefore not due to a single specific injury or accident.

Based on Mrs Bryan’s history however and significant aggravation following the attack by a ram on 17<sup>th</sup> June 1994 the latter should be considered an aggravating incident and responsible for the triggering and exacerbation of her pre-existing condition with ongoing related disability.

[275] Mr Osti provided further reports dated 26 September 1996 and 9 September 1997 in which he details Mrs Bryan's continuing problems with low back pain radiating to the right groin. In his report dated 25 September 2003, Mr Osti described the surgical implantation of an epidural cord stimulator on 19 August 2003. This surgery had involved a thoracic laminotomy at the T9-10 level to allow positioning of the electronic implant over the dorsal aspect of the thoracic spinal cord at the T8-9 level. The purpose of this implant was to reduce the intensity of Mrs Bryan's low back pain and leg pain.

[276] A final report was dated 24 February 2004. In this report Mr Osti referred to the spinal surgery performed on 9 March 1995 and 28 September 1995. He stated that:

“In summary, at the time of the initial operation, significant scarring, inflammation and flattening of the right L5 nerve root was observed which was related to foraminal stenosis compounded by previous surgery and ongoing displacement of the L5 vertebra.”

[277] In his evidence under cross examination, Mr Osti stated that Mrs Bryan was referred to him because of her complaints of her disabling back pain.

Mr Osti gave evidence Mrs Bryan had a long standing problem with her L5 nerve roots on both sides. She had narrowing of the L5 nerve root foramen bilaterally. The purpose of the initial surgery was to address the narrowing of the L5 nerve root canal and stabilise the L5/S1 segment. Mr Osti agreed that at no stage did he diagnose Mrs Bryan as having a fracture of her pre-existing fusion at the L5/S1 level. The first operation did not result in any

significant improvement of her symptoms. She continued to complain of invasive pain. Mr Osti agreed that at the first operation he performed on Mrs Bryan he had noted significant scarring and flattening of the L5 nerve root, there was extensive scarring related to previous surgery. Mr Osti had also noted the L5/S1 disk was highly scarred due to the 1972 fusion.

[278] Mr Osti gave evidence he performed a third procedure in October 1997 which was to remove the instruments that had been used in the initial operation. This was for the purpose of stabilising the L5/S1 joint. This procedure was carried out because Mrs Bryan continued to complain of pain. He agreed he had assessed Mrs Bryan in January 1995 as having pain caused by or related to the grade 2 spondylolisthesis. He performed surgery to try and address this. Mrs Bryan continued to suffer pain and in late 1995 Mr Osti carried out supplementary surgery. The third operation was in October 1997 to address the pain related to her grade 2 spondylolisthesis.

[279] Mr Osti stated that the main reason to attribute Mrs Bryan's disability, at least in part to the aggravating effect of the attack of the ram, was not simply her description of the attack but her history, which is subjective of symptoms being significantly worse after the ram attack. Her symptoms were moderate to mild and intermittent prior to the attack, becoming constant and elated after the attack. Her pain after the attack was more severe and constant.

[280] Mr Osti stated he could not identify any evidence of the ram attack having caused a fracture or nerve damage or bleeding or other obvious structural abnormalities. There was no objective evidence of significant structural change in her lumbosacral spine. Mr Osti agreed it all comes back to Mrs Bryan's subjective complaints of pain.

[281] It is Mr Osti's evidence Mrs Bryan had a pre-existing developmental and degenerative condition of her spine. She was always susceptible to the onset of low back pain for example after a long car journey, heavy lifting, prolonged forward bending or prolonged overhead work. There was no evidence of specific traumatic injury that could be attributed to an attack by a ram. Mr Osti referred Mrs Bryan to a neurosurgeon to perform nerve conduction studies. The nerves he examined were at the L5/S1 level. Dr Fewings reported that the study was normal, there were no neurophysiologic abnormalities to suggest peripheral disc function of the nerves examined. There was no objective evidence that the nerves in Mrs Bryan's spine were damaged by the ram incident, whether by compression or tearing or any other way. Mr Osti agreed the only evidence that exists is her subjective complaints of pain.

[282] Mr Osti said Mrs Bryan had stated that since the aggravation of her pain she had found it difficult to control her bladder. Mrs Bryan had also described to him a weakness in both legs after the tearing incident which had occurred in November 1995 and complained about problems with lack of control of her bladder. Mr Osti agreed that he had accepted Mrs Bryan's complaint

following this incident although they could not be confirmed by any objective evidence. It is Mr Osti's evidence that use of narcotics, as had been prescribed for Mrs Bryan, can be a complicating factor in relation to bladder problems.

[283] In re-examination Mr Osti described the signs he did find when he examined Mrs Bryan on 5 January 1995, being no extension of the lumbar spine possible, and abnormal feeling in the L5 nerve root distribution in her leg. The significance of these signs was that Mrs Bryan had evident pain due to her lumbosacral condition or spondylolisthesis and that pain was upsetting some nerve dysfunction. The nerve was not functioning normally in the L5 distribution. The findings made in her medical records D-12 on 17 June 1994 and 27 June 1994, are consistent with Mrs Bryan having suffered from an acute exacerbation of low back pain as a result of the ram attack.

[284] It is Mr Osti's evidence that as a matter of common sense, if Mrs Bryan were able to engage in heavy and repetitive tasks with no symptoms and did that for a number of years, then this meant she had no significant disability. This was so despite the fact that she had an established condition of lumbosacral spondylolisthesis which would be expected to have caused intermittent ongoing symptoms. Intermittent meaning three or four times a year where she may not be able to perform repetitive physical tasks for a week or two.

[285] Mr Osti gave this explanation for Mrs Bryan's deterioration (tp 1108):

“... was that what the ram attack caused was significant inflammation of the nerve, not tearing of the nerve as such, not extrinsic damage or increased pressure on the nerve as such, but inflammation of the – obviously due to the fact that the nerve was surrounded by scar tissue and was in an environment where there was no space or, if you like, extensive movement, and therefore, had Mrs Bryan been subject to any sudden movement of the lumbosacral spine that may have led to the nerve becoming acutely inflamed, and that has to increase disability.”

[286] Mr Osti gave evidence concerning the effect of narcotics on the bladder and bowel. He further stated that based on the history given to him by Mrs Bryan that since the ram attack her condition has deteriorated and that despite very expensive treatment involving a number of operations, she has not returned to her pre ram attack state.

[287] Mr Osti stated he had difficulty reconciling his opinions with Dr Fewings’ findings. In attempting this reconciliation he said that because of the scarring and the narrowing of the bony environment for the nerve being the foramen and also the bulging disc recalcifications linked to her condition and the surgery, that her nerves are extremely sensitive to inflammation and therefore intermittent deterioration which may not be permanent but temporary.

[288] Mr Osti stated that his opinion remains that Mrs Bryan’s principal source of symptoms were the lumbosacral segment and the relevant or related neural dysfunction due to scarring of the nerve.

[289] Mr Osti summarised Mrs Bryan’s problem as follows (tp 1122):

“... I don't find it too difficult to reconcile Mrs Bryan's history, although obviously it is based on her credibility as a historian and the, if you like, a chronological order of it, but I believe that the ram attack may have led to some significant deterioration of function of this particular nerve as a result of the nerve becoming stretched, and that the operation did not address that, despite technically being carried out, if you like, without any complications, and allowing that nerve to be, if you like, freer of any external pressure. But that infrequency – anomaly of the nerve due to stretching of scar tissue was not addressed and was not, if you like, cured by surgery. ...”

[290] Mr Osti described the external stimulator which had been implanted, this had reduced Mrs Bryan's pain levels and she experienced improvement of her symptoms.

**e) Evidence of Dr Pohl:**

[291] (tp 509) Dr Pohl is a legally qualified medical practitioner. His practice is confined to orthopaedic surgery. A statement was prepared by Dr Pohl dated 8 October 2003 attaching medical report dated 4 October 2001 (Exhibit P22).

[292] Dr Pohl indicated that he had obtained a complete history from Mrs Bryan as to her injury. He thought it was relevant that immediately after the accident she was on the ground struggling to move and incontinent of urine. He also stated that he had read other medical reports. Under cross examination Dr Pohl agreed that Mrs Bryan had not told him that about one month after the fusion operation in 1972 she was admitted to hospital with low back pain. Nor did she advise him of an admission to hospital in 1973 and 1974, twice in 1978 once in 1988 and in 1990 with low back pain. Dr Pohl stated

that it would be uncommon not to have back pain after a spinal fusion. He noted that in the four years prior to the attack from the ram, that is from 1990 onwards, she was fine and during this time had been working. Dr Pohl stated he made his report without reference to X-rays, CT scans or MRI scans. Dr Pohl stated he had read a report from Dr Thompson dated 24 October 1995, containing a provisional diagnosis that Mrs Bryan had fractured her earlier spinal fusion as the result of a head-butt by a ram in June 1994. Dr Pohl had this provisional diagnosis in mind when he stated his opinion on p 9 of his report “that it appeared she had suffered a refracture of her fusion as a result of the head-butt by a ram in June 1994”. Dr Pohl stated the significant matters he relied upon was the statement by Mrs Bryan that she felt and heard a crack and that her symptoms were immediate, severe and continuous (tp 513) from the time of the incident. Dr Pohl agreed that the afternoon prior to giving evidence on 12 November 2003, he had examined certain X-rays, CT scans and the report of a MRI scan taken in 1994. Two reports prepared by Dr W.A. Pye were tendered as Exhibit D23. The report says there is a spondylolisthesis, this is forwards of L5/S1 of grade 1 to 2 degree, and there is marked stepping of the canal in association with this. There is evidence of a protruding disc posteriorly at this level, mainly to the right of the midline. There appears to be significant extension of the disc bulge into the L5-S1 neural foramen on the right side. The conclusion in the report was spondylolisthesis at L5 on S1 with a disc protrusion at this level mainly to the right of the midline and apparently

compressing the right L5 nerve root in the neural foramen. It therefore seems likely that the combination of long standing spondylolisthesis L5 on S1 with the operative treatment account for most of the abnormalities visible in the right neural foramen (tp 519). Dr Pohl agreed that the report recorded what was shown on the X-rays, CT scans and MRI scans. Dr Pohl stated that the significance of looking at pre-accident X-rays and CT scans and comparing with post-accident X-rays and CT scans, was to see if there was anything that could explain what had occurred. Dr Pohl stated in re-examination that he did not attach any, or only little significance, to the hospital admissions Mrs Bryan had for low back pain between 1972 and 1990. He repeated that he would expect, following a fusion such as she had, most patients would have a low degree of back pain.

[293] In his report dated 4 April 2000 (Exhibit P22), Dr Pohl referred to the extensive treatment including operative treatment that Mrs Bryan had undergone. Under the heading *Summary* on p 9 of his report Dr Pohl states:

“Ultimately Mrs Bryan was left with the current residual symptoms of chronic lower back pain, bilateral leg pain, worse on the right than the left, right leg weakness, sensory changes, bladder problems, bowel problems, fatigue and depression, as detailed above. Consequently she reported restrictions to her work, recreational activities, activities of daily living, in her sleeping pattern and emotionally as documented above. On examination she demonstrated marked paravertebral muscle spasm with a minimal range of back motion, limited straight leg raising, particularly on the right and right L4, L5 and S1 myotomal tenderness, consistent with right-sided nerve root compression, tension and irritation.”

[294] Dr Pohl went on to state that it appeared Mrs Bryan had suffered an L5/S1 spondylolisthesis that had been successfully treated by lumbosacral fusion in 1972. She had resumed an active lifestyle. Mrs Bryan had suffered a refracture of lumbar fusion performed in 1972. From the report received from Dr Thompson he thought he noted that despite the surgery performed by Mr Osti on the 9 March 1995, Mrs Bryan suffered a post operative deterioration of her right leg pain. He considered it unlikely that her condition would improve. In this report, Dr Pohl states he believes that her current condition is fully the result of the subject accident at work when she was head-butted by a ram. Her condition had stabilised. It currently reflects something in the order of 35 per cent whole body permanent physical impairment and loss of physical function secondary to her restricted back motion, and 30 per cent whole body permanent physical impairment and loss of physical function secondary to her neurological involvement. This assessment did not include factors such as pain, suffering and the socio-economic effect of the injury upon her life as well as other non-medical factors to be considered when making an assessment of disability. Dr Pohl found that Mrs Bryan had clinical evidence of right sided nerve root involvement and radiological evidence of epidural fibrosis extending into the L5/S1 intervertebral forming more prevalent on the right side. This is shown on the MRI scan of October 1995. Dr Pohl stated in his report that on his examination he had noted surgical scarring over the lumbar spine.

**(f) Evidence of Dr Peter Reilly:**

[295] Dr Reilly is a legally qualified medical practitioner. He confines his practice to neurosurgery. He carries on the practice from the Neurosurgery Department at the Royal Adelaide Hospital in Northern Terrace Adelaide. Dr Reilly prepared a statement including a report dated 6 May 2002 (Exhibit P46).

[296] Dr Reilly took a detailed history from Mrs Bryan as to how the accident occurred. He had the benefit of a number of other reports. He carried out an examination of Mrs Bryan. He noted she had a lumbar lordosis and a lumbar tilt to the left. There was minimal lumbar spinal movement, apparent weakness of right ankle movement of a “giveaway” pattern which Dr Reilly said was not the usual pattern of weakness associated with neurological injury, slight diminution of pin prick sensation over the medial thigh and perianal region, rectal sensation and tone may have been slightly reduced. He found there is no muscle wasting or other neurological deficit in the legs. There was abnormal signal around the origin of the right S1 nerve root consistent with scar tissue. Apart from this there did not appear to be evidence of nerve root compression. Dr Reilly agreed he could find no objective evidence of pain from the incident on 17 June 1994.

[297] Dr Reilly stated in summary as follows:

“... On 17/6/94 while bent forward and somewhat to the right, she was struck from behind by a ram and thrown forward. She was aware of immediate severe pain in the back and legs and spontaneously

urinated. Since that time she has suffered severe back, groin and leg pains. She has suffered urinary incontinence, some difficulty with bowel function perhaps due or accentuated by the constipating effects of analgesic medication. In other reports I note a description of sexual dysfunction due to loss of sensation. She has undergone several operations to ensure a solid and stable fusion at L5/S1. Although Mrs Bryan told me that she understood that the previous fusion had been fractured, I see no reference to a fracture in Dr (sic) Osti's various reports. Following the operations there appears not to have been a significant improvement in her condition and she has required extensive pain management. She continues to take substantial analgesia. Concurrent with the pain there has been a complaint of bladder dysfunction and loss of genital sensation. The impression from the medical reports is that these problems have worsened. She has undergone a pelvic floor repair and appears to be continent except if the bladder is over full or if she has to strain. Her medical reports which include urological examinations describe varying states of sensory loss and various interpretations of the loss of power in the right foot. I did not find any previous record of an examination of anal tone and sensation. Nor did I find any record of examination and sensation in the sacral region.

It appears clear that up until the time of the event of 14/6/94 that she was actively engaged in work and did not suffer any significant back pain. Since this incident she has been disabled by pain despite several spinal operations and intensive medical management of the pain.

Therefore it seems clear that her present symptoms date from that event and that she is currently disabled by the pain. However the mechanism for continued disability is not clear. It is reasonable to accept that a sudden and severe blow to the lower back with a pre-existing fused spondylolisthesis might lead to severe pain however it is not clear why the pain should persist given that she has a stable fusion and no evidence of neural compression on numerous xrays. There may well be peri-neural scarring but this appears to be quite localised.

It is also not clear why this particular injury should have resulted in bladder dysfunction and loss of genital sensation. There is no evidence of neural compression of a degree or type likely to cause such neurological loss. On the other hand I had the impression that sphincter tone was reduced and that perianal sensation was partially impaired. There appeared on my examination to be some evidence of non-organic weakness in the right foot. I note that this was also the impression gained by Mr Brian North at the time of his examination and that Mr Osti reported a non dermatomal sensory loss.

It seems probable that her present condition is the result of a combination of physical injury and psychological factors which stem from the event of 14/6/94. Given the duration of her present state I consider it unlikely that there will be significant improvement. In other words she is likely to continue to require medical management for pain and psychological support. She will most likely continue to need the level of assistance which she currently receives. ...”

[298] Under cross examination Dr Reilly agreed that there is no evidence of neural compression of a type in the spine that would explain her bowel bladder dysfunction. Dr Reilly agreed that because she complained about pain in her lower back being continuous, severe and immediate from the time of the ram attack he related the pain to that incident. He could not locate any evidence to give an explanation for the pain. The foundation of his opinion is the accuracy of the history given to him by Mrs Bryan.

[299] Dr Reilly agreed that if Mrs Bryan had complained about incontinence prior to the ram attack or not until months after the ram attack then that would make it less likely that the ram attack was the cause of her bladder problems.

[300] On re-examination Dr Reilly stated he could not see any obvious signs of leg inequality when he examined Mrs Bryan.

[301] I am satisfied on the evidence of Dr Reilly and Dr Thompson that there is no significant difference in Mrs Bryan’s leg lengths. I do not accept that it was the difference in length between her two legs that was the cause of any of her problems.

**(g) Evidence of Dr David Cherry:**

[302] (tp 1025) Dr Cherry is a medical practitioner. He is the Director of the Pain Management Unit at the Flinders Medical Centre in South Australia.

Reports prepared by Dr Cherry and supporting documents were tendered and marked Exhibit D42.

[303] Dr Cherry performed an epidural block on Mrs Bryan on 23 November 2001. He stated that when he performed the epidural block there was no loss of cerebrospinal fluid and therefore he did not puncture the dura.

[304] Dr Cherry explained that the term in his report “not be entirely related to opioids” means he would not be persuaded to put a long term opioid pump into this woman as a result of her response to this procedure.

[305] It is Dr Cherry’s evidence that although Mrs Bryan does have spinal pathology it was considered she would be better managed with a psychological or cognitive behavioural therapy approach.

[306] Dr Cherry agreed in cross examination that it would be extremely rare for someone who had been complaining of significant physical pain for seven years not to have a significant psychological contribution.

[307] Dr Cherry was cross examined at some length as to the procedure he had adopted to administer the epidural block. He did not agree that Mrs Bryan suffered an undue amount of pain at the time of the procedure.

[308] Dr Cherry described the various tests he undertook with respect to the Waddell signs and the inferences to be drawn from these tests.

[309] In re-examination Dr Cherry stated that Mrs Bryan's bladder problems may be related to being struck by the ram or subsequent surgery. He noted that in her report dated 5 February 2003, Dr Samantha Pillay, who is a urologist, had listed possible other causes. He thought it more likely than not that Mrs Bryan's symptoms are related to some form of pathology within the spinal canal. He said Mrs Bryan may have had stressing problems prior to the accident and subsequent surgery, however, he still considered her urine incontinence was more likely the result of the accident or subsequent surgery.

**(h) Evidence of Dr Brian North:**

[310] Dr North is a duly qualified medical practitioner practising as a neurosurgeon at the North Adelaide Medical Centre. Dr North prepared a statement and a number of reports including additional reports dated 24 March 2004, 17 March 2004, 17 September 2003, 10 September 2003 and 21 December 1994, which were tendered Exhibit D69.

[311] In his report dated 27 February 2001, Dr North gave a history of how the ram attack in June 1994 had been told to him. He referred to seeing plain films, a CT scan and an MR scan which had been performed between August and October 1994. In the report Dr North stated these investigations showed a slip of L5 on S1 but there was no clear evidence of nerve root compression

by a disc. He has advised her treating doctor, Dr Thompson, that surgical treatment was inappropriate. Dr North then listed the complaints that Mrs Bryan complained of when he saw her on 26 February 2001. These complaints included low back pain, right leg pain, some left leg pain, right leg weakness, internal numbness of the bowel and bladder, difficulty with control of bowel and bladder. Dr North reviewed the operations and his findings on physical examination. He noted on p 3 of the report that he saw a large number of X-rays which included plain films showing a slip of L5 on S1. He noted that there had been a pedicle screw fusion at the lumbosacral level and later films showed a solid fusion with removal of the metallic implants. He stated that an “MR scan dated 23<sup>rd</sup> June, 2000, showed no nerve root compression or reason for the lower limb pain.” Dr North stated under the heading *Opinion*:

“This 54 year old animal attendant complains of unremitting back pain together with giving way of the right leg and pain in the lower limbs which she attributes to an accident in 1994 when a ram struck her forcibly and threw her to the ground. She has been surgically treated by a lumbar fusion at the lumbosacral level.

Her current presentation shows some back stiffness but there are discrepancies on physical examination which make it difficult to obtain a clear indication of her level of disability. There is no objective evidence of weakness and the bladder and bowel symptoms do not have a spinal cause in my opinion. It is difficult to explain her ongoing symptoms in the presence of a solid posterolateral fusion at the lumbosacral level and no evidence of nerve root compression on detailed imaging. I remain of the opinion that her management should be conservative.”

[312] A copy of Dr North’s letter to Dr Thompson dated 21 December 1994 is also included in Exhibit D69. In this report, Dr North had stated that the CT and

MR scans confirmed a significant slip of L5 on S1. He expressed a doubt as to whether a compressive lesion was present. Dr North stated that at that time it was difficult to make a precise diagnosis. He noted she did not have muscle weakness but accepted that the injury may have stretched the L5/S1 nerve roots. He advised against surgical treatment.

[313] In his report dated 10 September 2003, Dr North noted the wisdom of his opinions expressed in December 1994, that Mrs Bryan be treated conservatively and without surgical intervention. He noted that on his reading of the medical reports supplied to him, the medical opinions had focused on the subjective complaints of pain and either downplayed or ignored the nonorganic signs and discrepancies on examination. Dr North considered there was a marked discrepancy between the level of subjective complaints and the objective abnormalities on examination. He concluded that there was clearly a significant degree of embellishment. He stated that in physical terms, her level of disabilities is in the mild to moderate range and that in physical terms she was likely to have a capacity to obtain employment and not need any significant level of medical intervention in the future.

[314] In his report dated 17 September 2003, Dr North answered a query as to any causal link between Mrs Bryan's bladder, bowel and vaginal problems. He referred to a number of other medical reports. He noted the report from Dr Reilly which he interpreted as meaning Dr Reilly's opinion is that he did not identify a neurogenic bladder and that he has difficulty explaining her

bladder, bowel and vaginal symptoms. Dr North agreed with Dr Reilly's assessment that there was no objective evidence that Mrs Bryan had a neurological loss which would result in a neurogenic bladder.

[315] In his report dated 17 March 2004, Dr North stated that the X-rays and scans of Mrs Bryan do not show any change attributable to an incident which occurred on 17 June 1994. He concluded there was no change in Mrs Bryan's spine from prior to the incident which occurred on 17 June 1994 to post incident.

[316] In his final report dated 24 March 2004, Dr North stated that if there were a fracture of the previous fusion, this could only be seen on X-rays. The second most useful investigation would be a CT scan of the lumbar spine.

[317] Under cross examination (tp 1585), Dr North expressed the opinion that when he wrote his report dated 21 December 1994 to Dr Thompson, that Mrs Bryan's presentation was one of embellishment, that the overall picture suggested surgical treatment was quite inappropriate and that she would have a bad result if she did have an operation.

[318] Dr North stated that other things that could have occurred as a consequence of the ram attack was that she could have stretched her muscles or sustained a soft tissue injury. He agreed that was the probable diagnosis. He confirmed that it was difficult to make a precise diagnosis. He agreed he had accepted one of the differential diagnosis was stretched nerve roots. He

did think surgery was not the thing to do. He had noted Mrs Bryan's complaint of chronic pain.

[319] Dr North was cross examined at some length as to the physical examination he carried out and the tests he performed. Dr North said he accepted Mrs Bryan had some back stiffness. Dr North did not agree that paravertebral spasm was an objective clinical sign and that was why he had not made a note of it because he did not regard it as a useful sign. He stated that Dr Pohl had no basis for saying that his findings were consistent with right-sided nerve compression, tension and irritation. Dr North stated he found no muscle wasting. He further stated if there was muscle wasting that would be a sign of interference with nerve supply. In his notes, Dr North had made a note of a nonorganic sensory loss involving the right lower limb which meant a lack of feeling in a distribution that cannot be explained by anatomy. Dr North said he did not doubt that Mrs Bryan had some level of disability. He said he could not find any physical explanation that would explain Mrs Bryan's marked drop in her level of capacity to perform strenuous physical functions after the accident with the ram. Dr North was not aware of many of the previous physical activities Mrs Bryan had undertaken, including gardening and her association with horses. He could not find any evidence of the nerves being impinged. Dr North agreed he was critical of Mr Osti for performing the operations upon Mrs Bryan and considered there was no basis for these surgical operations. He was critical in particular of the first operation. He stated that subjective responses

cannot be used to say that an operation should or should not have been done (tp 1619).

[320] Dr North was also cross examined extensively about the use of the Waddell signs in clinical examinations. He stated he always administered the range of Waddell tests. Dr North was taken to Dr Waddell's first article published in 1979 in which he listed the standard groups of five types of physical signs and how to administer the tests. Dr North agreed that in his experience all patients with pain show some emotional and behavioural reaction.

[321] Mr Meldrum QC cross examined Dr North on body charts from Dr North's clinical examination of Mrs Bryan. This was subsequently tendered as Exhibit P70. Dr North described the tests he carried out including the tests for Waddell signs. Dr North agreed that there was no indication in his notes he had done the deep palpitation test for tenderness in the lumbar region. He stated he could not, after 10 years, remember if he had done this test. He agreed that if he only tested for superficial tenderness that would be for the sole purpose of establishing whether there was a Waddell sign. He had noted there was no evidence of a disc protrusion or disc prolapse. Dr North had written "basically story is unimpressive" which he stated meant was in terms of what Mrs Bryan had been referred to him for, which was surgical treatment. Dr North gave evidence that his note "physical signs unimpressive Waddell" means there were discrepancies on examination. Dr North agreed these notes were made before Dr Waddell updated his article in 1998. He agreed Mrs Bryan came into the category of persons who

had chronic pain for 10 years and a history of failed treatment. Dr North stated it is possible that Mrs Bryan stretched her nerve in the first accident but stated the treatment for that is not surgical. He confined his opinion to any nerve injury suffered in the ram attack as a stretching of nerves. He agreed that in an unexpected ram attack there is a possibility you move in three directions, rotation, flexion and extension. He agreed it was possible there could be a stretching of the nerves arising in at least three planes of movement. He would have expected that six months later when he saw her, Mrs Bryan would have settled from such injury. He had difficulty reaching a diagnosis at that time, as he does now. He agreed he was puzzled about her condition although confident in his assessment that she should not have operative treatment. Dr North agreed, that to use the Waddell signs as an indication of conscious exaggeration, was going outside their proper use. He agreed he would be slow to operate on a patient unless he had the clearest of signs in the MRI scan of a problem.

[322] Dr North said he did remember that in 1994 he had arrived at a number of differential diagnosis for Mrs Bryan's back problems, one of these was soft tissue strain. Dr North could not remember his other differential diagnosis. Dr North assessed it as a low to medium possibility Mrs Bryan could have strained the facet joint. Dr North had not written any of these diagnosis into his notes made at the time. Dr North agreed the lowest in probability was his diagnosis that there had been a stretch of an L5/S1 nerve, the next up would be disruption to the facet joint and the highest probability would be

muscle damage. Dr North said he did not write this in a report to Dr Thompson because it does not influence treatment. Dr North stated the real issue for him was, should he as a surgeon recommend surgical treatment. Dr North maintained that his report to Dr Thompson was a good one even though it only mentioned the least likely of his three provisional diagnosis. Dr North's notes were tendered Exhibit P74. The two articles by Dr Waddell were Exhibit P75.

[323] Under re-examination, Dr North said he would have expected the symptoms of nerve stretching to last a few months and gradually resolve. He came to the same conclusion with respect to his other two diagnosis, the back pain could be severe initially but would gradually resolve. In conclusion in re-examination, Dr North considered there was a marked discrepancy between Mrs Bryan's level of subjective complaints and the objective abnormalities on examination. He did not advise any significant level of medical intervention in the future.

### **Findings Based on the Medical Evidence:**

[324] On his own evidence, Dr North was primarily concerned with whether or not he should recommend surgical treatment. Mrs Bryan had been referred to him by her treating doctor, Dr Thompson. Dr North concluded that Mrs Bryan should be treated conservatively and there should be no surgical intervention. This was Dr North's assessment when he examined Mrs Bryan in December 1994. Ironically it would seem his advice as to no surgical

treatment may have been good advice. Mrs Bryan subsequently had two further operations to her lower spine. This has involved long periods of hospitalisation, a great deal of discomfort and distress and no significant improvement in her condition.

[325] The difficulty I have in accepting Dr North's evidence, in preference to the evidence of Dr Thompson, Dr Matarazzo, Mr Osti and Dr Pohl, is firstly that Dr North appears to have dismissed rather too quickly the effects of the ram attack. In his notes on 12 December 1994, Dr North stated "Basically story is unimpressive and physical signs as in précis-Waddell". He then added "I doubt whether there is a medical solution to this problem".

[326] This dismissal of Mrs Bryan's account of the ram attack and the reliance on the Waddell signs by Dr North, raise in my mind a concern as to his findings.

[327] At the time of the examination on 20 December 1994, Dr North was applying the examination techniques discussed by Dr Waddell and his co-authors in article titled "Nonorganic Physical Signs in Low-Back Pain" published in 1979. In this article a group of non-organic physical signs in low back pain are described and standardised.

[328] In a subsequent article published in 1998 titled "Spine Update - Behavioural Responses to Examination - A Reappraisal of the Interpretation of 'Nonorganic Signs'" the authors Dr Chris Main and Dr Gordon Waddell refer back to the earlier article and state inter alia:

“Despite clear caveats about the interpretation of the signs, they have been misinterpreted and misused both in clinical contexts and in medicolegal assessment. The purpose of this article is to offer a reconsideration of their use and interpretation.”

[329] The article goes on to explain this statement and then comes to a number of conclusions and recommendations which state as follows:

- “1) The term ‘pain behavior’ can be used to describe a number of aspects of the patient’s response to pain, but ‘behavioral signs’ should be used only to describe specifically how the patient responds to examination.
- 2) The signs are therefore most accurately described as ‘behavioral responses to examination’ and should be understood as such.
- 3) The behavioral signs offer an assessment of pain behavior in response to a standardized assessment.
- 4) They are a form of communication between patient and doctor and therefore are influenced by expectations (both by the patient and the doctor).
- 5) They must be understood in the context of the patient’s history.
- 6) They offer only a psychological ‘screener,’ not a complete psychological assessment.
- 7) They are not a reason to deny appropriate physical treatment. Some patients may require both physical management of their physical pathology and more careful management of the psychosocial and behavioral aspects of their illness. The signs should be used to decide not whether to offer treatment, but the type of treatment to offer.
- 8) The behavioral signs are not on their own a test of credibility or veracity. Interpretation of the signs is only possible within the context of a broader clinical or psychosocial assessment.”

[330] I found Mrs Bryan to be a very credible witness, both as to her account of the ram attack upon her and the subsequent effect upon her life. Her treating doctors, Dr Thompson and Dr Matarazzo have come to the same conclusion.

[331] Accordingly, I do not accept Dr North's scepticism about the account given to him by Mrs Bryan. I also find that the reliance Dr North placed on the Waddell signs in December 1994, may well have been misplaced in view of the subsequent article, by Dr Waddell, already referred to.

[332] In his examination on 26 February 2001, Dr North continued with his reliance upon the positive Waddell signs. He stated in his report dated 10 September 2003 referring to the assessment on 26 February 2001:

“.. There was a persistence of positive Waddell signs and again there were discrepancies on physical examination, indicating embellishment.

...

... There is clearly a significant degree of embellishment. ...”

[333] Dr North was cross examined extensively about his use of the word “embellishment”. When it was put to him that the second Waddell article talks about incongruity rather than embellishment. Dr North replied “Well I guess we're talking in semantics here”. He continued by saying that what he meant by embellishment was that there were discrepancies on physical examination.

[334] Dr North does not proffer a firm diagnosis for Mrs Bryan's complaints of pain or what alternative treatment or management of her condition he would suggest. The thrust of his reports and his evidence is that he concluded there should be no surgical intervention. That may well have been very

good advice but is not an answer to the question of what was Mrs Bryan's condition and why were there such persistent complaints of pain.

[335] Overall I consider Dr North has been too dismissive of the account of the accident on 17 June 1994 given by Mrs Bryan. I consider Dr North has given an emphasis to the Waddell signs that cannot be justified. Finally, he was primarily concerned with whether or not to recommend surgical treatment rather than the cause of her symptoms. For these reasons I do not accept his evidence in preference to the evidence of Drs Thompson, Matarazzo, Osti and Pohl.

[336] Doctors Thompson and Matarazzo have been Mrs Bryan's treating doctors over a number of years. They have had many opportunities to observe her and her response to the various treatments prescribed. I accept the evidence given by Drs Thompson and Matarazzo .

[337] Dr Thompson had at first concluded that Mrs Bryan had suffered a refracture of her 1972 spinal fusion. He subsequently realised this was not correct and not supported by the Cat scans and MRI. It is, however, his opinion that there is clinical evidence of nerve root compression even though this is not shown on the MRI's. He described Mrs Bryan's condition variously as crushed nerve, nerve entrapment and nerve irritation. His opinion is supported by the opinion of Dr Matarazzo who described Mrs Bryan as having nerve entrapment and injury to her lower spine at the site of the injury in 1994. Mr Osti found no objective evidence of significant structural

change in her lumbosacral spine. He referred to her having a narrowing of the L5 nerve root foramen bilaterally. Mr Osti referred to Mrs Bryan's subjective symptoms being severe and constant since the attack by the ram. He agreed that everything comes back to Mrs Bryan's subjective complaints of pain as there was no evidence of specific traumatic injury. Mr Osti does support the opinions of Drs Thompson and Matarazzo to the extent that Mrs Bryan's present complaints commenced with the ram attack in June 1994. He gave evidence that her previous spinal problems would not have degenerated to the extent of her disability following the ram attack. I accept Mr Osti's opinion that Mrs Bryan may have had some back problems and possibly required traction as a consequence of her 1972 spinal fusion, but there would have been no substantial interference with her activities.

[338] Dr Pohl also stated that he did not attach any significance to Mrs Bryan's previous admissions to hospital for low back pain as it was to be expected she would have some degree of back pain. I accept the opinion of Dr Pohl that her present condition is the consequence of the accident at work when she was head-butted by the ram. Dr Reilly could find no evidence of neural compression and no evidence to explain the pain. His evidence is that because she complained about the pain in her lower back as being continuously severe since the attack on her by the ram, he related her condition to the ram incident. I accept the evidence given by Dr Reilly that he found on measurement of Mrs Bryan's legs that there was no significant difference in the length and that this was not the cause of her problem. I

note finally that Dr North did proffer as a possible diagnosis that Mrs Bryan suffered stretching of the nerves as a result of the ram incident.

[339] I find in accordance with the evidence given by Dr Thompson and Dr Matarazzo that Mrs Bryan suffered from nerve root compression, nerve entrapment or nerve irritation in her lower spine. I find that from the moment of the ram attack upon her and over the subsequent years, Mrs Bryan has suffered severe and continuous lower back pain, pain in her groin and down both legs, this has resulted in right leg weakness, fatigue and depression. The debilitating effects of this pain have only recently been alleviated to some extent with the spinal stimulator implant. I find that the intermittent times when she suffered lower back pain following the spinal fusion in 1972, may have required traction from time to time but would not have interfered with her normal activities. I find the sole cause of her present condition followed upon the attack upon her by the ram.

### **The Psychiatric and Psychological Evidence**

#### **Evidence of Dr Burvill:**

[340] Dr Burvill is a qualified medical practitioner with qualifications in psychiatry and a special interest in the areas of pain and depression. Dr Burvill prepared a report dated 7 October 1997 which was tendered and marked Exhibit P37. This report indicates Mrs Bryan was referred to Dr Burvill by Dr Leahey in May 1997 and then referred back in July 1997 regarding her pain management.

[341] Dr Burvill set out Mrs Bryan's history and then described her as presenting in May 1997 as a depressed person, suffering sleep disturbance, variable appetite, considerably depressed mood, crying in the work place, loss of sexual libido and restriction in her interests of gardening. She was taking an antidepressant Prothiaden, which caused considerable unacceptable side effects of constipation, weight gain and a dry mouth.

[342] Mrs Bryan was admitted to the Adelaide Clinic and stayed there for 2½ weeks. Changes were made to her medication regime. On discharge she had a considerably improved mood, improved general mobility and interaction and her pain levels were under control.

[343] Dr Burvill categorised Mrs Bryan as having chronic pain disorder with physical and psychological causes in that she had genuine cause for her back pain and had developed depression secondary to this. He noted she retained a positive outlook in trying to help herself, that she benefited from the admission to the Adelaide Clinic. He stated her prognosis, although one of continued limitation in physical ability in terms of lifting or sudden twisting, was favourable due to her personality and her motivation to get on with her life.

[344] Under cross examination Dr Burvill stated that in July 1997 he had the opportunity of observing Mrs Bryan over a 2½ week period. Dr Burvill was cross examined as to his knowledge of Mrs Bryan's history prior to the ram attack on 17 June 1994. Dr Burvill stated she had a spinal fusion operation

some 25 years previously. He had noted Mrs Bryan reported a very good result. He had noted some pain and soreness in 1988 but otherwise no problems till the ram attack in 1994. He did not have a history of admission to Western Community Hospital on two occasions in 1990 with severe back pain. He did not have a history of frequent admissions to Alice Springs Hospital for severe back pain subsequent to the spinal fusion. Her only mention of prior back problems was problem with pain in 1988. She did not state that she had consulted Dr Selva in February 1994 complaining of depression, insomnia and poor memory. Dr Burvill stated in cross examination that a history of depression is of less significance when there is a genuine cause for a pain condition sufficient to cause depression and the need for pain management. He stated that Mrs Bryan presenting with a recurrence of pain, after being hit in the back, is consistent with a hit in the back having disturbed the spine of a person who has had a fusion. He stated that from his reading of the later medical reports, Mrs Bryan's sense of optimism and his own optimism for a good prognosis as referred to in his report had not been borne out.

[345] Under re-examination, Dr Burvill described his observations of Mrs Bryan during the 2½ week period she was in hospital, being facial expressions, body stance, her limited ability to walk or to sit comfortably. Dr Burvill was somewhat dismissive of a diagnosis of depression in February 1994 by Dr Selva who he said is a gynaecologist.

[346] In re-examination it is Dr Burvill's evidence that it would be a rare fusion that does not have lingering potential for ongoing back pain at some stage. He was not surprised that she would have pain requiring bed rest three weeks after her spinal fusion. Mr Meldrum QC then referred to a number of re-admissions to hospital and complaints of pain in her lower back as set out in Exhibit D11.

[347] In essence Dr Burvill's answer, to all the questions put to him following a reading of her past history of back pain, was that it did not alter his diagnosis that she suffered pain secondary to being hit by a ram. Dr Burvill stated when he observed Mrs Bryan he observed her as being moderately to severely depressed.

**Evidence of Dr Michael Epstein:**

[348] Dr Epstein is a qualified psychiatrist obtaining his qualification in 1975. He prepared a statement and a report dated 13 June 2002 which is Exhibit P35. Dr Epstein records a history of Mrs Bryan and her statement to him about the ram attack and her subsequent medical treatment including surgery. He provides details of her current condition and concludes with the following on p 8-9 of his report:

**“Opinion**

Ivene Bryan suffered a severe back injury in a work incident which occurred on the 17<sup>th</sup> June 1994 which has had devastating consequences on her quality of life. She has been in pain virtually since that time. She has had a variety of treatments including

repeated surgery and other physical treatment with no real reduction in her level of symptoms.

With the passage of time she recognised that she was likely to have long-term problems with a profound loss of the quality of her life and in that context became increasingly depressed, suicidal, and began experiencing panic attacks.

All these symptoms have persisted in varying degrees. She has had psychiatric and psychological treatment but not recently. She is a strong willed person with considerable strength of character who has tried to cope with this situation but with great difficulty. Her quality of life has markedly diminished effecting her work capacity, her relationships, and her recreational enjoyment.

She now suffers from a Major Depressive Disorder arising out of chronic pain, discomfort and disability and has developed Panic Disorder with Agoraphobia. Both these conditions are as described in the Diagnostic and Statistical Manual of the American Psychiatric Association Fourth Edition.

She is unfit to return to any type of work, in part because of her physical condition and in part because of her psychiatric state.

She continues to be suffering from the effects of the injury sustained on the 17<sup>th</sup> June 1994. She will be permanently incapacitated. She would benefit from psychiatric or psychological treatment. I anticipate that such treatment should be weekly at first for four weeks and then every two weeks for three months and then monthly for six months. She may also benefit from medication for her Panic Disorder.

Her prognosis is poor and her condition is stable.”

[349] (tp 791) Under cross examination Dr Epstein agreed he had seen Mrs Bryan on only one occasion about two years ago. He was with her for an hour and a half. He prepared his report from the history Mrs Bryan gave to him and from reading numerous reports he received from various doctors she had consulted. He agreed that his opinion would be affected if the history he had been given was not accurate. Dr Epstein stated that in his clinical experience patients treated for chronic pain are vastly relieved when their

levels of pain diminish but still remain quite depressed because their quality of life remains quite limited.

[350] In re-examination Dr Epstein stated that the significance of the implant, being the pain stimulator, is that there can be a period of euphoria because of the reduction in pain. However, when a patient comes to the realisation that there is unlikely to be any further improvement and that the stimulator is essentially palliative then there is a loss of hope and depression can return although not as severe as before. It is Dr Epstein's evidence that over the years Mrs Bryan has suffered significant levels of depression. Dr Epstein stated the impression he had was that Mrs Bryan had occasional active suicidal thoughts but had pushed them away and that at times she thought life wasn't worth living.

**Mr Luciano Guglielmin:**

[351] Mr Guglielmin gave evidence he was Mrs Bryan's treating psychologist. He prepared a report dated 1 November 1999 (Exhibit P30). Mr Guglielmin is a registered psychologist in the state of South Australia. This report details the history given to him by Mrs Bryan of the ram attack and her subsequent medical treatment. Mr Guglielmin first saw Mrs Bryan in September 1996. He described her as being significantly depressed and struggling to manage the persisting pain arising from her lower back injury and grieving the loss of her previously active and healthy lifestyle. He referred to Mrs Bryan's feelings of uselessness and being extremely frustrated by her inability to

engage in activities. He described her emotional distress in describing the ram attack and that she continued to be traumatised by what had occurred.

[352] Mr Guglielmin made arrangements for Mrs Bryan to have some treatment.

The next time he saw Mrs Bryan was at the Pain Management Clinic in Adelaide in July 1997. He described her depressed and despondent demeanour. During her three weeks at the Pain Management Clinic, Mrs Bryan received intensive psychological treatment which included cognitive pain coping strategies and self hypnosis. This was given in tandem with physical and psychiatric treatment which improved her mood and enabled her to be more active.

[353] Mr Guglielmin next saw Mrs Bryan at the Western Community Hospital following surgery performed by Mr Osti on 2 November 1997 to remove the hardware from her back with a view to improving her mobility. Mrs Bryan was clearly depressed and distressed that her position at the wildlife sanctuary had come to an end. These feelings continued despite further psychological treatment.

[354] In conclusion Mr Guglielmin found that Mrs Bryan had developed reactive ongoing depression to changes in her life as a result of the injuries sustained on 17 June 1994. He referred to the pride Mrs Bryan had in her physical prowess and the enjoyment she obtained from an active and healthy lifestyle. He considered Mrs Bryan required ongoing antidepressant

medication and ongoing psychological and psychiatric assistance to manage her chronic depression.

[355] Under cross examination, Mr Guglielmin agreed that Mrs Bryan had told him she believed that in the incident in June 1994, she had cracked a lower spinal fusion that she had some 24 years previously. She had said the spinal fusion had been successful and she had led a very busy and active life. Mr Guglielmin stated he was not aware Mrs Bryan had been hospitalised in relation to her lumbar spine in 1973, 1978, 1988 and 1990. He stated he would have assumed that she may have had some back pain from time to time and required medication or treatment.

[356] Mr Guglielmin said that when Mrs Bryan told him about the attack upon her by the ram, she had said she heard a loud crack and then when she was on the ground had to fend off the ram. She had told him that she had distracted the ram. She was initially treated conservatively but had little relief. Mr Guglielmin agreed that he had assumed, based on what Mrs Bryan told him, that prior to the attack by the ram she had a healthy and active lifestyle. He did not have any history as to her life prior to the ram attack other than as stated by Mrs Bryan. He stated he found what Mrs Bryan told him at the time convincing and he had taken it at face value. Mr Guglielmin did not have any note of an incident subsequent to June 1994 when Mrs Bryan experienced a tearing sensation or back strain. Mr Guglielmin agreed that his report was now four years old and to be of further assistance he would have to assess Mrs Bryan again.

[357] In re-examination Mr Guglielmin said that he had conferred with Mrs Bryan on 40 to 50 occasions usually 50 minutes to an hour each time but occasionally longer. Mr Guglielmin said he did have access to the hospital notes and had access to what medication she was on at the time of treating her. He knew she was on strong doses of opioids by way of analgesics. He observed she was laboured in her mobility and found walking, standing and laying down difficult. She reported on the severity and debilitating aspects of her pain. She had marked difficulties in concentration and flat affect. Mr Meldrum QC took Mr Guglielmin through the history of the hospitalisation Mrs Bryan had in the years subsequent to her spinal fusion in 1972. Mr Guglielmin said the total picture of her re-admissions to hospital with lower back problems between 1972 and 1990 did not in anyway alter his diagnosis of Mrs Bryan. If there were further admissions in 1992, 1993 and 1994 for conditions unrelated to her back this did not interest him in respect of his diagnosis and prognosis. He found Mrs Bryan had severe debilitating pain and marked depression. Mr Guglielmin described the difficulties for a person such as Mrs Bryan whose personality style is to do things quickly and effectively when they have to cope with pain and disability. Mr Guglielmin stated with the implanted stimulator and the reduction in her pain levels he would have to change his prognosis and be a little bit more hopeful than he was some four years ago when he last saw her. He stated that anything that would enhance Mrs Bryan's mobility and

give her independence would benefit her psychological well being for now and in the future.

**Evidence of Dr David Kutlaca:**

[358] Dr Kutlaca is a psychiatrist. He interviewed Mrs Bryan for a little over an hour on 26 February 2001. He prepared a report dated 27 February 2001 (Exhibit D64). At the time of preparing his report dated 27 February 2001, Dr Kutlaca had received a number of medical reports from other specialists, which he has enumerated. He obtained a history from Mrs Bryan of the ram attack and her subsequent treatment. He noted her statement that up to 1998 she had been an inpatient for a total of 352 days, had attended upon a total of 45 doctors and taken a total of 44 different medications. She was currently being managed by Dr Matarazzo, Dr Thompson and Mr Osti. Dr Kutlaca summarised Mrs Bryan's present symptomology, her medical history, her family history, personal history and current functioning. Dr Kutlaca then set out a number of matters under the heading *Impression*. He stated that from the history and information provided Mrs Bryan sustained severe and enduring low back, bladder and bowel symptoms following a work related event almost seven years ago. He noted that in psychiatric terms, Mrs Bryan became depressed and that her depressive morbidity was likely maximal in 1997-8 followed by improvement. He then stated as follows (p 7):

“Mrs Bryan described impaired cognition, motivation and sleep at this evaluation, suggesting a major depressive disorder, however the stated cause was pain, she was only tearful briefly and not convincingly depressed on the basis of her mental state examination. The overall impression was of an individual presently attempting to cope at their best with an enduring, painful organic condition. ...”

[359] He stated he did not think Mrs Bryan was suffering from a diagnosable depressive disorder in relation to her post-incident organic condition.

Dr Kutlaca asked to be given the reports from Dr North and Dr Pohl and stated he needed further clinical data before concluding his psychiatric evaluation. He did not consider Mrs Bryan needed psychological or psychiatric intervention and recommended a conclusion of her prolonged compensation matter which may well represent the psychological “treatment” of choice.

[360] In his report dated 24 April 2001 (Exhibit P64), Dr Kutlaca noted he had received the report from Dr North and Dr Pohl. Dr Kutlaca stated:

“I noted very substantial discrepancies in the reports of Drs North and Pohl, so much so that it was impossible to arrive at a conclusion regarding the legitimacy and extent of Mrs Bryan’s current organic complaints. At the very least, these differences of opinion suggest that significant suspicion should be exercised before her complaints are taken at face value. By way of qualification, it requires comment that many, perhaps most litigants tend to exaggerate their complaints to an extent for the purposes of succeeding in a compensation claim, however her presentation to Dr North appeared to have been embellished to a far greater extent.”

[361] He concluded that the differences received in the opinions between Drs North and Pohl suggest even more strongly that there will be a global improvement following the resolution of her compensation matter. He said

he did not consider Mrs Bryan was suffering from a diagnosable psychiatric disorder at evaluation on 26 February 2001.

[362] In a further report dated 9 September 2003 (Exhibit P64), Dr Kutlaca concluded having read some further medical reports, that he remained of the opinion expressed in his two earlier reports.

[363] Under cross examination Dr Kutlaca agreed that he had seen Mrs Bryan on only one occasion and that was for one hour and 10 minutes. During this time he made notes of his discussions with her. He was certain he would have read the other reports he had received before he saw her.

[364] It is Dr Kutlaca's evidence that the L5/S1 fusion Mrs Bryan had meant there was potential for ongoing pain and that this was a common occurrence.

[365] It is Dr Kutlaca's evidence in cross examination that Mrs Bryan may have exaggerated her symptoms.

[366] When asked about Mrs Bryan's bladder complaints, Dr Kutlaca said that when there is no cause to fully account for the symptoms or complaints then one may legitimately consider abnormal illness behaviour.

[367] (tp 1486) Dr Kutlaca stated he did wonder about the extent of Mrs Bryan's complaints. He stated pain is a subjective experience, an individual with a depressive disorder is likely to experience pain to a greater extent than when not depressed or than other people with the same disorder and disability.

Dr Kutlaca said he did not ask Mrs Bryan what was the extent of her current

depression. Dr Kutlaca was cross examined at some length as to how much he had ascertained Mrs Bryan's level of involvement in various activities before the ram accident, as compared to her level of involvement in these activities, e.g. gardening and dancing, following the ram incident. He did not know her high level of involvement in these activities, particularly as a passionate gardener, prior to the accident. Mrs Bryan had told him about being a recluse when her depression was bad. He did not have information as to how strenuous her work was at the Wildlife Commission. Dr Kutlaca agreed he had been anxious to read the reports from Dr North and Dr Pohl because the information they provided might go to the credibility of Mrs Bryan. He agreed that he was suspicious that she had a number of doctors and a number of admissions to hospital. He said the existence of a disagreement between doctors as to the cause of Mrs Bryan's complaints aroused his suspicion as to the validity of the complaint.

[368] Dr Kutlaca agreed that in his report dated 9 September 2003, he had noted the absence of bladder pathology on urodynamic testing by Dr Miller. He agreed this was consistent with abnormal illness behaviour. Having compared the reports received from Dr Miller and Dr Pillay, it was Dr Kutlaca's evidence that Dr Pillay was uncertain as to the cause of Mrs Bryan's bladder complaint and accordingly he was entitled to the notion of abnormal illness behaviour.

[369] (tp 1539) It is Dr Kutlaca's evidence in re-examination that the matters in his report under the headings *History, Family History, Medical History* and *Current Functioning*, were all matters that came from Mrs Bryan.

[370] (tp 1541) Dr Kutlaca stated that there is no objective evidence that Mrs Bryan has an organic injury. He stated there was no medical cause for her complaints which includes psychiatric cause and that her complaints were without substance.

**Findings on the Psychiatric and Psychological Evidence:**

[371] On the whole of the evidence concerning Mrs Bryan's psychiatric and psychological conditions, I prefer the evidence of Dr Burvill, Dr Epstein and Mr Guglielmin. I do not accept the findings made by Dr Kutlaca.

[372] Dr Burvill categorised Mrs Bryan as having chronic pain disorder with physical and psychological causes in that she had genuine cause for her back pain and had developed depression secondary to this.

[373] Dr Epstein formed the opinion Mrs Bryan suffers from a major depressive disorder arising out of chronic pain, discomfort and disability and has developed panic disorder with agoraphobia. He found Mrs Bryan continues to suffer from the effects of the injury sustained on 17 June 1994. He found she will be permanently incapacitated and that she would benefit from psychiatric or psychological treatment. He considered that over the years she had suffered significant levels of depression.

[374] Mr Guglielmin was Mrs Bryan's treating psychologist. He saw her on approximately 40-50 occasions for periods of about an hour. Mr Guglielmin described Mrs Bryan as being significantly depressed and struggling to manage the persisting pain arising from her lower back injury and grieving the loss of her previously active and healthy lifestyle. He concluded that Mrs Bryan had developed reactive ongoing depression to changes in her life as a result of the injuries sustained on 17 June 1994.

[375] These three opinions are in stark contrast to the opinion formed by Dr Kutlaca that there was no medical cause for her complaints which were without substance.

[376] In the first report prepared by Dr Kutlaca dated 27 February 2001, he was not able to come to any firm conclusion as to Mrs Bryan's condition. Dr Kutlaca asked to be provided with the reports from Dr North and Dr Pohl. In his subsequent report dated 24 April 2001, he noted the substantial discrepancies between the reports from the two doctors. He said this caused him to be suspicious about her complaints. This suspicion was clearly directed at Mrs Bryan because Dr Kutlaca went on to make a rather general statement about litigants tending to exaggerate their complaints in order to succeed in a compensation claim. It would appear he then relies on a statement by Dr North in his report that in Mrs Bryan's presentation there was a significant degree of "embellishment". Dr Kutlaca interpreted Dr North's use of the word "embellishment" as meaning exaggeration of her complaints. That accords with how I had interpreted Dr North's report.

When Dr North gave evidence to this Court and was cross examined on what he meant by the word “embellishment” in his report, he stated that what he meant was there were discrepancies on physical examination. Dr North did not provide a firm diagnosis of Mrs Bryan’s complaints of pain. He did refer to three possibilities, the highest being muscle damage. Under cross examination Dr North had to step back from his original statement that Mrs Bryan had “embellished” her complaints.

[377] I have already expressed concerns about the reliance Dr North placed on the Waddell signs in view of the subsequent article by Dr Waddell as to how these signs should be interpreted and the way they had been misused in clinical contexts and medicolegal assessments. Dr Kutlaca has placed considerable reliance on the report prepared by Dr North and accordingly the concerns I have expressed with Dr North’s evidence must extend to the evidence of Dr Kutlaca.

[378] In addition, my own assessment as to the credibility of Mrs Bryan and her complaints of pain, accords with the findings of Dr Burvill, Dr Epstein and Mr Guglielmin. It does not accord with the lack of credibility Dr Kutlaca attributes to Mrs Bryan. I find that as a consequence of the ram attack upon her, and the subsequent injuries, Mrs Bryan has suffered severe depression.

## **Mrs Bryan's Bowel and Bladder Problems**

### **a) Evidence of Patricia Neumann:**

[379] Ms Patricia Neumann prepared a statement and a report (Exhibit P39).

Ms Neumann is a physiotherapist. She specialises in pelvic floor muscle rehabilitation and incontinence management. In her report dated 17 January 2003, Ms Neumann stated that she had seen Mrs Bryan twice in June 2003 for assessment of her pelvic floor muscle function from the perspective of her bladder and bowel function and for advice regarding further management. Ms Neumann then described the advice she had given for future management.

[380] Ms Neumann concluded by stating that Mrs Bryan's pelvic floor muscle weakness and vaginal sensory loss, would appear to be related to neurological damage which could be attributed to the injury sustained by her in the ram attack in June 1994.

[381] Ms Neumann had found on examination of Mrs Bryan's pelvic floor that there was reduced muscle tone, no sensation proximal to the introitus and virtually no voluntary muscle activity. Mrs Bryan was straining to attempt to empty both her bladder and bowel. She was often constipated with small hard stools and she had no rectal sensation.

[382] Under cross examination (tp 886) Ms Neumann stated that she saw her role as treating Mrs Bryan. She had assessed her with a view to assessing her suitability for pelvic floor muscle training and found her problem unsuitable

for pelvic floor muscle rehabilitation due to lack of muscle activity. She did not consider herself qualified to state what the cause of the problem was. It did appear to her that there was neurological damage. She agreed she would hold similar views as to the cause of these problems as expressed by Dr Samantha Pillay.

[383] In re-examination, Ms Neumann stated that she thought that Mrs Bryan's lack of vaginal sensation suggested some neurological deficit, that the lack of sensation suggested that there was some damage to the nerve supply to the muscles which therefore caused the lack of muscle activity.

Ms Neumann stated that even women after childbirth, where there is muscle damage and muscle weakness, do have vaginal sensation which was completely absent in Mrs Bryan. The lack of sensory supply, as well as the lack of motor activity, suggested to Ms Neumann that there was some nerve damage and it was not from former childbirth. Ms Neumann stated that the consequence of being unable to contract the pelvic floor muscles means you cannot control your bladder or bowel. It was her distinct clinical impression of Mrs Bryan that there had been neurological damage.

**b) Evidence of Dr Samantha Pillay:**

[384] Dr Samantha Pillay did not give oral evidence to the Court. By consent, a statement prepared by Dr Pillay was tendered Exhibit P58.

[385] Dr Pillay is a urological surgeon. Dr Pillay first saw Mrs Bryan on 5 November 2002. Mrs Bryan presented with an 18 month history of

symptoms of leakage of urine with activities such as coughing, sneezing, laughing, walking and running. Mrs Bryan had given a history of previous stress incontinence treated successfully by Dr Miller in 1998 that resulted in resolution of her stress incontinence until about 18 months before when it returned.

[386] Dr Pillay also noted Mrs Bryan had faecal incontinence. She listed Mrs Bryan's relevant past history which included, three births, a hysterectomy in 1974, the removal of an ovarian cyst in 1984, the ram accident in 1994, subsequent back surgery, urinary retention in 1998 following an epidural for chronic back pain and a Burch culposuspension performed by Dr Miller in 1998. Dr Pillay described her findings on examination and her suggestions for future management of Mrs Bryan's problem.

[387] Dr Pillay again saw Mrs Bryan on 19 November 2002. In her report, under cover of letter dated 5 February 2003, she described her findings and stated that she had explained to Mrs Bryan there were no effective treatments currently available locally, to correct her weak detrusor muscle. Dr Pillay then listed the future option she discussed with Mrs Bryan. Dr Pillay then stated (p 4-5):

“Due to my recent involvement in the care of Denise Bryan I am unable to comment on whether her current condition is related to the accident in 1994. Factors that may have contributed to a weak detrusor in this patient may include;

1. Previous childbirth.

2. Previous pelvic surgery including abdominal hysterectomy.
3. Damage to lower spinal cord or pelvic nerves by back injury, back surgery or any other means.
4. Acute Urinary retention.
5. Chronic Urinary retention and repeated overdistension of the bladder.
6. Other yet unrecognised factors.

Factors that may contribute to her stress incontinence include

A weakness of the pelvic floor musculature and or the urethral sphincter mechanism. Items 1, 2 and 3 above could contribute to this, in addition to chronic straining to either pass urine or use the bowels, obesity, post-menopausal status and age.”

**c) Evidence of Dr John Miller:**

[388] Dr John Miller is a qualified urologist. He did not give oral evidence to the Court. Dr Miller prepared a statement with two reports dated 2 October 1998 and 17 June 2002. These were tendered by consent Exhibit P59.

[389] In his report dated 2 October 1998, Dr Miller stated that approximately two weeks before he had performed a cystoscopy and a Burch colposuspension procedure to prevent Mrs Bryan’s stress incontinence.

[390] Dr Miller prepared a further report dated 17 June 2002. He addressed the question put to him, as to whether the ram attack on 17 June 1994 caused injury to Mrs Bryan’s bladder and if so the nature of the injury. Dr Miller stated that Mrs Bryan did not describe any specific voiding problems following her back injury. The history taken by Dr Miller from Mrs Bryan, was that there was an onset of voiding problems following an epidural catheter insertion which was placed by Dr Phil Murray in an attempt to

control her chronic pain which had in fact arisen following this injury.

Dr Miller said his working diagnosis at the time was some interference with the S2/S4 nerve roots within the spinal cord area secondary to her recent epidural. Dr Miller concluded his answer by stating he did not believe there was a direct connection with any of her surgery or the initial spinal injury, however, a connection with subsequent treatment, in particular, the epidural performed for chronic back pain is a distinct possibility.

[391] It was also Dr Miller's opinion that given Mrs Bryan's bladder dysfunction over the past three years, her medication requirements and her general medical status, it is likely that her bladder problem will remain a life long issue.

**d) Evidence of Dr David Cherry:**

[392] Dr David Cherry was asked to comment on whether Mrs Bryan's bladder and bowel problems were related to the ram attack on 17 June 1994. He concluded that if she did not have symptoms of bladder or bowel problems prior to the ram attack but did have them afterwards, then the only logical conclusion to come to was that it was caused by being hit by the ram or the treatment and subsequent surgery.

[393] Dr Cherry was asked to comment on the report from Dr Pillay dated 5 February 2003 and in particular the list of possible causes of Mrs Bryan's bladder condition. Dr Cherry replied that Dr Pillay had provided a range of possible explanations. Given the numbness in the perineum and perineal

area, the lack of bladder and bowel control and the fact that she had previous surgery, it was Dr Cherry's conclusion that it is more likely than not that her symptoms are related to some form of pathology within the spinal canal. He stated that his opinion would not change even though Mrs Bryan may have had stressing problems prior to the accident.

**e) Evidence of Dr Peter Reilly:**

[394] Dr Peter Reilly, who is a neurosurgeon, stated in his report dated 6 May 2002, that he considered Mrs Bryan's present symptoms date from the incident with the ram attack. Dr Reilly considered it reasonable to accept that a sudden and severe blow to the lower back with a pre-existing fused spondylolisthesis might lead to severe pain. However, he could find no evidence of neural compression on numerous X-rays. He thought any peri-neural scarring appeared to be localised.

[395] With respect to the bladder dysfunction, Dr Reilly stated that it was not clear why this injury should have resulted in bladder dysfunction and general loss of genital sensation. He stated there was no evidence of neural compression of a degree or type likely to cause such neurological loss.

[396] Dr Reilly's evidence in cross examination is that there is no evidence available to him from his examination, and the MRI scan, of neural compression of a type in the spine that would explain her bowel and bladder dysfunction.

[397] Dr Reilly agreed that his conclusion was that it seemed probable that Mrs Bryan's present condition is a result of a combination of physical injury and psychological factors which stem from the events of 17 June 1994. He agreed that in accepting Mrs Bryan's complaints of pain he related them to the ram attack on 17 June 1994 and that was the foundation of his opinion.

[398] Dr Reilly gave further evidence under cross examination that if the first complaint of bladder problems was made by Mrs Bryan in August/September 1995, then it would be unlikely the accident on 17 June 1994 was the sole cause of her bladder problems. If she described a tearing incident on bending forward in November 1995, then that would be a more likely cause of her bladder problem. Dr Reilly also considered it would be significant if Mrs Bryan made complaints of incontinence shortly before the June 1994 incident. He agreed that would add to the evidence that the incident in June 1994 was unlikely to be the cause of her current bladder problems. He also agreed that a history of low back pain from 1972 and continuing from time to time up to March 1990, would affect his conclusion about the link between the commencement of her complaints of low back pain and the incident in June 1994.

**f) Other Medical Evidence re Bowel and Bladder Problems:**

[399] Exhibit D77 are the notes of Dr Selva indicating that in an attendance upon Mrs Bryan, a note made on 8 February 1994 reads "Other problem is stress incontinence".

[400] A report from Dr Fewings is Exhibit D78. Dr Fewings is a consultant neurologist practising in Adelaide. In his report dated 12 February 1996, Dr Fewings stated as follows (p 2):

“... She claimed that she has had some bladder dysfunction since November, 1995, she claimed that her bladder ‘was weak for a while and that it ‘gushed’ when she moved to get up’, she did however admit to being aware of similar but allegedly less severe symptoms prior to November, 1995, she also claimed that she has recently been more constipated, she attributed this to Endone. ...”

He also stated:

“... there are no objective clinical neurological or neurophysiological abnormalities to suggest that her alleged weakness has a spinal cord, nerve root or peripheral nerve basis, her tendency to give in a variable way and not to try too hard when being assessed raises the possibility of abnormal illness behaviour directed towards secondary gain. ...”

[401] Dr Fewings did not give evidence to the Court as for medical reasons set out in a letter from Dr Zimmet dated 12 March 2004, he was not fit to give evidence.

[402] Dr North had formed the opinion that Mrs Bryan’s bowel, bladder and urinary symptoms, do not have a neurological basis or a spinal basis.

[403] Exhibit D44 consists of a number of letters from Mr Osti to various doctors. In his letter dated 14 July 1998, Mr Osti stated inter alia:

“Her MRI had failed to demonstrate any evidence of significant neural compromise with solid anterior and posterolateral fusion at L5-S1 and moderate epidural fibrosis in keeping with multiple previous spinal surgery.”

[404] In a letter from him dated 21 November 2002, Mr Osti said inter alia:

“I had asked Sam Pillay to arrange a repeat lumbar MRI which had again failed to demonstrate any evidence of residual or recurrent neurological compression and had confirmed the presence of solid inter-body and postero-lateral bony union at L5-S1.

As indicated in previous imaging, the L4-5 segment was moderately degenerate but again with no suggestion of associated neural compression.”

[405] In his report dated 17 June 2002 (Exhibit P59) Dr Miller, who is a qualified neurologist, stated that he did not believe Mrs Bryan’s problem with her bladder is a direct consequence of her injury. He was referring to her injury on 17 June 1994. Dr Miller stressed that he had not been treating Mrs Bryan for an injury but for a bladder dysfunction. He did suggest that there was a distinct possibility of a connection between her subsequent treatment, in particular the epidural performed for chronic back pain.

[406] This epidural was performed by Dr Murray who is a medical practitioner. His practice is confirmed to anaesthetics. He prepared a statement and reports (Exhibit P36). In a letter to the then solicitors for the plaintiff, Dr Murray had stated that he considered Mrs Bryan’s bladder problems were directly related to the initial injury when she was charged by a ram. He went on to state that this injury caused immediate incontinence, and nerve damage, which subsequently resulted in difficulty in emptying her bladder. He concluded the letter by stating medication which was used to control back pain also contributed to her bladder problems, without the initial injury she would not have been on this medication.

[407] Under cross examination Dr Murray agreed that his letter dated 12 January 1999 was not intended to be a considered report for medico-legal purposes. He also agreed that he would defer to the opinions of a specialist urologist Dr Pillay and specialist neurologist Dr Reilly, regarding the cause of Mrs Bryan's bladder problems. Dr Murray gave evidence he treated Mrs Bryan after she had back surgery. Dr Murray described Mrs Bryan consulting him because she was in a desperate situation and unable to cope with her severe back pain. Dr Murray had suggested an epidural to try to change the way the nerves to her lower back reacted. This treatment is described as a cordial insertion which is described by Dr Miller as an epidural catheter insertion. This involves injecting drugs into the region of her lower lumbar area and achieving paralysis over a two to three day period in the hope that when the paralysis subsides the nerves will be in a less painful state. Dr Murray stated he did inject the drugs and achieve the paralysis. Mrs Bryan was pain free for three days and then complained of weakness in her legs. This is not an unusual complaint and the reaction subsided after a few days. It is Dr Murray's evidence that he had a vague memory that she had bladder problems after the epidural but it was his impression it had finally settled. Dr Murray agreed that Mrs Bryan's diary records, that she started having her current problems with excessive amounts of urine output and lack of bladder control from August 1999, a long time after the cordial insertion treatment.

[408] Dr Murray stated he had carried out thousands of epidurals, hundreds of cordial insertions as a common anaesthetic technique and a dozen or so times for pain clinic patients where a cap is inserted for a three day period. He had never experienced a patient suffering long term dysfunction of the bladder or bowel after administering an epidural. Dr Murray thought it unlikely that the epidural or cordial insertion affected the nerve or caused Mrs Bryan's bladder dysfunction. It was his opinion that the problem was an exacerbation of her original injury when struck by the "goat" (sic) that this caused a likely dislocation of the 5<sup>th</sup> vertebrae on the sacrum so that it stretched those nerves. That was the cause of her pain which condition worsened and caused her bladder problems.

[409] In re-examination, Dr Murray listed the reasons why he had a good memory of Mrs Bryan which included the fact that Mrs Bryan seemed a very genuine person with a genuine problem. Dr Murray said he was treating Mrs Bryan purely for her symptoms of pain.

[410] I also refer to the evidence of Dr Thompson and Dr Matarazzo whose evidence I have already summarised.

**Findings with respect to the bowel and bladder problems:**

[411] The evidence on this aspect indicates a diversity of opinions from various medical experts who examined Mrs Bryan. I summarise this as follows.

[412] Ms Patricia Neumann physiotherapist, agreed she was not qualified to state the cause of the problem. Ms Neumann was under the impression that the problem of pelvic floor muscle weakness and vaginally sensory loss was related to neurological damage suffered in the ram attack. Ms Neumann stated her opinion would accord with that of Dr Pillay.

[413] Dr Pillay a urologist, could not nominate a definite cause. Dr Pillay postulated a number of possibilities totalling six in all. One of them did indicate the possibility that the cause was “damage to lower spinal cord or pelvic nerves by back injury, back surgery or other means”.

[414] Dr Miller a urologist, concluded there was no connection between Mrs Bryan’s bowel problems and her surgery or the initial spinal injury. It was his opinion that there was a connection between her bowel problem and the epidural performed upon her for chronic back pain.

[415] Dr Cherry, a qualified medical practitioner and pain specialist, concluded that if Mrs Bryan did not have bladder or bowel problems prior to the attack on her by the ram, then the logical conclusion was it was caused by the ram butting her or subsequent treatment and injury. He thought it more likely than not, her symptoms were related to some form of pathology within the spinal canal.

[416] Dr Reilly neurosurgeon, concluded that it was not clear why this injury should have resulted in bladder dysfunction and general loss of genital sensation. He found no neurological compression likely to cause such

neurological loss. He concluded that if Mrs Bryan's first complaint of bladder problems was in September 1995, then it was unlikely the ram attack was the sole cause of her bladder problems.

[417] There are notes from records of Dr Selva that Mrs Bryan complained of stress incontinence in February 1994.

[418] Dr Fewings in his reports stated there were no objective clinical neurological or neurophysiological abnormalities to suggest alleged weakness has a spinal cord, nerve root, or peripheral nerve basis. I do take into account, in assessing the weight to be given to this report, the fact that Dr Fewings could not be cross examined as to his conclusions.

[419] Dr North neurologist, formed the opinion Mrs Bryan's bowel, bladder and urinary symptoms do not have a neurological or spinal basis. I have previously made findings concerning the evidence of Dr North. It should, however, be noted that his opinion does not support a connection between the ram attack and Mrs Bryan's bowel and bladder problems.

[420] Mr Osti orthopaedic surgeon, had found no evidence from the MRI or other scans, that there was evidence of significant neural compromise. Mr Osti did of course conclude from his own clinical examination, that there was neural compression. He made reference to stretched nerve and deterioration of function of the nerve. Mr Osti also considered the side-effects of the drugs Mrs Bryan was taking. These narcotics were a complicating factor in her bladder problems.

[421] Dr Murray medical practitioner and anaesthetist, concluded Mrs Bryan's bowel and bladder problems were directly related to the ram attack upon her and not to the epidural he performed.

[422] I have already referred in some detail to the evidence of Dr Thompson. I have accepted Dr Thompson's evidence as to his clinical findings of nerve root compression and that this is the cause of Mrs Bryan's debilitating condition. This finding is supported on the evidence of Dr Matarazzo, Mr Osti and Dr Pohl which I have also previously summarised. I accept the evidence of these doctors that the nerve root compression was caused in the ram incident as reported by Mrs Bryan. I also accept the evidence given by Dr Thompson that Mrs Bryan's bladder and bowel problems are associated with this nerve dysfunction. Dr Thompson gave evidence that in September 1995, Mrs Bryan reported poor bladder control and that August 1998 was the first mention of her bowel problems. Dr Thompson attributed the chronic bowel and bladder disturbance to spinal nerve involvement. Dr Matarazzo made reference to the side effects of the painkilling drugs Mrs Bryan was taking. These drugs could have an adverse effect on her bowel and bladder.

[423] Finally, I refer to certain aspects of Mrs Bryan's evidence relevant to her symptoms of bowel and bladder dysfunction.

[424] Mrs Bryan gave evidence the force of the impact when she was head-butted by the ram caused her to lose control of her bladder. I have already referred

to the evidence given by Mrs Bryan as to the severe pain she felt in her lower back upon impact. It is Mrs Bryan's evidence that the spinal stimulator has not had any effect upon her bladder, she states that she is still leaking and has gushes of urine. To lessen the effect of the leaking she will catheterise or wear a pad. The sensation she experiences in passing urine is now completely different to the time prior to her bladder problems. She has suffered a number of urinary accidents. Mrs Bryan also gave evidence as to the bowel accidents that have occurred, the difficulties she has with bowel movements, that include constipation and diarrhoea. She does not have warning of a bowel movement. Prior to the accident with the ram she states she had no difficulty with bowel movements. Mrs Bryan described the process that she undertakes once or twice a week with respect to her bowel and bladder problems. There is some discomfort on the withdrawal of the catheter.

[425] When Mrs Bryan first attended the Bath Street Medical Centre, she saw Dr Scott. Dr Scott referred her to the Alice Springs Hospital for X-rays. Mrs Bryan told Dr Scott what had happened. Dr Scott wrote a letter to the hospital saying she had no bladder or bowel problems. Under cross examination Mrs Bryan said she had told Dr Scott that she wet herself at the time of the accident. She had assumed that he meant by the letter that she did not have bladder or bowel problems prior to the accident.

[426] Mrs Bryan was cross examined about when her bladder problems started. She gave evidence this was in 1994. She stated she was having problems

with leakage on and off “but they said they could not – they would not like to attempt to do anything until after the back was repaired or in a stable condition” (tp 242). Mrs Bryan was cross examined about a time in 2000 when Dr Matarazzo referred to a Dr Hardy, who was an endocrinologist at Alice Springs Hospital. Mrs Bryan said she could not remember the name of the doctor or his speciality but does remember being referred to a doctor for her bladder problem by Dr Matarazzo. Mrs Bryan was asked about a note she had written to this doctor. Mrs Bryan was referred to a letter she had written to Dr Harding and agreed she had written the letter and the note. The letter was tendered Exhibit D8. Omitting formal parts this letter reads as follows:

“After coming home yesterday from my appointment with you, I checked up on my 1999 diary. I started having the current problems from **August 99** with excessive amounts of urine output.

On several occasions if my bladder was too full I would experience leaking first then urine would gush out and I couldn't control to stop flow. I then started to go more frequently to the toilet to help avoid any accidents while out. If I sleep longer than 3-4 hours the bladder seems to throb and wake me and as I put pressure on my stomach getting up urine starts to leak and continue to flow, by the time I get to the toilet I'm very wet, on the toilet with contracting my stomach it (urine) then gushes out.

PS (This is not the case every day and night but on severe occasions this has happened so I have a towel close by just in case).

I didn't know if this bit of information was of any importance, but I know I didn't mention it all yesterday or remember a lot until I check on my diary.”

[427] A “PTO” attached to his letter refers to problems in catheterising and states that she ended up with a bad urinary tract infection “this was all before my

current problems”. She then went on to state “problems started August 1999 until March 20.....”.

[428] A question was put to Mrs Bryan in cross examination that when she was admitted to the Western Community Hospital on 25 October 1994 and was asked about the condition of her bladder and bowel she had answered that they were normal. In reply to this question under cross examination Mrs Bryan had replied that she did not know.

[429] Under re-examination Mrs Bryan gave evidence concerning a gall bladder operation she had in 1971 and her use of a catheter following this operation.

[430] There is again a diversity of opinion between the medical experts as to the cause of Mrs Bryan’s bowel and bladder problems. The evidence which I accept is that on 17 June 1994, Mrs Bryan sustained a serious injury to her lower spine when attacked by a ram. The evidence is there were no significant bowel or bladder problems prior to the accident on 17 June 1994. I agree with Dr Cherry that the only logical conclusion is that it was caused by the ram butting her or subsequent treatment and injury. I accept the evidence of Dr Thompson that the bowel and bladder disturbance is because of spinal nerve involvement. He stated it was indicative of nerve dysfunction. His opinion is supported by Dr Pohl, Mr Osti and Dr Matarazzo. The latter two doctors also referred to the effects on her bowel and bladder of the high dosages of pain killing drugs she had been prescribed over a long period of time.

[431] I am satisfied on the balance of probabilities that the bowel and bladder problems which Mrs Bryan now suffers are causally related to the ram attack upon her on 17 June 1994.

**The Spinal Stimulator:**

[432] The evidence from Mrs Bryan is that on 19 August 2003, she underwent an operation to implant a spinal stimulator. She stated that this reduced her pain from about five or six on a scale of zero to 10, to a more acceptable level. It meant she could engage in more activities such as shopping and she is generally less reclusive.

[433] Mr Grant Mercorella is a qualified physiotherapist. He assessed Mrs Bryan's physical abilities on 30 October 2003, and set out his findings in a report (Exhibit P38).

[434] Mr Mercorella went into considerable detail in carrying out his assessment. He concurred with the recommendations made by Ms Michelle French and Associates Occupational Therapy report done in August 2002. He confirmed the recommendations for physiotherapy and hydrotherapy are "highly needed".

[435] Mr Ross Bryan, the husband of Mrs Bryan, also gave evidence about the effect of the stimulator. Mr Bryan observed a vast improvement in his wife's walking since the use of the stimulator. She does not spend as much time in bed, is not as tearful and is more willing to go out shopping. He

described his wife as being more confident in her walking, that she did not limp as much or drag her right leg as much as before the stimulator was put in place. She was able to walk further and participate in activities such as watering the garden every second evening for about 15 minutes. In addition to this she would spend more time feeding and caring for the dogs and was able to make sandwiches for lunch four or five times a week. He stated Mrs Bryan can sit for longer, up to half an hour without too much movement and can stand for up to 10 to 15 minutes without becoming agitated. He stated her bad days had reduced from five or six bad days a week to three bad days a week. He described a driving trip undertaken from Alice Springs to Darwin for the 2004 hearing and stated that Mrs Bryan had not complained much at all and upon arrival in Darwin was much freer in her movement than when she had been travelling in 2003.

[436] The evidence given by Mr Osti is that the external stimulator has reduced Mrs Bryan's pain levels and that she has experienced improvement of her symptoms. He considered it was probable that this would continue and she will have greater participation in ordinary activities.

[437] Dr Cherry was of the opinion that if pain relief continues for six months after the implant of the stimulator, then this is a positive sign that it may continue.

[438] I find that the spinal stimulator, which was implanted by operation on 19 August 2003, means Mrs Bryan is effectively able to reduce the level of

pain she experiences. This has resulted in an increased mobility capability to perform some day to day functions better than previously, although there are still limitations.

**Mrs Bryan's Post Accident Admissions to Hospital:**

[439] On 17 June 1994, Mrs Bryan was admitted to the Alice Springs Hospital, having attended at her local surgery first. Her treating general practitioner, Dr Scott, wrote a letter to hospital stating, inter alia, "she is tender posteriorly L4/L5 but slightly tender on lateral fossa of the pelvis...DX? (meaning diagnosis) pelvic # (meaning fracture)".

[440] Mrs Bryan remained at the hospital for a couple of hours before going home. She spent the next five days in bed, taking pain relief drugs every four hours. A week later she returned to Dr Scott, who ordered more X-rays. She was referred to the physiotherapist Laima Gusica, who worked on her hips in an effort to relieve the pain. This was not successful.

[441] Mrs Bryan then commenced consultations with the surgeon at the Alice Springs Hospital, Dr Charles Butcher, in conjunction with Dr Thompson from the Sports Medicine Clinic in Darwin. On 20 September 1994, she was admitted to Alice Springs Hospital for two weeks to undergo traction. This did not alleviate her pain, and in fact in she returned to the hospital a week later with the pain having escalated.

[442] Mrs Bryan travelled to Adelaide to visit a sick relative. There she consulted Dr Leahey. The trip to Adelaide in the car was painful. Mrs Bryan had to lie across the backseat of the vehicle for the journey. She was admitted to the Western Community Hospital on 25 October 1994 and was treated with traction until she was released on 11 November 1994. Three weeks later she returned to Alice Springs on an aeroplane. Upon her return she was experiencing severe pain again and continued to consult with Drs Thompson and Butcher. In December 1994 she was referred to Dr Fry and Dr North, but ultimately it was Dr Leahey who arranged for her to see Mr Osti on 23 December 1994.

[443] Mrs Bryan was in hospital at St Andrew's in Adelaide between 7 and 28 March 1995, in which time Mr Osti performed an operation on her back. On 9 March 1995, Mr Osti performed a bilateral extensive laminectomy at L5/S1 with thorough decompression of the L5 and S1 nerve root bilaterally.

[444] On Mrs Bryan's evidence, the pain worsened and was probably worse than it had been prior to the operation in March. She was admitted to the Calvary Hospital in Adelaide on 25 September 1995 and released on 28 October 1995. On 28 September 1995, Mr Osti performed a postero-lateral fusion using bone graft from the right iliac crest through a postero-lateral approach. She returned, via air, to Alice Springs. During this period in hospital she consulted a pain specialist, Dr Murray. Upon her return she kept up consultations with Drs Thompson and Matarazzo.

[445] Approximately 6 weeks after her return, she leant forward when she was at home one day, and experienced a tearing sensation in her back, which immediately brought on the pre-existing pain and radiated into her right leg.

[446] On 29 November – 30 November 1995, Mrs Bryan was admitted to Alice Springs Hospital – Dr Butcher.

[447] Mrs Bryan was re-admitted to Calvary Hospital on 26 January 1996 and remained there until 12 February 1996. She was again counselled by Mr Osti and Dr Murray about pain management. Throughout this year she continued to experience constant back pain, tiredness, depression, trouble sleeping, loss of confidence, a reluctance to socialise, an inability to stand for periods in excess of 15 minutes, and stumbling when walking. She describes the effects of her injury as “devastating”. She could not drive her car, could not work in her garden, could not partake in recreational activities such as camping or swimming, and she continued to suffer “severe” depression which created marriage difficulties. Mrs Bryan suffered disturbed sleep, waking every couple of hours, and when she did wake in the morning, it took about an hour to “get moving”. This was very distressing as she had always been a very energetic person.

[448] Between 21 August and 15 October 1996, Mrs Bryan was in-patient at Western Community Hospital twice, where she was treated for depression and drug dependence, and she was also admitted to the Memorial Hospital once. Mrs Bryan was taking a cocktail of prescription drugs at the time,

including, MS Contin (morphine), Efexir (antidepressant), Mersyndol Forte, Diazepam and Temazepam. She was also attending a pain clinic in Adelaide throughout 1996. Mrs Bryan gave evidence as to some of the side effects she has suffered as a consequence of taking the various drugs she was prescribed. These side effects included hypersensitivity, shortness of breath, palpitations and an effect on her balance when she walked.

[449] On 11 June 1997 she was admitted again to the Western Community Hospital, under the care of Drs Leahey and Murray. She was there due to the extreme pain that she continued to suffer. The doctors changed her medication and performed an epidural to help reduce pain, and she was also assessed by a psychologist, Mr Guglielmin. Eventually she was referred to Dr Burvill, a psychiatrist, whom she saw on 28 May 1997.

[450] Between 7 and 26 July 1997, Mrs Bryan was again admitted to a hospital, this time to the Adelaide Clinic, to assist her in pain management.

[451] Between 27 October and 17 November 1997 she was re-admitted to the Western Community Hospital, and operated on again by Mr Osti. As a consequence of the procedure to remove the plates and screws, she felt minor relief from the pressure, but her back, legs and buttocks remained numb. After the removal of the plates and screws, Mrs Bryan continued to have a lot of pain and suffer spasms. She had difficulty walking, tiring very quickly. This also furthered the depression. The plates and screws removed in this operation were tendered Exhibit P4.

[452] Mrs Bryan began to experience relationship difficulties with her husband, asking him to leave her a number of times due to her feelings as to lack of self worth. They had no sex life together. Mr Bryan was responsible for the running of the house, which did not sit well with Mrs Bryan who, prior to the ram attack, managed the running of the household.

[453] From April 1997 to 1998, Mrs Bryan consulted Dr Carl Richardson of the Alice Springs Pain Clinic. He counselled her on pain management techniques.

[454] On 25 May 1998 she was admitted to Western Community Hospital again, under the care of Dr Murray. In total, she had two steroid injections into the coccyx area, as well as the insertion of a spinal catheter to cut off the feeling from her waist down. Back in the general ward she was assisted by Mr Guglielmin in her pain management. She was released on 24 June 1998.

[455] Between 12 and 21 July 1998, Mrs Bryan returned to Calvary Hospital, where an MRI scan was taken. Further, a physiotherapist, Andrew Smith, also attended upon her. The pain stayed with her.

[456] On 5 September 1998 she was admitted to Alice Springs Hospital and then transferred to the Calvary Hospital on 13 September, where she was under the care of Mr Osti and Dr Murray, as well as a neurologist, Dr Miller. Dr Miller operated on her bladder on 19 September 1998. Mrs Bryan was released on 2 October.

[457] During this period she was taking the following medications to assist the pain: MS Contin, Amitriptyline, Rhondi, Mersyndol Forte, Baclofen, and Nitrozapam. By the beginning of 1999 Mrs Bryan's pain involved the following:

- Numbness from right knee to right groin, causing difficulty walking.
- Could not stand or walk for any great period of time due to pain in the back and legs.
- Involuntary spasms in her back and legs whilst resting and sleeping.
- Sexual relations with her husband were difficult.
- Bladder and bowels problems, making it difficult to pass urine and had to self-catheterise to empty her bladder.
- Trouble writing.
- Could only drive short distances, otherwise would have to lie on the back seat of the vehicle.
- Lack of self-esteem, lack of sleep, depression and frequent headaches.
- Could not properly assist in house chores such as mopping and vacuuming.
- Could not tend to her garden apart from planting seedlings and the like.

[458] In January 1999, Mrs Bryan went to Adelaide and attended on Mr Osti, Drs Murray and Miller about her prognosis. She returned in September 1999 to see Drs Miller and Murray, as well as Mr Guglielmin. It was recommended that she see Dr Adrian Winsor, a pain specialist who travelled to Alice Springs.

[459] Mrs Bryan's current medical "regime" includes the following:

- MS Contin
- Cipramil
- Progynova
- Somac
- Panadol
- Mersyndol Forte
- Bricanyl-Turbuhaler
- Pulmicort
- Diazepam

[460] Mrs Bryan gave evidence that over the years the drug regime has had a significant effect upon her. Both her memory and concentration have deteriorated.

[461] Mrs Bryan was admitted to the Calvary Hospital in South Australia between 11 August 2003 – 22 August 2003 for fitting of a spinal stimulator.

[462] Solicitors for the plaintiff usefully prepared a Schedule of Dates in Hospital which is set out hereunder:

YEAR	HOSPITAL	DATES	NO. DAYS	DOCTORS
1994	Alice Springs NT	20 Sep – 30 Sep	11	Dr Butcher – Ex 1 Para 82
1994	Western Community SA	25 Oct – 11 Nov	18	Dr Leahey – Ex 1 Para 83
1995	St Andrews SA	7 Mar – 28 Mar	22	Mr Osti – Ex 1 Para 90
	March 1995 St Andrews Hospital First operation Inserted plates and screws			
1995	Calvary SA	25 Sep – 28 Oct	34	Mr Osti

	Sept 1995 Calvary Hospital – Second operation – Replace 4 screws			
1995	Alice Springs NT	29 Nov – 30 Nov	2	Dr Butcher
1996	Calvary SA	26 Jan – 12 Feb	8	Mr Osti/Dr Murray Ex 1 Para 99
1996	Western Community SA	21 Aug – 4 Sep	7	Dr Leahey Para 103
1996	Memorial SA	4 Sep – 10 Sep	7	Mr Osti – Para 103
1996	Western Community SA	10 Sep – 15 Oct	36	Dr Leahey – Para 103
1997	Western Community SA	11 Jun – 26 Jun	16	Dr Leahey – Para 113
1997	Adelaide Clinic SA	7 Jul – 26 Jul	20	Dr Burvill – Para 117
1997	Western Community SA	27 Oct – 17 Nov	22	Drs Osti, Murray & Leahey – Para 119
	Oct 1997 Western Community – Third operation – Removed all screws and plates			
1998	Western Community SA	25 May – 24 Jun	31	Dr Murray – Para 125
1998	Calvary SA	12 Jul – 21 Jul	10	Drs Osti, Murray & Miller – Para 129
1998	Alice Springs NT	5 Sep – 6 Sep	2	Drs Lucas & Richardson
1998	Calvary SA	13 Sep – 2 Oct	20	Drs Murray & Miller – Para 134
2003	Calvary SA	11 Aug – 22 Aug	12	Drs Osti & Wright
			<b>296</b>	
<p>August 12, 2003 – First operation carried out to insert the lead and extension cable of the Spinal Cord Stimulator.</p> <p>August 19, 2003 – Second operation carried out to insert the Pulse Generator of the Spinal Cord Stimulator</p>				

**Assessment of Mrs Bryan's Medical Condition by Mr Mercorella –  
30 October 2003:**

[463] Mr Mercorella, physiotherapist, assessed Mrs Bryan. On the day of the assessment (30 October 2003) she was reported to have “constant stiffness and pain from the bone of her lumbar spine up to her mid thoracic region”. If she tried to rotate or move she would experience sharp grabbing pain in this area. Mrs Bryan also reported pain radiating down her legs. The pain in her right leg was much worse than her left, this was aching/throbbing in nature and pins and needles in both legs, which varied in intensity day to day. Mrs Bryan reported being “numb” inside her abdomen and pelvis and not being able to determine when she needed to urinate or defecate. Hence she used suppositories and catheterisation to defecate and urinate. In his report dated 28 October 2003, Mr Mercorella states (Exhibit P38):

“Mrs Bryan reported only being able to sit up for 30mins before her pain increased and then she had to get up and move around. Prolonged walking >400m caused an increase in her pain symptoms, heaviness in her right leg, which often caused her to trip. Mrs Bryan reported getting headaches from doing too much walking/standing and migraines on a monthly basis.

Mrs Bryan reports having a spinal cord stimulator operatively implanted in August 2003. She reported that this did help with reducing pain and she has been able to reduce her pain medication to 75mg of MS Contin twice daily and Nurofen Plus as needed. But her walking and standing tolerances were approximately the same.”  
(exhibit P38).

[464] In his objective assessment, Mr Mercorella found Mrs Bryan stood with more weight on her left leg, and wasting of her right gluteal, quadriceps, hamstring and calf muscles. She walked with a limp and a “trendelenberg

gait pattern”, which affected her right leg and foot. Her lumbar spine was severely restricted in its active range of motion, and all flexions caused her pain from her lower back into her legs. Likewise, her thoracic spine was also severely restricted by pain and stiffness, and her left hip was severely restricted in its passive range of motion, while the internal and external rotation was moderately limited due to pain. He found there to be a definite correlation between the muscle wasting in Mrs Bryan’s lower limbs and the decrease in muscle strength.

[465] Mrs Bryan gave evidence that the spinal stimulator had not resulted in any improvement to her bladder and bowel problems.

[466] With respect to the proposed alterations to her house, Mrs Bryan gave evidence that the plans drawn by an architect, Mr Dugdale, in consultation with herself, would make movement around the house a lot easier for her. She also gave evidence as to her need for walking supports and at times a wheelchair.

**Damages:**

[467] There is no evidence from the X-rays, CT scans or MRI’s of an injury to Mrs Bryan’s back following the attack upon her by the ram. There is a divergence of views amongst the many doctors whom she consulted as to the cause of her subsequent complaints. Essentially, Mrs Bryan’s claim must depend upon her credibility as to the attack by the ram upon her and her subsequent complaints of pain and disability.

[468] I found Mrs Bryan to be a very credible witness. I accept her account of how the ram attacked her and what occurred in that attack. I find on the evidence the ram was a large male animal weighing 70-100 kilograms and 700 millimetres in height. The ram had no horns. I find that it was capable of, and did in fact deliver, a very severe blow when it head-butted her from behind. The head-butt from the ram pushed her forward a distance of some 2½ metres onto the floor, flat on her face.

[469] I accept the evidence given by Mrs Bryan that upon being head-butted by the ram she heard a loud crack and felt very severe pain in her back, legs and groin. I accept that since that date she has suffered severe and continuous back pain and pain radiating down both legs. She has experienced the distress of hospital admissions and operations which have not been successful in alleviating her pain. I accept her evidence as to suffering headaches. She has a substantially reduced sex libido and sexual relations with her husband have been difficult. I accept her evidence as to the depression she suffered as a consequence of her disabilities caused by the ram attack. I have found that her bowel and bladder problems are causally related to the ram attack. I found Mrs Bryan to be a truthful witness endeavouring to do her best to remember the myriad of details involved in her numerous post accident admissions to hospital and attendances upon approximately 45 doctors. I accept that her regime of drugs, that she has been prescribed since 17 June 1994, have had an effect upon her including a significant impact on her memory and concentration. All of these problems

I find to be as a direct result of the injuries she suffered in the ram attack. I find that her debilitating pain has substantially affected her quality of life and had a marked effect on her ability to participate in her pre-accident activities. These have been previously identified. Taking into account contingencies both favourable and unfavourable. I award the sum of \$170,000 for general damages for pain and suffering and loss of amenities of life. I apportion this as to the sum of \$100,000 for past pain and suffering and loss of amenities and \$70,000 for the future. I would assess her general damages as follows:

**General Damages – Past** **\$100,000.00**

Interest on general damages past @ rate of 4%

- *MBP(SA) Pty Ltd v Gogic* (1991) 171 CLR 657

See also *Martin v Moore* decision of Riley J delivered 15 April

1999 (unreported) and *Rosecrance v Rosecrance* 129 FLR 310.

10 years x 4% x \$100,000 **\$ 40,000.00**

[470] The Court has heard Mrs Bryan has had a reduction in her pain levels since the implant of a spinal stimulator. This has improved her quality of life to some extent and given her greater mobility. She will be able to participate to a limited extent in activities she enjoyed prior to the accident such as gardening and travelling to visit family members and friends. Mrs Bryan is able to do the shopping for herself and her husband and whilst her mobility is still restricted she does have an increased capacity to participate in day to day activities. No further surgical treatment is recommended.

**General Damages – Future**

**\$ 70,000.00**

**Past Loss of Earning Capacity:**

[471] I accept the evidence given by Mrs Bryan that following her accident she did not return to full time work under her contract. She did attend her place of work but did not attend except in the company of another person. She did render some assistance with the injured animals, getting meals for the bandicoots and some watering. Following her accident, Mrs Bryan paid other persons to fulfil her obligations under the contract. This included payments to a Ms Ruth Glover and others. Mrs Bryan gave evidence as to these details. At other times Mrs Bryan went to her place of work and was assisted by her husband, other family members or school children who volunteered to help. She also had assistance with the heavy physical work from Mr McKenzie, Mr Gibson, Mr Langford and Mr Lundie-Jenkins. The Income Tax Returns lodged by Mrs Bryan are included in her statement Exhibit P1 annexure IDB 15.

[472] October 24, 1997 was Mrs Bryan's last day at work and the last day she was paid for being at the Institute. The contract with the Institute concluded on that date as the responsibility for the care of mala and bilby was transferred to the new Desert Park. There was no evidence the plaintiff had found or been offered other paid employment.

[473] As at the date her contract of employment was terminated, Mrs Bryan had recently turned 51 years of age. Mrs Bryan is three years younger than her

husband Ross Bryan. He was 54 years of age at the time Mrs Bryan's contract with the Wildlife Institute concluded. There is evidence that the plan was Mr Bryan would retire at the age of 63. Mrs Bryan agreed she would have retired at the same time which would have been when she was 60 years of age. Mr Bryan in fact retired considerably earlier than that, at the age of 58, to care for Mrs Bryan.

[474] Prior to entering the contract with the defendant in 1991, the plaintiff had not been in paid employment since prior to her marriage as a hairdresser. Her first child was born on 7 January 1967. She did have a brief period of work at a takeaway shop. She has lived a very active lifestyle and helped her husband and children in their work. The plaintiff's claim is that past economic loss should include the years up to 31 December 2004. The position adopted on behalf of the Defence is that the plaintiff's past economic loss should be limited to October 1997 i.e. 3.25 years. The details of the claim made by the plaintiff for past economic loss is set out as follows:

<b>Year</b>	<b>But for her injuries the plaintiff would have earned</b>	<b>Less amount in tax return</b>	<b>Net loss \$</b>
1994/95	\$10,530 less tax of \$1,099.80 (\$21.15 x 52) = \$9,430.20	\$2,358	\$7,072.20
1995/96	\$10,530 less tax of \$1,099.80 (\$21.15 x 52) = \$9,430.20	\$1,904	\$7,526.20

1997/98	Note the contract expired in October 1997, ie 3 months into the financial year. Thus the plaintiff claims one quarter of the loss for 1996/97 (\$2,357.55) plus for three quarters of the year as follows: \$10,530 less tax of \$1,099.80 \$21.15 x 52) x 0.75 = \$7,072.65 Total for the year = \$9,430.20	\$1,161	\$8,269.20
1998/99	\$10,530 less tax of \$1,066 (\$20.50 x 52) = \$9,464	\$150	\$9,314.00
1999/00	\$10,530 less tax of \$1,066 (\$20.50 x 52) = \$9,464		\$9,464.00
2000/01	\$10,530 less tax of \$806 (\$15.50 x 52) = \$9,724		\$9,724.00
2001/02	\$10,530 less tax of \$806 (\$15.50 x 52) = \$9,724		\$9,724.00
2002/03	\$10,530 less tax of \$806 (\$15.50 x 52) = \$9,724		\$9,724.00
2003/04	\$10,530 less tax of \$806 (\$15.50 x 52) = \$9,724		\$9,724.00
2004/05	\$10,530 less tax of \$806 (\$15.50 x 52) x 0.5 (being to 31 December 2004) = \$4,862		\$4,862.00
		<b>TOTAL:</b>	<b>\$94,634.80</b>

[475] On the evidence Mrs Bryan was very dedicated to her work with the mala and bilby. She had been able to fulfil all aspects of her contract up to the date of her accident. Even after the accident Mrs Bryan involved herself with some aspects of the work when she was not either hospitalised or out of Alice Springs seeking treatment or visiting family.

[476] In view of her interest in her work, her level of fitness prior to the ram attack and her plans to work up until her husband's retirement, I would allow her claim for past economic loss.

**Past Loss of Earning Capacity** **\$ 94,634.80**

**Interest on Past Loss of Earning Capacity:**

[477] I agree with the submission made by Mr Reeves QC on behalf of the defendant, applying the decision of Riley J in *Martin v Moore* [1999] NTSC 34 at par 72:

“The plaintiff is also entitled to interest on past economic loss awarded at ordinary commercial rates. No evidence was led before me of what those rates might be over the relevant period and reference to decisions of this Court reveal differing figures for different periods. The plaintiff, in his submissions, suggested that an appropriate source of information would be the interest rates allowed on judgment debts pursuant to the *Supreme Court Act and Rules* and published in the Law Almanac for 1999. I adopt this approach and allow interest at the rate of 8 percent per annum. The rate should be halved for the relevant period in order to reflect the fact that the loss occurred over the whole of the period and was not a loss of one sum at the commencement of the period: *Cullen v Trappell* (1979-1980) 146 CLR 1 at 19. In the present case the loss commenced after the defendant (or the Territory Insurance Office) stopped making payments to the plaintiff on 10 November 1995. The period for which interest should be paid is therefore from 10 November 1995 to

1 April 1999, a period of 176 weeks or approximately 3.4 years. Interest is therefore \$42000 x 4% x 3.4 years giving an allowance of \$5712.”

[478] I have read the submissions made by Mr Reeves QC as to the interest rates from the current Law Almanac from 1 July 1993 to 17 December 2002. This gives an average of 7.19 per cent. Half the average would be 3.59 per cent. Consistent with *Cullen v Trappell* (supra) and *Martin v Moore* the interest for past economic loss would be 3.59 per cent.

**Interest on Past Loss of Earning Capacity**

10 years x 3.59% x 94,634.80 = **\$ 33,973.89**

**Future Loss of Earning Capacity:**

[479] The evidence is that Mr Bryan planned to retire at the age of 63. Mrs Bryan planned to retire at the same time as they had plans to do many other things with their life. Mrs Bryan is three years younger than her husband, she will turn 60 years of age in 2006.

[480] Given a number of contingencies which include her age and the physical demands of her job, the possibility of her husband retiring earlier than 63 years of age or that their plans for retirement changed, I am not satisfied Mrs Bryan has established a claim for future economic loss.

### ***Griffiths v Kerkemeyer* – Claim for Gratuitous Services Past & Future**

[481] Prior to the ram accident, the plaintiff was the person who took the greater part of the responsibility for the household chores, the shopping and the gardening. She performed these tasks for herself and her husband and such of their children who either stayed or lived with them.

[482] The evidence on this issue is contained in the evidence of the plaintiff herself, her husband Mr Ross Bryan, her daughter Selena, Mrs Kay Hawkins and the occupational therapist, Ms Michelle French.

[483] The principle established in *Griffiths v Kerkemeyer* (1977) 139 CLR 161 is that damages can include services that are necessary but which are provided gratuitously by a friend or a relative – see also *Van Gervan v Fenton* (1992) 175 CLR 327.

[484] I accept the evidence given by Mrs Bryan that prior to the accident she did the greater part of the cooking. Following the accident her husband does the greater part of the cooking. Mrs Bryan has difficulty standing for any length of time, difficulty in lifting and moving the pots and pans and generally working in the kitchen. She needs assistance with doing the clothes washing. Usually Mr Bryan loads and unloads the washing machine. Whilst she can do some dusting and wiping down, she has difficulty in using a vacuum cleaner. Prior to the accident, Mrs Bryan was an enthusiastic gardener who had built up a vibrant garden from nothing. Now she is only able to do a minimal amount of gardening. Prior to the accident she did all

the housework and general maintenance including painting internal and external walls of the house. Mrs Bryan gave evidence about the plans prepared by architect Ms Dugdale. Mrs Bryan stated she had fallen twice around the home in the last two months and on other occasions. She considered the re-designed steps as suggested by the architect would be very helpful.

[485] Mrs Bryan described how she liked to be able to go out into the garden and gave evidence as to the future use of a wheelchair increasing her ability to go out into national parks, participate in activities with her husband and to be able to go shopping unassisted. Mrs Bryan gave evidence that her husband had retired early to care for her. This made her feel she had cheated him of a job he loves and that she is a burden upon him.

[486] Mr Ross Bryan described how following the accident he took his wife to the Bath Medical Centre. From there she was taken by ambulance to Alice Springs Hospital. She was wheeled into the ambulance on a bed. She left the hospital in a wheelchair. After Mr Bryan took his wife home she had difficulties with everything. Mr Bryan had to dress and undress her, cook the meals, take her to the toilet, do everything for her. On first arriving home from hospital, Mrs Bryan stayed in bed for five or six days. She was crying and complaining of her lower back pain. She was not a person normally given to complaining. Mrs Bryan remained in the house for about 10 days. Mr Bryan took her out to check on the mala and bilby. Mrs Bryan could only walk slowly and with some difficulty. Mr Bryan described how

his wife had never returned to her pre-accident way of walking. She continued up to the present time to walk slowly and with difficulty. She requires assistance up and down stairs. Prior to the accident Mr Bryan did assist his wife at her place of work with carrying really heavy bulky items, otherwise she did everything herself. Following the accident she was not able to do the work she had previously done. Mr Bryan said that when his wife went to work following the accident, he would accompany her.

Mrs Bryan was not able to clean the pens after the accident. Mr Bryan would do all the lifting and carrying and organise the placement of food into the food bins. In addition to himself, Mr Bryan had seen a couple of research scientists at the Institute come in to help his wife. His wife had also received assistance from work experience students. Mrs Bryan appeared to be in a lot of pain. Following the accident Mr Bryan was the primary carer. He did the shopping, cooking and laundry. Mr Bryan travelled to Darwin in 1994 for the Darwin Cup. During the three weeks he was away, his son Clint and daughter Selena cared for Mrs Bryan. Mr Bryan has had to accompany his wife on all her doctor's appointments and to take her shopping. Mr Bryan is the principal cleaner in the house including showers and toilets and all areas of the house. He does the laundry and the ironing. Prior to the accident, Mrs Bryan used to do all the driving, now Mr Bryan drives her around. He does some gardening. They both share the care of their domestic animals.

[487] Following the accident, Mrs Bryan has not been able to participate in the housework to the extent she did prior to the accident. She could not do any sweeping or cleaning. She was able to put some of the clothes into the washing machine. Mr Bryan would hang them out. Occasionally she would cook a meal. About 12 months after the accident, Mr Bryan became aware of his wife having urinary accidents. He was not aware of any bowel or bladder problems prior to the accident. Following the accident, Mrs Bryan reverted to wearing flat shoes as she had difficulty walking in shoes with a heel.

[488] Mr Bryan gave evidence as to the long distance his wife used to be able to drive prior to the accident. He described her love of bushwalking and outdoor activities. This had slowed a bit when Mrs Bryan entered into the contract with the defendant because of her need to spend time at work caring for the mala and bilby. He described her employment with Parks and Wildlife prior to the accident. Mr Bryan described this as being pretty heavy work as he had seen her lift bales of hay and cart them around. Mr Bryan gave evidence that his wife's social life prior to the accident had been a full and active one which included entertaining friends at home and visiting friends and relatives for social occasions and celebrations.

[489] Mr Bryan gave evidence at the trial that he was a horse-trainer from the early 1960s, and later got his licence to formally train horses in Alice Springs. He also rode racehorses in amateur races. In 1987 he gave up his licence, and Mr and Mrs Bryan's son, Sean, took over his position at the

stable. Mr Bryan said that Mrs Bryan was the backbone of their horse-training business, doing the essential ground duties such as cleaning the yards, feeding and washing the horses, and getting them ready for racing. They had between one and 16 horses at any given time.

[490] Mr Bryan said that his wife thoroughly enjoyed participating in anything to do with the family and the horses. Also, their other son, Clint, was a keen motorcycle rider. Mrs Bryan rode a motorcycle down to and around the stables.

[491] Mr Bryan was questioned about driving and holidays. Prior to the accident the Bryans had been on a driving holiday, driving to Adelaide, Port Augusta and over to the west coast and on to Darwin. They camped along the way. He also said that between 1991 and 1994 they went on driving holidays from Alice Springs to Adelaide and that Mrs Bryan was a very good and confident driver herself.

[492] When Mr Bryan worked as a Coach Captain for Ansett Pioneer, Mrs Bryan assisted him when he did a few tours, for example, in the West Macdonnell Ranges and Glen Helen. On one occasion she did the cooking for the tourists and on other occasions she helped with setting up lunch by unpacking, lighting the fire, putting the billy on and generally assisting.

[493] In 1972, Mrs Bryan worked for the most part in an unpaid capacity, alongside her husband who was a senior ranger for the Northern Territory Reserves Board and responsible for all of the parks and reserves east of

Alice Springs. Eventually the Bryans moved to Trepina Gorge in 1978 and stayed there until 1986. Mrs Bryan assisted Mr Bryan with rubbish patrols, cleaning barbeques, digging post holes and erecting fences, which he described as very heavy work. For example, the cleaning out of rubbish bins meant lifting a 44 gallon drum full of rubbish and emptying it into the back of the trailer, and then shovelling the refuse out of the trailer at the dump, which Mrs Bryan did. Fencing involved two people, and using a steel dropper, crow bars and star pickets. She also manually crank-started the generator, routed and painted signs, and drove the 4WD Toyota during back-burning. Mr Bryan estimated that she would drive as a passenger or driver, some 30,000 kilometres per year in some sort of assisting capacity. Fuel used to be delivered from Alice Springs and on occasion Mrs Bryan would move full drums of fuel by rolling them over and then usually had assistance from Mr Bryan to right the drum. Mrs Bryan would change tyres on the Toyota when required.

[494] Mr Bryan gave evidence that Mrs Bryan enjoyed bushwalking, as she was “a bit of a naturalist”, and was very good with animals and plants. He estimated fairly regular walks, up to and over five or six kilometres over the Macdonnell Ranges. When Mrs Bryan became a registered carer for wildlife in 1991, the bushwalking slowed down considerably as her time was taken up with injured and orphaned wildlife.

[495] Regarding her employment with Parks and Wildlife, Mr Bryan described it as “pretty heavy work”. He had seen her lump bales of hay and cart them

around on a trolley for the mala, and she had to tip bags of lucerne chaff into bins.

[496] As far as home life was concerned, prior to the injury from the ram attack, Mr Bryan said that his wife tended to the garden as “that was her job”. As well as trimming, pruning, re-locating plants, weeding, lawn-mowing and basically spending every opportunity in daylight hours in the garden, she spread close to four tonnes of soil over the garden after the floods in 1988. Mrs Bryan did most of the painting, inside and outside, of the house, with Mr Bryan only allowed to paint the ceilings or the eaves. This stopped in 1994.

[497] Mrs Bryan was also the person who did the shopping, including the food to Mr Bryan’s clothes. She washed and ironed the clothes, kept a very tidy house by doing all of the cleaning.

[498] Ms Selena Matthews, daughter of Mr and Mrs Bryan, prepared a statement which was tendered (Exhibit P41). Annexed to the statement is a schedule of voluntary care which includes a column headed Selena Matthews. This details the voluntary care provided by Mrs Matthews for the period 17 June 1994 to mid 1999 when she and her husband left for Singapore.

[499] Mrs Kay Hawkins was a friend of Mrs Bryan. Evidence was given as to the support and voluntary help provided by Mrs Hawkins. Her statement is Exhibit 34.

[500] I accept the evidence given by Mrs Bryan as to her ability and capacity to perform a range of tasks and interests prior to the attack on her by the ram. I accept the evidence given by Mr Ross Bryan on these matters.

[501] I also accept the evidence given by Mr and Mrs Bryan as to the limitations placed upon her capacity to undertake these pre-accident activities following the ram attack. I find that Mrs Bryan's life was drastically affected by the injuries she sustained in the ram attack and the pain and distress she has undergone in subsequent years.

[502] The evidence of Mrs Bryan on these aspects is substantially supported by the evidence of her husband Mr Ross Bryan, her daughter Mrs Selena Matthews, Ms Kay Hawkins and occupational therapist Ms Michelle French.

[503] I accept the submission made by Mr Meldrum QC that the schedules of assistance provided are not required, nor intended, to be any more than a general overall indication of the average time taken over a long period of time to assist the plaintiff. The schedules assist to establish the cost of such voluntary help and are within the legal principles of this head of damage.

[504] The plaintiff is entitled to recover for voluntary assistance and services provided to her since the accident. The principles applicable to the damages recoverable under this head of damage is set out in Professor Harold Luntz, 4<sup>th</sup> edition "Assessment of Damages for Personal Injury and Death" at par 4.6.1. These have been helpfully summarised by counsel for the plaintiff as follows:

- “(a) Persons who are injured are often assisted by relatives or friends who provide nursing, perform domestic chores, help with travel, look after a business during the period of incapacity.
- (b) Such assistance necessarily involves the relatives or friends in loss of time and may in some instances, result in financial loss to them, either in incurring travelling expenses or giving up wages which they would have earned.
- (c) The law is now clearly settled that the need for the services entitled plaintiffs in the absence of a statutory prohibition or limitation (of which there is none in this jurisdiction in respect of this claim) to recover the reasonable costs of meeting these needs at commercial rates.
- (d) As to the rates, we rely on the evidence of Ms Burkitt from the Red Cross (T1456-1460, exhibit P57). These rates are established as the commercial rates.”

[505] The decision of *Griffiths v Kerkemeyer* (1977) 139 CLR 161 and *Van Gervan v Fenton* (1992) 175 CLR 327 establish the principle that damages are recoverable under these heads as they constitute a measure of needs that have been created as a result of the personal injury suffered by the plaintiff.

[506] Counsel for the Defence, Mr Reeves QC, contends that the Court should not rely upon the estimates of care Mr Bryan provided to the plaintiff.

[507] Mr Bryan agreed in cross examination that the reason for the change between the first, second and third schedules provided by him was because he had grossly overstated the amount of care he had provided to his wife. He conceded that following the accident, and prior to his retirement, he was away from home an average of seven days per month.

[508] Counsel for the plaintiff concedes that there were mistakes made in the preparation of the schedule of services provided by Mr Bryan to the

plaintiff. The Court was urged to accept the schedule of services (Exhibit P51) prepared after Mr Bryan timed himself doing various tasks. I find that whilst Mr Bryan made an error in his original calculations as to the time he spent on various tasks, I am satisfied that there was a need for his services and that he did provide them.

[509] The regime recommended by Ms French requires a greater amount of time than that provided by the carers to date.

[510] In assessing damages under this heading, I do take into account that the recommendations of Ms French are somewhat excessive. This is because as Mr Reeves QC points out, this assessment was made on one date in April 2002 when Mrs Bryan was having a very bad day. Mrs Bryan herself has made some corrections to the findings made by Ms French. Following the spinal stimulator implant there is evidence Mrs Bryan's pain levels have been reduced and it is to be expected that in the future there will be an improvement in her mobility and capacity to undertake limited activities.

[511] On the basis of this evidence, I make the following calculations on past *Griffiths v Kerkemeyer* (supra) claim.

[512] **A. From 17 June 1994 to 1 November 2001.**

These figures are extricated from Exhibit P51 with a reduction to reflect the fact that the voluntary assistance of the mala and bilby shelter was not required after the cessation of the contract in October 1997. Added to this is

the plaintiff's concession that the voluntary assistance did not extend beyond December 1996. The plaintiff is allowed the past claim:

From the date of the accident to December 1996:

$$129 \text{ weeks} \times \$588.15 = \$ 75,871.35$$

From December 1996 to November 2001:

$$252 \text{ weeks} \times \$548.15 = \$ 138,133.80$$
$$\$ 214,005.15$$

This must be reduced by the time spent in hospital, details of which are in par [462] of these reasons for judgment:

$$284 \text{ days} \div 7 \text{ days} = 40.57 \text{ weeks}$$
$$\$548.15 \times 40.57 \text{ weeks} = \$ 22,238.45$$
$$\$214,005 - \$22,238.45 = \$ 191,766.55$$
$$\text{Total} \quad \$ 191,766.55$$

[513] **B. From 1 November 2001 to 31 December 2004**

$$\text{From 1 November 2001 to 31 December 2004} = 164.7 \text{ weeks}$$

The weekly rate is based on the amounts for housekeeping and gardening set out in Ms French's report of August 2003, Exhibit P40. This is preferred to the evidence of Ms Burkitt.

$$164.7 \times 396.49 = \$ 65,301.90$$

Reduce by time spent in hospital per attached schedule:

2 weeks (actual time 12 days)

$$2 \times 396.49 = \$ 792.98$$

$$\$65,301.90 - \$792.98 = \$ 64,508.92$$

## Summary

A. Total	\$	191,766.75
B. Total		64,508.92
<b>Total:</b>	\$	<b>256,275.67</b>

**Amount allowed** **\$250,000.00**

Interest on Past *Griffith v Kirkemeyer* Expenses calculated

@ 3.59 %. That is  $\$250,000 \times 3.59\% \times 10 =$  **\$ 89,750.00**

### [514] C. Future Care Component

I refer to the evidence given by Ms French at pages 34-38 of her report (Exhibit P40) as to the housekeeping, gardening assistance required by Mrs Bryan and personal attendant care, eg to assist with exercises, personal care routine and meal preparation. In view of the subsequent improvements in her condition as a consequence of the pain stimulator, I do not accept that Mrs Bryan requires four hours of attendant care to assist her complete the weekly shopping and attending medical appointments. Mrs Bryan has given evidence that she and her husband do the shopping, whilst this is done slowly, it is still within her capability. Similarly, the evidence does not support a finding that Mrs Bryan is not capable of herself attending medical appointments. The evidence is that the pain stimulator implant has improved her own confidence in moving about. Her improved condition and the medical opinion that no further operations are anticipated or advisable would suggest that attendance upon medical advisers will be less frequent.

[515] For these reasons I do not allow the claim for four hours per week of attendant care to take Mrs Bryan shopping or for attendance for medical and therapy appointments.

[516] I do not accept the claim for two hours per day or 14 hours per week for other attendant care needs as specified by Ms French at par 20.7 of her report (Exhibit P40). This is because the assessment carried out by Ms French was done on one of Mrs Bryan's bad days. The evidence is the number of bad days are decreasing. The spinal stimulator is reducing pain levels and allowing Mrs Bryan more mobility. I would allow 10 hours a week.

**Total**

Attendant care needs per week:	10 hours x \$27	=	\$ 270.00
Home help needs per week:	5 hours x \$20	=	\$ 100.00
Garden help per week:	0.5 hours x \$25	=	\$ 12.50
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	15.5 hours per week		\$ 382.50

[517] The plaintiff was born on 22 September 1946. Luntz table 4A identifies the value to death of \$1 per week for a female aged 59 as 897.1 (as claimed by the plaintiff). I have based the assessment on the claim as made by the plaintiff although on my calculation the plaintiff is currently 58 years of age.

\$382.50 x 897.1	=	\$ 343,140.75
Less an amount for contingencies		
<b>Total allowed</b>	=	<b>\$ 335,000.00</b>

**Past Medical Expenses:**

[518] I accept the calculation on the amended special damages schedule

Exhibit P81 with respect to doctors, hospital, ambulance and travel costs.

Amount payable to HIC \$ 28,255.25

Amount paid by plaintiff to:

Doctors \$27,648.77

Hospital 10.00

Ambulance 247.90

Travel 2,943.03

= \$30,849.70 \$ 30,849.70

**Total \$ 59,104.95**

**Interest on Past Medical Expenses:**

[519] This is to be calculated at the rate of 3.59 per cent – see *Martin v Moore*

(supra)

\$59,104.95 x 3.59 x 10 = . **\$ 21,218.67**

**Future Medical Expenses:**

[520] The plaintiff's claims are as follows:

<b>Service Provider</b>	<b>Description</b>	<b>Ongoing costs</b>	<b>One-off costs</b>
<b>Grant Mercorella</b>	Monitoring progression and guidance with home-based exercise program  2 hours per bi-month for life	\$1,620.00 pa	

	Initial monitoring progression and guidance with home-based exercise program		\$ 3,240.00
	Full physical assessment		\$ 1,350.00
	Hydrotherapy/Aquatic physiotherapy assessment		\$ 1,350.00
	Wheat-filled packs	\$ 110.00 pa	
<b>Dr Geoff Thompson</b>	5 x consultations p.a.	\$ 500.00 pa	
<b>Dr Orso Osti</b>	Battery replacement to epidural cord stimulator \$20,000 every 5 years	\$ 4,000.00 pa	
<b>Dr Gus Matarazzo</b>	Monthly visits of 45 minutes \$97 per visit	\$ 1,164.009 pa	
	<b>TOTALS</b>	\$ 7,394.00 pa	\$ 5,940.00

Total of one-off costs + \$ 5,940.00

**Total of ongoing costs:**

[521] Ongoing costs are \$7,394.0 p.a. or \$142.19 per week. Luntz Table 4A identifies the value to death of \$1 per week for a female now aged 59 as 897.1 \$142.19 x 897.1 =

\$ 127,558.64

Total \$ 133,498.64

Less and amount for contingencies Allow say **\$ 130,000.00**

[522] The costs claimed by physiotherapist, Mr Mercorella, are based on a costing of physiotherapy services and included in his statement Exhibit P38.

[523] Mr Reeves QC, counsel for the defendant, argues that no amount should be allowed for future medical expenses because the inference to be drawn is that the plaintiff will be able to claim future medical expenses on Medibank Private. This is because, on the argument for the defendant, Medibank Private have not sought to pursue any claim for the plaintiff's past claims for treatment.

[524] I do not think it appropriate to make no allowance for future medical expenses. In the event that Mrs Bryan is able to make a claim for these expenses on Medibank Private, or any other private health insurance scheme, then obviously that amount will have to be refunded to the defendant.

[525] On all of the evidence the preponderance of medical opinion is there should be no further operative treatment and Mrs Bryan's condition should be treated conservatively. There is evidence that the spinal stimulator will have to be replaced every five years.

[526] On the basis of the evidence, I consider the claim for physiotherapy and attendance on the doctors as set out in the claim, are reasonable. I would allow the claim for future medical expenses.

One off costs	\$ 5,940.00	
Ongoing costs allowed	\$127,558.64	
Total	\$133,498.64	
	<b>Amount Allowed</b>	<b>\$130,000.00</b>

**Past Pharmaceutical Expenses:**

[527] I consider the plaintiff has established the amount of the claim as set out below:

We refer to the agreed figures for this item in exhibit P81 \$ 6,473.53

The agreed figures account for the period to 22 March 2004, being the date of the last pharmaceutical item appearing in the agreed Special Damages Schedule.

Past pharmaceutical expenses are also claimed for the period 22 March 2004 – 31 December 2004, being a period of 0.775 years.

The total amount paid by the plaintiff over the most recent 12 month period appearing in the Special Damages Schedule (ie the period 22.3.03 – 22.3.04) was \$201.70. This figure has been used to calculate the additional period since 22.3.04:

$\$201.70 \times 0.775 =$  \$ 156.32

**Total** **\$ 6,629.85**

**Interest on Past Pharmaceutical Expenses:**

calculated @ 3.59 %:  $\$ 6,629.85 \times 3.59 \times 10 =$  **\$ 2,380.11**

### **Future Pharmaceutical Expenses:**

[528] With respect to this claim I accept the claim as made by the plaintiff which is set out below:

The plaintiff has calculated this item by looking to the cost of pharmaceutical items for the period 23.03.2003 to 22.03.2004, being \$201.70. (22.03.2004 is the last prescription referred to in Exhibit P80).

The plaintiff submits that the figure of \$201.70 p.a. (ie \$3.88 per week) is the appropriate figure to be used for the purpose of calculating the plaintiff's likely future pharmaceutical expenses.

Luntz table 4A identifies the value to death of \$1 per week for a female now aged 59 as 897.1

\$3.88 x 897.1 = **\$ 3,480.74**

### **Past equipment Costs:**

[529] This includes the following categories from the Special Damages Schedule p 81:

Prosthesis and building costs

Amount paid by plaintiff:

Prosthesis                   \$ 3,120.25

Building Costs           \$ 4,038.00

**Total                               \$ 7,158.25**

### **Interest on Past Equipment Costs:**

[530] Interest on costs 3.59 % x 7158.25 x 10 = **\$ 2,569.81**

### **Future Equipment Costs:**

[531] In her report dated August 2002 (Exhibit P40), Ms French has set out at par 24 on pp 43 – 44, an “Estimated Future Costing Schedule”. The weekly cost identified in Ms French’s report is \$65.69.

[532] From this weekly cost I would disallow the following items:

- a) Under the heading *Mobility* there are three items for folding walking frame, motorised chair, annual servicing of chair. These three items total \$29.74 as a weekly cost. This estimate was made by Ms French during a two hour interview when Mrs Bryan was having a very bad day in 2002. I do not consider the medical evidence supports a need for these items. Since this date Mrs Bryan has had a spinal stimulator implanted and the need for any walking assistance has diminished.
- b) Certain items under the heading *Unit Cost*, I would disallow. I agree with the submission made by Mr Reeves QC on behalf of the defendant that the Unit Cost of the items should not be allowed on the basis that this would be claiming twice for each item.
- c) I note there are some items e.g. “raised garden beds” for which a weekly cost has not been allocated. However, I would not allow that cost on the basis that an amount has been allowed for gardening under the *Griffith v Kerkemeyer* claim and that should cover this

item. The amount allowed for a front loading washing machine is on the evidence well above the cheapest price for a washing machine and sufficient to absorb the cost of the wall mounting of the washing machine and clothes dryer.

Accordingly, the total amount allowed for the weekly costs estimated at \$65.69 deducting the \$29.74 leave a balance of \$35.95

$$\$35.95 \times 897.1 = \quad \quad \quad \mathbf{\$ 32,250.74}$$

**Renovations:**

[533] Statements were made by architect Ms Susan Dugdale (Exhibit P55) as to recommended renovations to the plaintiff's house. Exhibit P56 is the statement of Mr Clive Towell setting out the quantity surveyors costs of implementing the architects plans. The modification expenses arose from the report of occupational therapist Ms French. On the date Ms French assessed Mrs Bryan for the purpose of preparing her report dated August 2002, Mrs Bryan was having one of her "bad days". Since this time, Mrs Bryan has had the spinal stimulator implant. Her pain levels have reduced and her mobility improved. The medical evidence does not support a finding that she is at real risk of falling or that she is in danger to the extent that the proposed renovations to the house are necessary. Mr and Mrs Bryan have already made some structural alterations to the bathroom which have been taken into account.

[534] I am not satisfied on the balance of probabilities that the claim made for further renovations to the house has been substantiated and accordingly do not allow the claim in respect of future renovations.

**Summary of Findings:**

[535] I have found that on 17 June 1994, the plaintiff was head-butted by a ram at the entrance to her office within the Arid Zone Research Institute at Alice Springs. Mrs Bryan had a contract with the defendant to care for the mala and bilby housed within the Arid Zone Research Institute. It was an implied term of this contract that the defendant owed her a duty of care as claimed in her Third Amended Statement of Claim. The ram arrived at the Institute about a month before it attacked Mrs Bryan.

[536] Mr Geoff McKenzie, an employee of the defendant, had been delegated responsibility for the old nursery area which was adjacent to the mala and bilby pens. He was also a member of the Safety Committee established by the defendant. Mr McKenzie was aware that a ram had been placed with other sheep in the old nursery area. Mr McKenzie had been effecting repairs to the fence around the area for the purpose of containing the sheep. The defendant managed and controlled this area. I have found that the defendant assumed management and control of the ram. It was reasonably foreseeable that the ram could cause injury to Mrs Bryan if it escaped into the area through which she had to travel to her place of work. The defendant breached the implied term to exercise a duty of care by allowing the ram to

escape through the fence between the old nursery area and into the area where Mrs Bryan travelled to reach the mala and bilby pens.

[537] I have found that Mrs Bryan was head-butted by the ram in the area of her lower back. It was a hard and severe blow. As a consequence Mrs Bryan suffered injuries including severe and debilitating pain to her lower back, her groin and down both legs. The pain has continued despite extensive surgical and other treatment. She has suffered bladder and bowel incontinence, severe headaches, depression and side effects from the pain-killing drugs she has been prescribed over the last 10 years. In August 2003 she was fitted with a spinal stimulator. This has helped her to reduce her pain levels. She still has limited mobility but with the assistance of the spinal stimulator has been able to participate to some extent in day to day activities. I have found she is entitled to an award for pain and suffering and loss of amenities of life, loss of employment, medical and pharmaceutical expenses, past gratuitous services and future care.

[538] I now summarise the awards made as follows:

General Damages Past, Pain & Suffering & Loss of Amenities of Life	\$ 100,000.00
Interest on Past General Damages	40,000.00
Future General Damages, Pain & Suffering & Loss of Amenities of Life	70,000.00
Past Loss of Earning Capacity	94,634.80

Interest on past Loss of Earning Capacity	33,973.89
Future Loss of Earning Capacity	Nil
<i>Griffiths v Kerkemeyer</i> Past, Gratuitous Services	250,000.00
Interest on <i>Griffiths v Kerkemeyer</i> Past	89,750.00
<i>Griffiths v Kerkemeyer</i> Future, Care Component	335,000.00
Past Medical Expenses (including HIC)	59,104.95
Interest on Past Medical Expenses	21,218.67
Future Medical Expenses	130,000.00
Past Pharmaceutical Expenses	6,629.85
Interest on Past Pharmaceutical Expenses	2,380.11
Future Pharmaceutical Expenses	3,480.74
Past Equipment Costs	7,158.25
Interest on Past Equipment Costs	2,569.81
Future Equipment Costs	32,250.74
Renovations	Nil
<b>TOTAL</b>	<b>\$1,278,151.81</b>

[539] Accordingly I enter judgment against the defendant in favour of the plaintiff in the sum of one million two hundred and seventy eight thousand one hundred and fifty one dollars and eighty one cents (\$1,278,151.81).

[540] The parties are granted leave to apply on the question of costs if they are not able to reach agreement as to costs.

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