SUPREME COURT OF QUEENSLAND

CITATION:	*Ibbs v Woodrow & Anor* [2002] QCA 215
PARTIES:	**JANE IBBS** (plaintiff/appellant) **v** **JOHN LESLIE WOODROW** (first defendant/first respondent) **QBE INSURANCE LTD** ACN 000 157 899 (second defendant/second respondent)
FILE NO/S:	Appeal No 11536 of 2001 DC No 679 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	24 April 2002
JUDGES:	Davies and McPherson JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Set aside the judgment given at trial** **2. Judgment for the appellant in the sum of $86,681.94** **3. The second respondent pay the costs of the trial and of the appeal**
CATCHWORDS:	DAMAGES – GENERAL PRINCIPLES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERALLY – METHOD OF ASSESSMENT – LOSS OF EARNINGS AND EARNING CAPACITY – NON-PECUNIARY DAMAGE – PAIN AND SUFFERING – LOSS OF AMENITIES OR CAPACITY FOR ENJOYMENT – where plaintiff injured in motor vehicle accident – whether the assessment of future economic loss, future superannuation and general damages for pain, suffering and loss of amenities was inadequate *Michael v Stephens and FAI General Insurance Company Limited*, CA No 160 of 1992, 24 November 1992, considered

COUNSEL: J G Crowley QC, with R W Trotter, for the appellant
R M Treston for the respondents

SOLICITORS: Shane Ellis Lawyer for the appellant
Quinlan Miller & Treston for the respondents

[1] **DAVIES JA:** I agree with the reasons for judgment of Atkinson J and with the orders she proposes.

[2] **McPHERSON JA:** I agree with the reasons of Atkinson J for allowing this appeal with costs by varying the judgment to increase the amount of damages awarded to the plaintiff in the District Court from $52,899.44 to $86,681.94. The second respondent should be ordered to pay the costs of an incidental to the proceedings in the District Court.

[3] **ATKINSON J:** The appellant, Jane Ibbs, was injured whilst travelling as a passenger in a motor vehicle on 2 April 1999. The vehicle skidded, went off the roadway, and hit a large concrete block, which threw the car back up onto the road, facing in the opposite direction. Liability was not in issue and a trial on the quantum of damages only was conducted in the District Court. The learned trial judge ordered that the second defendant, QBE Insurance Limited, pay the appellant the amount of $52,889.44. The appellant's grounds of appeal were that the quantum of damages awarded in respect of general damages, future economic loss, future care and future treatment was inadequate. On the hearing of the appeal, however, the only areas in which argument was pressed were the awards for future economic loss and general damages for pain, suffering and loss of amenities.

[4] It is convenient to deal with the heads of damage in the order in which they were approached on the hearing of the appeal.

Future economic loss

[5] The appellant was born on 16 July 1954. She left school after completing Grade 12 and one semester of a pharmacy degree and was then employed as a receptionist in a medical practice. Throughout her life, apart from immediately before and after the birth of her children, Ms Ibbs has been in steady employment as a receptionist in a medical or dental practice. After the birth of her younger child, Ms Ibbs worked part-time until that child turned 16 on 12 February 1999, when she started looking for full-time work. There were pressing economic reasons for her to do so. From this time, she no longer received social security payments nor maintenance from the children's father. It was, however, difficult for her to find full-time work initially because of her age, where she lived, and the fact that she had been in one position for a long time.

[6] Ms Ibbs was injured on 2 April 1999. She returned to work on reduced duties with the use of painkillers four days after the car accident. She married her present husband, the defendant who had been the driver of the motor vehicle, 7 months later in November 1999. Mr Woodrow was an Army officer who had retired at the age of 55 and received a modest Army pension of slightly less than $20,000 a year. At the time of their marriage, they took out a mortgage for the purchase of a home, repayable over 25 years.

[7] Ms Ibbs obtained full-time employment in May 2000 as the sales co-ordinator/office manager for a real estate agency. Her evidence was that at the end

of each working day she is exhausted and in pain. As a result, she was no longer able to manage five days' work a week and in October 2001, she reduced her working week to 4 days, taking Wednesday to recuperate from the physical strain of working on Monday and Tuesday.

[8] The evidence given by Ms Ibbs and by Mr Woodrow was that she intended to keep working until the age of 65. At the time of trial, in November 2001, the appellant was aged 47 and her husband 63. Her expectation that she would not retire until the age of 65 had always been and remains her intention. Not only is that her intention, she also has pressing financial reasons to act on that intention: the reduction in income after her younger child's 16th birthday, her husband's modest pension and their mortgage commitments.

[9] As a result of the pain she suffered from her injuries, she has been forced to reduce her working week by one day which led to a loss of earnings of $68 per week. His Honour found that the plaintiff is well motivated, is well regarded by her employer and fellow employees, has a good work history and is a reliable and dedicated employee. He also accepted that she reduced her work from full-time to part-time because of the effect of her injuries on her. Future economic loss was claimed on the basis of the loss of $68 per week which the trial judge accepted was attributable to having to reduce her work by one day a week. The potential loss to the appellant of $68 a week for 18 years to the age of 65, using the 5 per cent interest tables, is $42,500.00.

[10] An adjustment is usually made to such a sum and must be made in this case for the various contingencies which may arise. The trial judge mentioned a number of factors that might properly be considered as contingencies: the prospect that the appellant would have reduced her working hours from full-time to part-time to be with her retired husband; the usual retiring age of workers in her occupation; that she might otherwise have suffered a non-compensable injury to her neck; and her difficulty in finding work due to personal circumstances not connected with her injuries. The contingencies mentioned justified a reduction in damages to the extent of 30 per cent, which was the amount the trial judge allowed for contingencies. However, they did not justify what was in effect a double reduction made by his Honour. Firstly, he reduced the period which he allowed for future economic loss to six years instead of 18 years. Although there was no evidence that if she had not been injured, she would have reduced her working hours from full-time to part-time at the age of 53, his Honour first reduced the damages as if this were not a contingency but a certainty. His Honour then further reduced the amount by 30 per cent to allow for what he referred to as contingencies. This resulted in an effective reduction of the appellant's damages for future economic loss by 70 per cent which was clearly excessive.

[11] The method of reduction used by the trial judge led to a doubling of the reduction for contingencies and, therefore, under-compensation of the appellant. The award for future economic loss should have been $42,500 reduced by 30 per cent for all of the contingencies to which his Honour referred, including the prospect that she may have reduced her working hours even if she had not been injured. When this percentage is deducted to take account of all the contingencies, the award given under this head of damage would be an amount of $29,750.00.

[12] The appellant submitted that a further sum should be awarded to the appellant for the added difficulty she might have in finding other suitable work if she were to lose her current job. This, like the prospect of her choosing to work part-time, is, however, just another of the contingencies to be taken into account in the assessment of future economic loss and would not lead to a separate award of compensation.

Future superannuation

[13] The appellant was awarded 9 per cent of the amount of future economic loss to compensate her for loss of future superannuation benefits. The adjustment to the quantum of damages for future economic loss must lead to an adjustment in the figure allowed for loss of future superannuation benefits to award 9 per cent of $29,750.00, being an amount of $2,677.50.

General damages: pain, suffering, loss of amenities and enjoyment of life.

[14] The appellant complains that the assessment of $20,000 under this head of damages was manifestly inadequate.

[15] His Honour was satisfied that the appellant suffered injuries to her neck, shoulder, sternum, chest, ribs, knees, right ankle and pelvis in the motor vehicle accident which was the subject of her claim. He was satisfied that she suffered pain in those areas that were injured as well as nausea and shock. He found that her symptoms were severe for about two weeks after the accident and then gradually improved over the next six weeks. He was also satisfied she suffered from headaches which resolved after about a year.

[16] While the learned trial judge expressed some reservations about the appellant's evidence, saying in his reasons for judgment that he did not accept her evidence in its entirety and that to some extent she had overstated the effect her injuries had had upon her, the appellant has continued to suffer pain and restriction in the use of her neck and of her knees and suffers a problem with her right arm as a result of the accident. He did not, however, compensate her for the arm injury because it was not the subject of a medical report. The learned trial judge accepted that she had crepitus in both knees. Her knees have an audible crunching sound; she can only crouch or kneel with pain and difficulty; walking on gradients or uneven ground is difficult. The medical evidence was that she had a significant intra-articular disruption to the left knee including the anterior cruciate ligament. Her neck injury gives her continuing pain and restrictions in movement.

[17] While he accepted the medical evidence that she had permanent impairment of the neck and the knees, he did not accept the percentage of impairment attributed by either medical practitioner. Instead he found the percentage of permanent impairment of efficient body function attributable to her neck was 4 per cent and 3 per cent with regard to each lower limb. This approach is not a particularly useful measure, as the attribution of a percentage disability cannot be used mechanically, as it might be in a compensation table, for the assessment of the quantum of damages.

[18] The use of a percentage loss of body function was criticised by this court in *Michael v Stephens and FAI General Insurance Company Limited* (Appeal No 160 of 1992, 24 November 1992) on a number of grounds. First, in that case it was not possible to say how the trial judge had arrived at the figure. He did not give an adequate

explanation and this court decided that the figure must have been chosen at random. In the present case, however, the trial judge gave an adequate explanation of and justification for the percentage disability which he assessed. The second criticism was that a percentage can only be a guide. It must be considered along with other evidence to arrive at the proper amount of compensation to be awarded. When used that way, there can be no reasonable objection to the use of a percentage. The learned trial judge took that approach in this case and so his use of a percentage loss of body function cannot be considered an error of law. The error made by the trial judge was not in using a percentage but rather in under-compensating the appellant for the pain and ongoing suffering from which he accepted she was suffering.

[19] As to loss of amenities, there are a number of activities which the appellant is no longer able to undertake or if she does, is able to undertake them only with difficulty. These include driving, and leisure activities such as going to the movies, going out to dinner, cooking, entertaining, gardening, playing tennis, bush and beach walking, swimming and her sexual relationship with her husband.

[20] When one considers the appellant's initial severe pain and the extent of her permanent injuries and ongoing pain and discomfort from which the trial judge accepted she suffered, together with the serious adverse effect on her lifestyle and activities, the assessment of $20,000 under this head of damage is clearly inadequate. A more appropriate level of compensation for the appellant's pain, suffering and loss of amenities is the amount contended for by the appellant in this court of $35,000.00.

Future care and future treatment

[21] No oral submissions were made in support of these grounds of appeal and no error can be seen in the trial judge's assessment of these heads of damage.

Conclusion

[22] The appeal should be allowed with costs and an award of $86,681.94 should be substituted for the award of $52,889.44 made by the trial judge. This award represents increased damages which should be awarded for future economic loss and pain, suffering and loss of amenities. As it is a higher amount than the offer to settle filed by the defendant on 6 June 2001, the respondent should also pay the costs of the trial.

Orders

1. Set aside the judgment given at trial.
2. Judgment for the appellant in the sum of $86,681.94.
3. The second respondent pay the costs of the trial and of the appeal.