SUPREME COURT OF QUEENSLAND

CITATION:	*Townsend v BBC Hardware Ltd* [2003] QSC 015
PARTIES:	**DOUGLAS VICTOR TOWNSEND** (plaintiff) **v** **BBC HARDWARE LTD** ACN 000 003 378 (defendant)
FILE NO/S:	SC No 320 of 2000
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court Townsville
DELIVERED ON:	6 February 2003
DELIVERED AT:	Townsville
HEARING DATE:	28, 29 January 2003
JUDGE:	Ambrose J
ORDER:	**I give judgment for the plaintiff in the sum of $341,450.00 and costs to be assessed on the standard basis.**
CATCHWORDS:	NEGLIGENCE – BREACH OF CONTRACT – claim by subcontractor for negligence, breach of statutory duty and breach of contract for injuries suffered while working near a defective radial arm circular saw *Evidence Act* 1997 (Qld), s 4, s 48 *Industrial Relations Act* 1999 (Qld), s 123, s 123(1)(b), s 124(1) *Workplace Relations Act* 1997 (Qld), s 125, s 125(1)(b), s 126(1)(e) *Workplace Health and Safety Act* 1995 (Qld), s 9(1), s 12, s 14(1), s 30, s 30(1)(b), s 31 *Astley v Austrust Ltd* (1999) 197 CLR 1, considered *O'Brien v T F Woollam & Son Pty Ltd* [2002] 1 QdR 622, considered *Schiliro v Peppercorn Child Care Centres Pty Ltd* (No 2) [2001] 1 QdR 518, applied
COUNSEL:	C A White for the plaintiff A J Moon for the defendant
SOLICITORS:	Roberts Nehmer McKee for the plaintiff Quinlan Miller Treston for the defendant

[1] **AMBROSE J:** On 14 April 1997 the plaintiff was working in a large shed owned, occupied and controlled by the defendant near a radial arm docking saw and bench, also owned by the defendant when the circular saw blade then in operation moved from a stationary position behind the saw bench on which the plaintiff's left hand was resting and across the bench and caused serious injury to that hand. The radial arm docking saw machine had serious defects. It lacked any guard to prevent the circular saw blade from coming into contact with any body part of an operator while in operation (or even while not in operation for that matter). The docking saw also lacked a retrieving device to ensure that at times when it was not being manually pulled forward across the saw bench by its operator it automatically remained at or returned to its resting place behind a fence on the saw bench against which timber to be cut by the saw rested as it was being cut.

[2] There is no doubt on the expert evidence that the radial arm docking saw device was dangerously defective by reason of the absence of both an automatic retrieving device to keep it in place behind the saw bench when not in use actually cutting timber and any proper guard to prevent the circular saw coming in contact with any part of the body of an operator using the saw.

[3] I accept the evidence of the plaintiff as to the events leading to his injury. At that time he was in the process of adjusting components of the long saw bench which accommodated a number of docking saws to permit milled timber to be cut to various lengths and to be docked at various angles for the purpose of the manufacture of roof trusses. The defendant had earlier provided him with computer produced drawings specifying the various lengths of timber and angles at which it was to be cut to prepare components of the framework for roof trusses later to be assembled in a jig some distance from the saw bench where he was injured.

[4] The saw bench and various docking saws are shown in exhibit 1. The particular docking saw which caused the plaintiff's injury is shown in the centre of each photograph.

[5] Initially apparently the docking saw that caused the plaintiff's injury did have a retrieving device to ensure that it did not move out of its own motion from its resting place when not in use. It used also to have a guard which operated to

prevent the blade from coming into contact with an operator standing in front of the docking saw. Upon the evidence I find that these safety devices had ceased to be attached to the saw some years before the plaintiff was injured. The saw bench and the accompanying docking saws had been shifted from another shed owned by the defendant four or five years before the plaintiff's injury. Apparently neither safety device to which I have referred was attached to the saw when shifted to the defendant's shed where the plaintiff was injured and no steps were taken to replace them after they had been relocated.

[6] Over a period of 12 months or so before the plaintiff's injury the saw had been observed on a number of occasions to move forward from its place of rest and across the saw table when not under the manual control of the operator. The precise reason for this is uncertain on the evidence, however the saws were about 25 years old and various explanations were advanced as to the possible cause of the saw moving. It is unnecessary and unhelpful to embark upon an investigation of the possible causes. It suffices to say that had there been an automatic retrieving/restraining device on the radial arm docking saw it could not possibly have moved forward except when pulled forward by its operator.

[7] Upon evidence called on behalf of the defendant no steps seem to have been taken to inspect its saw docking equipment which it authorised/required the plaintiff and his employees to use to manufacture roof trusses for it to ensure that the saws and saw bench were maintained in a reasonably safe condition for their use. Indeed evidence was given that had the plaintiff or presumably any of his workmen advised the defendant's supervisor at the shed of the deficiencies in the saw, the defendant's engineer or supervisor would then have moved forthwith to have the deficiencies rectified because it was conceded that the saws were very dangerous in the absence of an automatic retrieving device for the saw and a guard over its blade to prevent it coming into contact with an operator's hand.

[8] Over the years this saw bench assembly together with the radial arm docking saws connected with it had been owned by a series of organisations which used them to manufacture roof trusses. In 1974 the plaintiff had been employed by the then owner of the assembly and saws to fabricate trusses. He was then employed with a number of other persons, presumably as labourers to assemble roof trusses for

Wilson Hart. In about 1983 the plaintiff with another person was persuaded by Wilson Hart to become a contractor with another person and be paid piece rates for the assembly of roof trusses rather than continue as a wages employee. When the legal relationship between Wilson Hart as manufacturer of the roof trusses and the plaintiff changed from an employer/employee relationship to one of contractor/subcontractor Wilson Hart took orders for roof trusses of various sizes from building contractors, prepared the design, and gave the design to the plaintiff as sub-contractor. The "arrangement" then was that the plaintiff and his partner, a Mr Scott, would employ the other former employees of Wilson Hart who had previously manufactured the roof trusses and use Wilson Hart's plant and equipment and timber and all the other things necessary to manufacture the roof trusses in the factory owned by Wilson Hart. One resulting change in outcome was that the plaintiff and his newly found partner then became contractors who were paid on a piece work basis for the trusses they actually assembled using Wilson Hart's timber and equipment in its factory. A significant difference seems to have been that the employer-employee relationship between Wilson Hart and all the men previously employed by it to manufacture roof trusses ceased. The new relationship was one of contractor and sub-contractor between Wilson Hart and the new partnership of which the plaintiff was a partner. Other former employees of Wilson Hart became employees of the new partnership. Persons ordering roof trusses would apparently enter into a contract with Wilson Hart who would then subcontract with the plaintiff and his partner to assemble the roof trusses using the equipment supplied, powered and maintained by Wilson Hart as well as the various components of the roof trusses also supplied by that company and the plaintiff and his partner would employ men previously employed by Wilson Hart to do that work.

[9] The plaintiff and a Mr Scott formed a partnership called D & R House Framing. Later the plaintiff's wife became his partner in substitution for Mr Scott.

[10] Eventually the roof truss business owned by Wilson Hart was transferred to a succession of other manufacturing contractors each of which seems to have sub-contracted with the plaintiff and his partner for the assembly of roof trusses which the contractor then supplied to the building industry.

[11] Eventually the defendant became the owner of the factory building and plant and equipment in it used for the construction of roof trusses and there were discussions between the plaintiff as partner and officers of the defendant about the execution of a formal written contract. I accept the plaintiff's evidence that although there were discussions and drafts prepared, no written contract was ever signed by the parties or at least by him or by his partner. There were from time to time discussions about the piece work rates for the construction of trusses – presumably to keep pace with market demand, inflation etc.

[12] In late 1993 the defendant shifted its premises from Garbutt to Kirwan. This involved moving all its plant and equipment used in manufacturing roof trusses and setting them up in a large shed which was also used to store timber the defendant sold to the building trade. The docking saws and saw bench shown in the photographs to which I have referred were located approximately in the centre of the shed and an assembly rig and other equipment used to fasten the various parts of roof truss in place were also located towards the centre of the shed. The timber used to manufacture the roof trusses was stacked in the centre of the shed and around the perimeter of the shed various other building materials and timber of various dimensions were stored prior to their sale by the defendant to the building industry out of that shed.

[13] For the defendant it was contended that the plaintiff (and the firm of which he was a partner) was not "required" to use the saw bench and line of docking saws and other equipment in the shed for the purpose of cutting out and assembling roof trusses. It was contended that it was open on the evidence for the plaintiff to have cut out and assembled roof trusses with other equipment on other premises. This was not really canvassed on the evidence even with the plaintiff; it suffices to say in my view that upon the evidence it was never in the contemplation of the plaintiff's partnership from the time it entered into the contract with the owner of the equipment used to cut out and assemble roof trusses in the shed in which such equipment was kept and maintained by the owner that his partnership would perform his contractual work other than within the defendant's premises using the defendant's equipment and materials. In essence the contract was for the plaintiff and his partner to supply only the labour necessary to use the defendant's plant and materials to cut out and assemble roof trusses. It was never within the contemplation in my view of either

plaintiff or defendant that the defendant's materials would be delivered to some factory or building of the plaintiff's choice off the defendant's site so that the plaintiff and his partner might there cut out and assemble roof trusses.

[14] I infer from the very vague and rather unsatisfactory evidence as to the content of the contract between the plaintiff and his partner and the defendant that indeed the plaintiff was "required" to provide the necessary labour to cut out and assemble the roof trusses using the defendant's premises and plant to be maintained and powered at the defendant's cost. I am satisfied that it was never within the contemplation of the plaintiff or his partner or the various organisations with which he contracted to cut out and assemble roof trusses – including the defendant – that that contract would be fulfilled in any way other than by using the manufacturer's premises, plant and equipment to assemble the roof trusses with timber and connectors supplied by the manufacturer upon its premises.

[15] I am satisfied on the evidence that the defendant failed in the respects to which I have already adverted to properly maintain its plant so that it might safely be used by the plaintiff and the employees of his partnership for the purpose for which that plant and equipment was designed – as was contemplated by the contract between the plaintiff and the defendant.

[16] I am unpersuaded that there was any contractual obligation on the plaintiff to draw to the attention of the defendant the defective state of the equipment which had persisted over so many years. Those defects must have been patently obvious to any person qualified to inspect and maintain such equipment. Although this was not canvassed in evidence I would be very surprised if over the years from time to time the sort of equipment involved in the plaintiff's injury which received so much use would not have had parts replaced, including circular saw blades which one would expect from time to time would need to be sharpened and/or reset. The docking saw units after all were more than 25 years old and photographs of more modern docking saws tendered upon the trial – *vide* exhibit 6 pps 16 to 19 – rather suggest that advances have been made in the design of this sort of equipment over that time.

[17] It emerges clearly enough that as initially constructed in any event the radial arm docking saw which caused injury to the plaintiff was designed so that while in

motion the circular saw would be pulled by the operator standing in front of it across the timber to be cut. To pull the docking saw towards him the operator would have to overcome some degree of resistance designed to keep the docking saw away from the operator. Presumably this resistance could be effected either by some sort of spring or a suspended weight subject to gravity so that should the operator let go the handle on the saw, the spring and/or weight pulling the saw away from him would return the rotating saw back to its position of rest altogether off the saw bench where it would be kept in a stationary position until the operator again took hold of the handle shown in the photographs and pulled that rotating saw towards him across the saw bench to cut through timber held against the fence behind the bench.

[18] The plaintiff pursues three causes of action –

1. Negligence.

2. Breach of s 30 and/or perhaps s 31 of the *Workplace Health and Safety Act* 1995 and

3. Breach of contract.

Negligence

[19] In my view it was clearly within the contemplation of the defendant that the plaintiff (and his workmen) would use the defendant's equipment for the purpose of cutting out and assembling roof trusses as its contractor. In my view it there is clearly a proximity arising out of that contractual arrangement to impose upon the defendant a duty to take reasonable steps to maintain its equipment (and indeed its shed where the plaintiff and his workmen were known to work to meet the plaintiff's contractual obligations) in a reasonably safe condition. The circular saws were approximately 300 mm in diameter and capable of inflicting very serious injury on operators or other persons if reasonable care was not taken to see that unnecessary dangers of contact with persons in its vicinity when it was in operation were avoided. There was no suggestion on the evidence in this case that it would have been either expensive or difficult to put the docking saw which injured the plaintiff

in the condition that it had been in when purchased new – that is with an appropriate guard and an automatic returning device – the provision of either of which on the facts of this case would almost certainly have avoided the plaintiff's injury. In my view there was nothing in the design of the saw to prevent a guard operating efficiently when the saw was cutting timber for roof trusses. I refer only to the photographs at pps 16-19 in exhibit 6 and to exhibit 14.

***Workplace Health and Safety Act* 1995 ("the Act")**

With respect to any obligation owed by the defendant to the plaintiff pursuant to ss 30 and 31 of the Act, in my view the place where the plaintiff was injured was clearly a "workplace" within s 9(1) of the Act, where work was likely to be performed by a worker, self-employed person or employer.

[20] In my view the plaintiff was a "self-employed person" within both s 9(1) and s 12 of the Act.

[21] I apply *Schiliro v Peppercorn Child Care Centres Pty Ltd* (No 2) [2001] 1 QdR 518 and hold that if the plaintiff can bring himself within Part 3 the 1995 Act gives him a civil cause of action.

[22] Under s 30(1)(b) it is provided *inter alia* –

"**30.(1)** A person in control of a workplace has the following obligations –

…

to ensure the risk of … injury from any plant … provided by the person for the performance of work by someone other than the person's workers is minimised when used properly".

[23] Section 31(1) provides *inter alia* –

"A principal contractor has the following obligations for a construction workplace –

…

(b) to ensure that plant … at the workplace for which no other person is presently responsible [is] safe and without risk of …injury to persons at the workplace".

[24] I am unpersuaded that the defendant's premises where the saws and saw bench were located comes within the definition of "construction workplace" under s 14(1) of the Act. I am unpersuaded that premises where work was conducted to pre-fabricate roof trusses for delivery to constructions sites can properly be characterised as a workplace "where building work" or "civil construction work" was done. I refer merely to the definition of "building work" and "civil construction work" contained in schedule 3 to the Act.

[25] In my view therefore whether or not a breach by a principal contractor of an obligation under s 31(1) of the Act gives a civil cause of action it could not be said that the defendant's premises in which the offending plant was located was a 'construction workplace" within the Act.

[26] The decision of Phillipides J in *O'Brien v T F Woollam & Son Pty Ltd* [2002] 1 QdR 622 was cited as an authority relevant to obligations under both ss 30 and 31 of the Act.

[27] In my view on the facts of this case there is no obvious reason why a statutory obligation owed by an employer to minimise the risk of injury to its employee from plant which it owns and provides for the performance of work should differ from that on the same owner of such plant to minimise the risk of injury from that plant it provides to a contractor to perform that very same work as contractor as would be performed by its employee.

[28] I observe merely that on a broad reading of s 30(1) of the Act, it seems to impose little if any greater statutory obligation on a person in control of a workplace than would be imposed in negligence in any event. On one reading of the section it would purport to impose on a person "in control of a workplace" the same obligation with respect to independent contractors having access to and working within that place as it would impose with respect to employees (or "workers") of that person in control.

[29] However in this case I am satisfied that it is unnecessary for the plaintiff to rely upon a breach of obligation under s 30 of the *Workplace Health and Safety Act* 1995 to recover judgment against the defendant and it is unnecessary to give further consideration to *O'Brien v Woollam.*

Breach of Contract

[30] I will turn next to the plaintiff's cause of action in contract.

[31] In *Astley v Austrust Ltd* (1999) 197 CLR 1 at 23 (para 48) the majority members of the High Court observed –

> "The theoretical foundations for actions in tort and contract are quite separate. Long before the imperial march of modern negligence law began, contracts of service carried an implied term that they would be performed with reasonable care and skill. Persons who give consideration for the provision of services expect that those services will be provided with due care and skill. Reliance on an implied term giving effect to that expectation should not be defeated by the recognition of a parallel and concurrent obligation under the law of negligence. The evolution of the law of negligence has broadened the responsibility of professional persons and requires them to take reasonable care and skill even in situations where a contractual relationship cannot be established. But given the differing requirements and advantages of each cause of action, there is no justification in recognising the tortious duty to the exclusion of the contractual duty."

[32] Although the nature of the contractual relationship and resulting obligations considered in *Astley v Austrust* differ in significant respects from the nature of the contractual relationship in the present case in my view it is clear that whatever may have been the precise terms of the contract between the plaintiff and the defendant the plaintiff was under an implied contractual obligation not to provide the services required under the contract negligently so as to put the defendant at risk of loss and equally the defendant was under an implied obligation to take reasonable steps to see that its equipment which the plaintiff was required/authorised to use in the performance of his contract with the defendant and which in the contemplation of both parties would be used for that purpose was maintained in a reasonably safe

condition so as to avoid posing a danger to the plaintiff and the partnership's workmen when the plaintiff was meeting his obligations under his contract with the defendant.

[33] In my view the failure of the defendant in this case to take reasonable steps to see that the dangerous condition of the radial arm docking saw which led to the plaintiff's injury was not repaired or made safe was a breach of an implied term in the contract between the plaintiff and the defendant that the defendant would maintain that equipment in safe working condition for use by the plaintiff's partnership in performing its contractual obligations.

[34] Having regard to the effect of *Astley v Austrust Ltd* at the time of the plaintiff's injury on 14 April 1997 I hold that the defence of contributory negligence is not open to the defendant in this case.

[35] To the extent that I have found the defendant guilty of negligence leading to the plaintiff's injury it is desirable in any event that I make a finding on the question of contributory negligence with respect to that cause of action pursued with other causes of action by the plaintiff in this case in spite of my application of *Astley v Austrust Ltd*.

[36] In my view on the facts the plaintiff was not really in the process of using the radial arm docking saw at the time of his injury. He was merely adjusting the saw bench to cut lengths of wood appropriate to comply with the computer drawn plan that he had been given by the defendant. While it is true that he was aware that on a number of occasions over the previous 12 months the docking saw had of its own motion, moved onto and partly across the saw bench, he was really not using the saw at the time of his injury. He had not touched it. He was merely setting up the equipment so that his men might cut wood the required length and with the required angles and so on. In my view it was really a matter of momentary inattention that led him to put his left hand on the bench well away from the rotating circular saw not then in use as he stretched around the radial arm of the saw to pull a piece of wood that had been cut at one end down the bench; that piece had to be cut at the other end to measure the appropriate docking length on the saw bench. The whole incident must have occurred within a very short time while the plaintiff was

concentrating on setting up the saw bench to be used by the first shift of his men to work after he had set the saw bench up ready for use.

[37] It is contended on behalf of the defendant that the plaintiff should be held about 70% responsible for his injury. Essentially it is said that he was negligent not merely in not anticipating that the saw might move out towards him and cut his hand where he placed it – perhaps inadvertently – on the saw bench but also and more importantly in failing to take steps to ask the defendant to repair the saw by having the missing automatic restraining device replaced and as well having the missing saw guard replaced.

[38] It is not suggested on the evidence that the plaintiff would have had any right to repair or alter the defendant's equipment. There was no obligation on the plaintiff to maintain or repair that equipment. To the extent that there was an obligation on anybody to repair it and see that it was safe, that obligation was on the defendant. Undoubtedly the plaintiff and his workmen were aware that over a period of 12 months or so prior to the plaintiff's injury, that particular docking saw in any event could sometimes move forwards without the operator pulling it out across the saw table. It is said that the plaintiff ought to have informed the defendant and asked the defendant to repair this defect. When asked, the defendant's employee, Mr Marsh said unsurprisingly that had he been asked to repair such a dangerous condition he would have taken steps to see that that was done.

[39] With respect to the apportionment of fault upon a finding of contributory negligence I take the view that the plaintiff ought to have asked to have these deficiencies in the docking saw (and perhaps other docking saws) made good by the defendant. Had he asked I think it more probable than not that the defendant would have taken steps to repair the deficiencies in the docking saw. It is not suggested that it would have been very difficult or that it would have taken very long to make those repairs. I cannot believe however that officers of the defendant who must regularly have maintained and serviced the docking saw would not or should not have become aware of its defective condition. However there is no positive evidence to that effect.

[40] In my view the negligence of the defendant was "gross" in this case. With some reservation I would conclude that the acts and omissions of the plaintiff go beyond mere inadvertence although I think the placing of his hand inadvertently in the path of the then stationary saw when he was setting up the saw bench for his men to cut out pieces of roof truss could properly be described as inadvertence while he was distracted while reaching for a piece of wood to ensure that timber was cut to the correct measurement on the saw bench, preparatory to work commencing on the cutting of timber for the roof trusses. Had one of the plaintiff's employees been injured that employee in my view could almost certainly have sued for negligence both the plaintiff as employer and the defendant as the owner and provider of the dangerous equipment. While the plaintiff may not have had any right to interfere personally with the defendant's radial arm docking saw by fixing new parts or replacing old parts to it, in my view he should have taken steps at least to request the defendant to repair that equipment.

[41] In the circumstances with respect to the plaintiff's cause of action in negligence I would apportion responsibility as to 15% to the plaintiff and 85% to the defendant.

[42] I will turn now to quantum of damage.

[43] In April 1997 the plaintiff was 45.5 years of age. He is presently 51.25 years of age. His present life expectancy on the statistics is 32 years. The plaintiff's injury suffered in April 1997 involved amputation through the base of the thumb, index, middle and ring fingers on the left hand. He underwent surgery at Townsville General Hospital and his thumb was replanted and the tip of his ring finger reattached. His index and middle fingers amputated through the distal joints, were not reattached and were repaired with skin grafting. He was discharged from hospital on 25 April 1997 and returned daily for wound dressings and splint applications. On 19 May 1997 he underwent surgical tendon repair and was discharged on 23 May 1997. When this wound healed he underwent physiotherapy and occupational therapy. In May 1998 he underwent surgical treatment for joint contracture in the web space between his thumb and index finger.

[44] He undertook various rehabilitation courses with a view to strengthening his left hand and desensitising the pain from which he was then suffering. He took various

training courses and sought employment but was unable to obtain it. He did go back to supervise his partnership operations when he got out of hospital but was unable to do very much. He relied upon the foreman of his workmen to stand in his place. He has sought jobs of various sorts but unsuccessfully. He helps his wife to conduct a gift shop which produces very little income.

[45] He has been left with a weak thumb and left hand generally and cannot sustain holding anything or weight bearing in his left hand for more than a few minutes. He experiences phantom pain in the tip of his left index finger and there is a numbness over the stump of that finger. He suffers pain at night time and from time to time takes drugs to relieve it. What is left of his index finger aches when he carries out gripping or manipulative activities. He has been left with numbness of his middle finger which also aches when he grips or manipulates things with his left hand. The left ring finger is slightly bowed and he has lost movement in one of the joints. There is a loss of range in the movement in the left wrist although it is painless. He has not really worked since the accident. He assists his wife who has started up business in a gift shop – mainly serving behind a counter. He is able to perform only some of the outdoor activities he performed before his injury. He could do very little for about six months but is now able to work as long as he does not spend more than half an hour or so using his left hand. He is now able to drive although he could not for about six months after his injury. If he drives for more than a relatively short time the pain is his left hand is aggravated.

[46] He is no longer able to play squash or golf which he did prior to his injury although he is able to enjoy fishing to some extent, although his capacity to use his left hand when necessary is diminished.

[47] His hand appears of course to be deformed by the amputations he has had and the appearance of his left thumb is cosmetically unattractive.

[48] I am satisfied that he applied for many jobs after he recovered sufficiently from his injury to do something but was unsuccessful in obtaining any position.

[49] It is clear from the evidence that he applied for positions presumably in the building industry or other industries connected with them, without informing prospective

employers of the injury he had suffered to his left hand but perhaps because of his age, and/or because the nature of his injury was known in the industry in the Townsville district generally, he did not manage to secure an interview with anybody who might have available jobs that he could perform with his physical disability.

[50] I will not list the various functional incapacities in the plaintiff's left hand and wrist which are contained in paragraph 7 of the report of the occupational therapist, Katherine Purse, which is Exhibit 5. It suffices to say that he now has a very significant restriction in left wrist flexion and extension and left ulna deviation and left radial deviation. His left thumb joint is restricted to 35 degrees in comparison with the right thumb flexion of 90 degrees. Similarly abduction of the left thumb is restricted to 30 degrees compared with 90 degrees on the right thumb. Adduction is also restricted.

[51] The plaintiff is able to safely lift and carry a load of 18 kilograms if he uses both hands. He uses his left hand to support the load on his palm, rather than attempting to grip it with his fingers. The grip strength of his left hand initially is about three-quarters that of his right hand but drops to nearly half that of his right hand after he has lifted something five times. This indicates a lack of endurance for sustained gripping. His functional left hand grip is reduced. His left hand dexterity is very impaired and he has difficulty manipulating small items with it. He continues to experience pain in his left thumb and left fingers and he takes drugs to alleviate this pain. He will probably suffer such pain in his left hand, particularly after attempting to use it, for the rest of his life.

[52] He no longer has the physical capacity to engage in the employment in which he did engage prior to his injury because he lacks both hand strength and dexterity. Indeed he is unable to engage in labouring positions in the industrial field.

[53] He might obtain some employment if it were available. However employment involving driving motor vehicles or forklifts or handling equipment generally that requires that he use his left hand on levers or controlling devices is unsuitable for him because after he has used his left hand for this purpose for a relatively short time, he loses the capacity to continue to do so.

[54] I accept that had it not been for his injury the plaintiff would have continued to work in fields ancillary to the construction industry if not indeed in the construction industry itself. He had spent nearly all of his working life making roofing trusses. However, the defendant ceased the manufacture of roof trusses in November 1997. At that time of course the plaintiff was unable to do that sort of work although he attended at the defendant's premises from time to time presumably to oversee the performance of his foreman who oversaw the plaintiff's employees while they were finishing the contractual work for the defendant.

[55] Had the plaintiff not been injured on 14 April 1997 I am satisfied that he would have obtained employment somewhere in the construction industry subsequent to November 1997. I am satisfied that with his experience both as a roof truss fabricator and as business man running the partnership business he would either have obtained employment with somebody supervising and making roof trusses or perhaps in the alternative have acquired some interest in the equipment necessary to fabricate roof trusses and continue in partnership with his wife to do the work that he had been doing for nearly a quarter of a century before his injury.

[56] There was no evidence as to what happened to all the roof truss manufacturing equipment which presumably the defendant did not require when it closed down its roof truss manufacturing business. It may be that had the plaintiff not been so badly injured, and had he had available to him his trained workforce with many years experience, should he not have been able to acquire that equipment for the partnership he may well have been able to enter into a contract similar to that which he had with the defendant and its former owners with any purchaser of that equipment. These considerations however verge on speculation because the evidence is quite silent as to what prospects if any the plaintiff may have had in making available his services to whoever purchased the truss making equipment from the defendant – if indeed anybody did purchase it – when it ceased to make use of that equipment. The plaintiff says that there were four other manufacturers of roof trusses in Townsville at the time and it may be perhaps that competition from those manufactures was a factor which led to the defendant deciding to cease its roof truss manufacturing operations. This was not canvassed or examined in the evidence and it seems to me impossible to do more than assume that the plaintiff without injury would almost certainly have engaged in some other occupation

involving the use of equipment of the sort that he had been using for most of his working life. He never made any enquiries as to the availability of this sort of employment of course because of the consequence of his injuries. He was quite unable to do that sort of work. The evidence is silent as to the availability after his injury of work suitable for him in his pre accident condition as indeed it is silent (apart from very brief evidence of the plaintiff himself) as to availability of work suitable for him after he suffered injury.

[57] The following items of damage are agreed between the parties –

Griffiths v Kerkemeyer – past assistance	$3,936.00
Interest thereon	$452.64

Future loss of Earning Capacity – $200 per week for 13 years and 9 months

The plaintiff would discount this by 15% leaving a total of $89,250. The defendant would discount this by 25% leaving a total of $79,395.

[58] Although I have some reservations about the future weekly loss of $200 which the parties have agreed upon it seems to me inappropriate to embark upon further consideration of this matter. I have no knowledge of factual matters which the parties took into account in reaching the agreement. The plaintiff obviously has a physical capacity to do something but having regard to his age and disability it seems to me that he will be unable to find employment that would earn him anything like the income that he was able to earn as manager of his roof truss fabrication business in April 1997. However in the light of what the parties have agreed, I will simply assess his loss of future income earning capacity in the sum of $89,250.

[59] Lost superannuation on that sum at 9% is $8,032.50.

[60] I assess his future medication costs for pain killing tablets for 85% of his life expectation of 32 years at $4 per week in the sum of $2,873.

[61] It is agreed that past expenses paid by the plaintiff or for which he is liable to pay amounts to $11,868.72.

[62] An item of damage in issue is the assessment of general damages for pain, suffering and loss of amenities of life.

[63] The plaintiff had a severe and painful injury to his hand. Having regard to his background, experience and education, he has been left largely unemployable.

[64] He had a series of painful hospitalising operations on his left hand over a period of about 18 months. He has been left with a painful hand which has required him to take analgesics for relief. It interferes with his daily activities and even with his sleeping. It has restricted him in his sporting activities. It may well be that he will be able to engage in some other activities for relaxation. These were not canvassed in the evidence and I will avoid speculating what sporting or social activities may still be available to him should he be sufficiently interested to pursue them. There are a variety of activities perhaps which have not been canvassed, in which he could engage should he be interested.

[65] I assess his general damages in the sum of $80,000. Of this sum I apportion $50,000 pre-trial and $30,000 post-trial. I assess interest on past general damages of $50,000 at 2% for 5.66 years at $5,660.

[66] With respect to past economic loss (and indeed future economic loss), reference to the partnership statements for the years ended 30 June 1996 and 30 June 1997 (Exhibit 11) demonstrates that at 30 June 1996 the plaintiff and his wife shared the partnership profits equally each taking the sum of $32,756.

[67] For the year ended 30 June 1997 they shared the partnership profits equally, each taking $38,039.45.

[68] For the year ended 30 June 1998, they shared the partnership profits equally each taking $6,413.35.

[69] The whole matter is complicated because the evidence was not analysed or considered in the context that the whole of the partnership profits prior to June 1997

seem to have resulted from the activities of the plaintiff rather than that of his wife. There is no evidence whatever that she did anything in connection with the assembly of roof trusses. Perhaps she performed some clerical work for the partnership.

[70] On one view then, it was the effort and activities of the plaintiff which produced in reality the whole of the partnership income which he shared equally with his wife.

[71] This was a matter however that was never canvassed or examined upon the trial and it is inappropriate I think, in the circumstances to do other than simply accept what has been agreed between the parties as to future loss of earning capacity and analyse the case presented on behalf of the plaintiff as to his pre-trial loss of earnings/earning capacity.

[72] The authorities dealing with cases of this sort in the assessment of pre-trial and post-trial loss of income resulting from physical disability of an income producing partner whose the activity produces the partnership income shared equally with another partner who makes little or no contribution to that income, have not been canvassed or argued. They are analysed in Luntz on damages, 4th edition, at p339 *et seq*. Upon the evidence I feel unable to apply them directly although I keep in mind the approach they adopt when assessing pre-trial loss of earning capacity.

[73] The plaintiff of course is entitled only to an after tax figure for loss of income. The evidence does not disclose what additional expense was incurred by the partnership to employ other people to do what the plaintiff had done prior to injury from 14 April to 30 June 1997.

[74] On the face of his personal tax returns and the partnership returns, I am unable to discover any additional costs that may have been incurred in this period of ten weeks or so. Reference to the partnership profit and loss statement for the year ended 30 June 1997 shows that the wages paid by the partnership during that year went up from approximately $84,500 paid in the previous year to $124,800.

[75] Upon the evidence I feel unable to infer what, if any part, the inability of the plaintiff to work for the last 10 weeks of the 1996/97 tax year in the partnership business may have played in that very significant increase in wages.

[76] I am unprepared to speculate as to what if any loss prior to 30 June 1997 the plaintiff suffered as a consequence of his severe hand injury.

[77] Looking at the picture broadly it seems to me the only way to assess pre-trial loss of income is to adopt a broad brush approach. In doing this it seems to me appropriate to ignore the post trial loss of earning capacity of $200 per week to which the parties have agreed. The basis of this agreement is not clear to me and it seems to me a very generous concession of the part of the plaintiff who obviously had an earning capacity (disregarding the income splitting effect of the partnership arrangements he had with his wife) of somewhere between $60,000 and $70,000 gross per year. Tax payable on $65,000 pa was $21,152 leaving a net weekly income of $843.23 probably attributable to his work.

[78] For the year ended 30 June 1998 the partnership profits shared equally between the plaintiff and his wife amounted to about $12,826 upon which tax of about $1,500 would be payable leaving a net weekly income of $217.80. I find that apart from during the period 1 July 1997 to November 1997 while the roof truss fabrication business was still being conducted, the plaintiff's efforts contributed little if anything to the partnership income which was attributable almost entirely to the activities of his wife. The attribution of the earning of income from the gift shop to the partnership was merely to achieve the splitting of the income earned by the wife for taxation purposes – in line with the course adopted with respect to splitting the plaintiff's income when he was managing the fabrication of roof trusses. The gift shop itself seems to produce a negligible income.

[79] On the material before me I would attribute the gross loss of from $60,000 to $70,000 pa to the cessation of the partnership roof truss making venture. I find it difficult however to deduce from these figures what the plaintiff's loss of earning capacity attributable to his injured hand may have been because closure of that roof truss fabrication business run by the defendant seems to have been unconnected with the plaintiff's injury. At least there was no evidence to suggest that the

plaintiff's injury had anything to do with that closure. What does emerge however is that from 1 July 1997 to 30 June 1998 the profit of the non-gift shop partnership business shared by the plaintiff and his wife equally greatly diminished. I attribute this diminution to the roof truss making partnership business ceasing to operate. Had it not been for the plaintiff's injury of course, he may very well have earned income doing something else either in roof truss fabrication or in some other field connected with the building construction injury.

[80] I am satisfied, having regard to his experience and application in the business in which he had been working for 25 years that apart from his injury he would have earned more than the basic wage from the time of the closure of the roof truss making business in November 1997 up until date of trial – a period of 5.25 years. It is probable that he could have obtained employment in the building industry or as a storeman. Indeed he obtained a ticket to use a mechanical loader after his injury but was unable to drive it adequately because of his injured hand.

[81] I have had regard to relevant awards for :

1. The minimum basic wage
2. Builder's labourers
3. Storemen and packers

[82] Although no reference was made in the course of the trial to awards made by the Commission under the *Workplace Relations Act* 1997 or the *Industrial Relations Act* 1999 under s 125(1)(b) of the 1997 Act which is replicated in s 123(1)(b) of the 1999 Act an award has the force of law throughout Queensland and under s126(1)(e) and 124(1) binds all employers and employees who are engaged in the calling to which it applies.

[83] Awards must be published in the Industrial Gazette evidence of which "may be given" by its production under s 48 the *Evidence Act* 1977. I refer to the definition of "gazette" in s 4 of that Act. The guaranteed minimum Queensland wage is recorded in the Industrial Gazettes for the year following the dates specified in the following amounts –

1 September 1997	$359.40 per week
1 September 1998	$373.40 per week
1 September 1999	$385.40 per week

1 September 2000	$400.40 per week
1 September 2001	$413.40 per week
1 September 2002	$431.40 per week

[84] Over the period between 1 July 1997 and date of trial the average guaranteed minimum wage in Queensland was $393.90 per week before tax.

[85] With respect to the Builders Labourers award the Industrial Gazette records the following entitlements

1 September 1997	$431.30 per week
1 September 1998	$446.50 per week
1 September 1999	$459.42 per week
1 September 2000	$475.38 per week
1 September 2001	$488.68 per week
1 September 2002	$508.82 per week

[86] The average award wage for a building labourer over this six-year period was $468.35 before tax.

[87] With respect to the award for packers and storemen the Industrial Gazette records the following award entitlements with respect to the following periods –

1 September 1997	$399.65 per week
1 September 1998	$413.65 per week
1 September 1999	$425.65 per week
1 September 2000	$440.65 per week
1 September 2001	$453.65 per week
1 September 2002	$471.65 per week

[88] The average award rate for storeman/packer over this period therefore was $434.15 before tax.

[89] The average of these three award rates per week is $432.13.

[90] I am satisfied that had the plaintiff not been seriously disabled, in November 1997 when the defendant ceased manufacturing roof trusses he would probably have been able to obtain a job returning an income between that time and date of trial which was significantly in excess of the average basic wage. I am satisfied that he would probably have been able to obtain a job at least as a builder's labourer or as a storeman and packer using loading equipment. There is no evidence called in this case as to what the likely wage would have been in either of those occupations. I am only left with what the awards provide. It is common knowledge of course that very

often persons in the building industry and indeed in other areas connected with it are paid significantly in excess of the current award wage. However, in the absence of any evidence from persons knowledgeable in this field it seems to me that I should proceed with caution on the basis that the plaintiff would certainly have received at least the award rate and while I am prepared to infer that he would probably have received something in excess of award rates, to attempt to estimate precisely how much in excess on the state of the evidence would be mere speculation. Having regard to his experience drive and initiative however I infer that he would probably have earned at least 10 per cent more than the average of the award rates referred to in para 88 hereof which is $475.34.

[91] Adopting the broad brush approach which I have it would seem unprofitable to attempt to calculate with precision the income tax payable on the various averages of the award rates to which I have referred. I have regard however to the tables contained in the CCH Volumes of the Master Tax Guide for the years 1998 and 2002.

[92] I proceed on the basis that had the plaintiff received the minimum wage of $475.34 per week which I have averaged over the period of six years from November 1997 to February 2003, for a period of 5.25 years he would have paid income tax on that wage in the sum of $4,425.76 per annum. His average net income would have been $20,291.92 per annum. Loss of that income for 5.25 years I assess at $106,532.58.

[93] I am unpersuaded that the evidence would support an assessment on the basis upon which counsel for the plaintiff relies. It was contended that from date of injury until 1 October 2000 he suffered a loss of income (and superannuation) of $700 per week.

[94] It is contended that from the 1 October 2000 until the date of trial on the basis that the plaintiff had been capable of some employment since 1 July 2000 he had suffered a net loss of $200 per week. The problem I have with this approach is that there seems to be no evidence upon which it could properly be inferred that between date of injury and 30 June 1997 the plaintiff did lose $700 per week net. This figure seems to have been adopted by an analysis of the plaintiff's tax returns. I am unpersuaded that any analysis of the tax records of either the plaintiff or the

partnership supports this figure. In my view there is no evidence to justify inferring from the partnership and/or the plaintiff's tax records that subsequent to the termination of the contract between the plaintiff and the defendant he could have continued to earn a net wage and superannuation together amounting to $700 per week.

[95] While satisfied that the plaintiff has suffered significant financial loss between date of injury and date of trial I am persuaded that the only assessment open to me on the evidence is to use the awards published in the Industrial Gazette to which I have referred to and consider the average of award payments over the period to which I have referred. The tax rate which I have applied to that average indicate a net income after tax in respect of the average of those awards. The assessment I then make finds support if not in the evidence at least in the awards which fortunately for the plaintiff by virtue of ss 125 and 123 of the industrial Acts to which I have referred had the force of law through the State at material times.

[96] Doing the best I can on this rather unsatisfactory state of affairs I assess the plaintiff's pre-trial loss of wages and loss of income (and superannuation) as follows:

Loss of net income $106,532.58

Loss of superannuation at 7% of loss of gross income of $24,717 x 5.25 years is $9,083.50.

I assess interest on $66,347.58 ($106,532.58 (lost income) – $40,185 (INS and DSS *vide* exhibit 8) + $9,083.50 (lost superannuation) = $78,026.36 at 6% pa for 5.25 years which is $23,760.79.

[97] In summary I assess damages as follows:

General damages pain suffering and loss of amenities	$80,000.00
Interest on $50,000 thereof	$5,660.00
Pre-trial loss of income	$106,532.58

Pre-trial loss of superannuation		$9,083.50
Interest thereon (lost income and superannuation)		$23,760.79
Past *Griffiths v Kerkemeyer* (agreed)		$3,936.00
Interest thereon		$452.64
Loss of future earning capacity (agreed)		$89, 250.00
Loss of future superannuation (agreed)		$8,032.50
Future medication (agreed)		$2,873.00
Pre-trial expenses (agreed)		$11,868.72
	Total	**$341,450.00**

[98] I give judgment for the plaintiff in the sum of $341,450.00 and costs to be assessed on the standard basis.