SUPREME COURT OF QUEENSLAND

CITATION:	*Lowe v Nominal Defendant* [2003] QSC 465
PARTIES:	**TREVOR JOHN LOWE** (plaintiff) **v** **THE NOMINAL DEFENDANT** (defendant)
FILE NO:	SC No 7941 of 2001
DIVISION:	Trial Division
PROCEEDING:	Claim
DELIVERED ON:	12 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	8 December 2003
JUDGE:	de Jersey CJ
ORDER:	**1. Judgment for the plaintiff against the defendant for $149,368.88.** **2. Costs reserved.**
CATCHWORDS:	TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – GENERALLY – where plaintiff injured in road accident for which defendant admits liability – where plaintiff now earns $400 per week – where comparable full-time wage is $580 per week – where plaintiff will ultimately require arthrodesis – assessment of damages
COUNSEL:	J Lee for the plaintiff R Treston for the defendant
SOLICITORS:	Keith Scott & Associates for the plaintiff Gadens Lawyers for the defendant

[1] **de JERSEY CJ:** The plaintiff is a single man who was born on 4 September 1956. On 23 April 2000 he was injured in a collision between his motor cycle and a motor vehicle. Liability is admitted. The quantum of damages only needs to be determined.

[2] It is convenient to state at once that I accepted all of the evidence given at the trial. (I note that the plaintiff did not pursue the issue of risks of further injury raised in the final paragraph of the occupational therapist Ms Bentley's report, to which objection was taken.) I record expressly that I found the plaintiff a patently honest and reliable witness who did not seek to overstate his disabilities and consequent limitations.

[3] The plaintiff was 43 years old when injured, and is now 47 years old. He suffered a fractured right ankle, which Dr Toft described as severe and complex. He spent two days in hospital following an operation on the ankle, wore a plaster cast for six weeks, and later for a further fortnight. He underwent physiotherapy. The accident has led to a 15 per cent loss of function in the right leg, according to Dr Toft, and on Dr Pentis's view, a 20 to 25 per cent loss of function. The difference between those percentage assessments has not assumed any great significance in my resolution of the case.

[4] The plaintiff also suffered a wound to his left shin, which took some time to heal, but produced no residual disability.

[5] His consequent practical limitations are that he cannot jog as he did, his walking is affected – he limps, he has to descend steps sideways, and uneven ground can produce difficulty in movement.

[6] At the time of the accident, the plaintiff was working in a multi-faceted role at a builder's demolition yard, for a company trading as Builders' Surplus, owned by a Mr Alan Coleman. The plaintiff is a qualified glazier. The workplace, where he still works, is comparatively flat and he is able to carry out his work – glazing, truck driving, serving customers and yard work – with relative ease. His largest problem is that the right ankle tends to roll over from time to time. But if his leg aches, as it does every week or so, he can relieve the pain by sitting down, relaxing and rotating the limb. He has to be careful lifting. A good indication of the overall extent of his problem is that he has not had to resort to analgesics.

[7] The plaintiff had a varicose vein condition in his right leg prior to the accident, and that has become worse. A vascular surgeon Dr Grosser thought it probable that the veins had worsened because of local trauma at the time of the collision, but he could not exclude other causes. At least in the short term, elastic compression support should decrease swelling.

[8] With degenerative arthritis, the right ankle will deteriorate over the next five to 10 years, ultimately necessitating an arthrodesis in 10 to 15 years time. That should be regarded as consequent upon his accident injuries. Dr Toft put the total cost involved in that at $10,000 to $12,000, whereas Dr Pentis put it at $7,500. Dr Toft envisaged immobilization for about three months following the operation, and Dr Pentis envisaged a recovery period of about a year. Dr Toft considered that the plaintiff would, following the arthrodesis, be permanently 15 per cent impaired in right leg function. Although the plaintiff said that he would hate to have to endure another operation, and that the pain would have to be very bad before he did so, I am proceeding on the basis that the plaintiff will probably have that operation in 10 to 15 years time, and the evidence of Dr Toft especially leads me to that position.

[9] The plaintiff has had a reasonable work history. He is not qualified for clerical work. He spent two years on sickness benefits around 1996 because of a shoulder injury but that problem has subsided. His income has never been substantial. Ms Treston, who appeared for the defendant, suggested he may have been disinclined to push himself work-wise, because he received income from some family financial arrangement, which features in his tax returns. But having heard his evidence, in which he disclosed little knowledge or understanding of those arrangements,

arrangements from which he said he received no actual financial return, I do not think that consideration influenced his approach.

[10] Mr Coleman has always regarded the plaintiff as a valuable employee. At the time of the accident, the plaintiff was employed on a part-time, casual basis, working three and a half days per week and earning $285 net per week. He was off work because of the injuries for 18 weeks. When he returned, he resumed work on the same basis as prior to the accident. Mr Coleman subsequently offered the plaintiff five and a half days work per week, which the plaintiff carried out from August 2001 to January 2002, but he found he could not cope, so reverted to the shorter period.

[11] The plaintiff now works four days per week, earning $400 net per week, compared with $580 per week for similar employees working full-time. The plaintiff said under cross-examination that as at the time of the accident, he was content to work three and half days per week, and was not looking for longer hours. But the fact is that five and a half days per week later became available, and the question arises whether had he been fully able, he would probably have taken up those longer hours. I revert to this issue when dealing with the matter of economic loss. I accept that the plaintiff's limitations would reasonably prevent his working to that extent now. On the other hand, one also cannot assume that work at that higher level would always have been available, allowing for the vagaries of industry, and I am not satisfied that the plaintiff would always have wished to work at the more intensive level, another matter to which I return. I infer from the evidence that the plaintiff has been generally content working on a four day per week basis. Mr Coleman respects the plaintiff's abilities, and regards him as a treasured employee. The plaintiff is however subject to the limitation that were he to lose his present employment, albeit presently and indefinitely secure, and be thrown on to the open labour market, he would not be as attractive to a potential employer as a fully-able applicant.

[12] The following components of damages have been agreed: specials $119, interest on specials $44.63, *Griffiths v Kerkemeyer* $1,207.

[13] For pain, suffering and loss of amenities, which it should be noted will include the inconvenience of the further surgery and recuperation, I allow $40,000. I allow interest at two per cent per annum on $25,000 of that amount for 3.75 years, which amounts to $1,875.

[14] For the future operative costs, I adopt $6,140, which is the present value of $10,000 actually to be incurred in ten years' time. I have had to take a somewhat general approach to that assessment.

[15] I turn to past economic loss. At the time of the accident, the plaintiff was earning $285 net per week. He was off work for 18 weeks in consequence of his injuries. That should attract a component of $5,130. He worked part-time on resuming work, as prior to the accident, and then later on a full-time basis from August 2001 until January 2002, whereafter he returned from five and a half days per week to four days per week. Between January 2002 and trial, which is 96 weeks, he claims $17,280 loss, which equals $180 net loss per week, representing on Mr Coleman's evidence the difference between part-time ($400 per week) and full-time ($580 per week) rates. In a statement of loss and damage filed in the proceedings and signed

by him, the plaintiff said that he reduced his hours in January 2002 both because of incapacity, and for "personal reasons". In his evidence, he could not explain what he meant by "personal reasons" (transcript pp 33-4). Mr Lee, who appeared for the plaintiff, suggested that it may have had something to do with the circumstance that the plaintiff's father died in September 2001, but to take that view would involve impermissible speculation. Nevertheless the fact remains that the plaintiff did assign personal reasons as at least part of the motivation for his reducing his hours, and notwithstanding his inability when giving evidence to elucidate that explanation, it should be given some play. I consider it appropriate to allow two-thirds of $17,280, which is $11,520. The component for past economic loss therefore amounts to $16,650, which is $5,130 plus $11,520. Interest is allowed at five per cent for three and a half years on the sum of $16,650, which is $2,913.75. The superannuation loss in respect of past economic loss, at six per cent, amounts to $999.

[16] As to future economic loss, his present position is, as I have said, secure, although he would be at some disadvantage if thrown on to the open labour market. As to whether he would, but for the injuries, have elected to work full-time, I am not convinced he necessarily would, or that he would have persisted full-time until retirement. He expressed in evidence a degree of satisfaction with the part-time regime and displayed no particular ambition, or wish to increase his income. He is a single man and there was no suggestion he needed more money, or had unfulfilled plans which might have generated an interest in increasing his reserves. Further, there is the possibility the "personal reasons" which he assigned as part of the explanation for his reverting from full-time to part-time work may have continued to influence his disinclination to work full-time. On the other hand, with mutual loyalty and respect between the plaintiff and Mr Coleman, had the plaintiff been up to full-time work, he would I believe have made an effort to oblige Mr Coleman, at least for a time. This assessment cannot in these circumstances pretend to be precise.

[17] The difference between the plaintiff's present earnings and full-time earnings is $180 per week, on Mr Coleman's evidence. The plaintiff is presently 47 years old. In view of the labouring character of his work, and the prospect of the arthrodesis, it is appropriate to work from a purchase period of 15 years, which would take him to the age of 62 years. On the five per cent table, the present value of a loss of $180 per week over 15 years is $99,900. I propose to reduce that sum by one quarter in order to reflect the range of uncertainties mentioned in the previous paragraph, and other ordinary contingencies. That yields $74,925. I allow six per cent for future superannuation losses, which is $4,495.50.

[18] The various components of damages total $149,368.88. There will be judgment for the plaintiff against the defendant for $149,368.88. The question of costs is reserved.