SUPREME COURT OF QUEENSLAND

CITATION:	*Whyte v Jawad* [2004] QSC 256
PARTIES:	**DAVID ANTHONY WHYTE** (plaintiff) **v** **NABI JAWAD** (first defendant) **NRMA INSURANCE LIMITED** (second defendant)
FILE NO/S:	BS 1169 of 2004
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
DELIVERED ON:	17 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	19 – 20 July 2004
JUDGE:	Philippides J
ORDER:	**Judgment for the plaintiff in the sum of $276,098.**
CATCHWORDS:	DAMAGES – PERSONAL INJURY – negligence – shoulder injury – whether pre-existing injury – assessment of damages – pain and suffering – economic loss *Purkess v Crittenden* (1965) 114 CLR 164 *Watts v Rake* (1960) 108 CLR 158
COUNSEL:	S C Williams QC and P Feely for the plaintiff R Green for the second defendant
SOLICITORS:	McInnes Wilson for the plaintiff Sparkes Helmore for the second defendant

PHILIPPIDES J:

[1] The plaintiff seeks damages for personal injuries sustained as a result of a motor vehicle accident on 28 January 2002. At the time of the accident, the plaintiff was working as a roof plumber and was 43 years of age, being born on 15 January 1961. Liability has been resolved, leaving quantum as the only outstanding issue. Quantum was contested by the second defendant, and for convenience I shall refer to that party as the defendant.

The plaintiff's injuries

[2] As a result of the accident the plaintiff sustained soft tissue injury to the left elbow and a fracture of left ulnar coronoid process (of his dominant arm), soft tissue injury

to the right shoulder, involving tendon injury with a supraspinatus tear, cervical spine soft tissue injury and some dental damage.

[3] The cervical spine injury was associated with pain for several months, but by the time the plaintiff was seen by Dr Johnstone, an orthopaedic surgeon, some 14 months post accident, that injury had largely resolved, with only a slight decrease of lateral flexion being observed by Dr Johnstone, which he equated to a disability of 1% of the whole person. Dr Pincus, an orthopaedic surgeon, examined the plaintiff on 3 December 2003 and considered that there had been a full recovery. The plaintiff's counsel accepted that the evidence indicated that the plaintiff had largely recovered from his neck injury, having only intermittent symptoms of stiffness and pain when holding his neck still in a weight bearing position for prolonged periods, such as when riding a motorbike while wearing a helmet.

[4] The fracture of the left elbow was treated by the arm being placed in a cast for some 6 weeks. It healed with minimal symptoms occurring only if the elbow was placed under load, such as when performing heavy manual or roofing work. Dr Johnstone reported some minor loss of full extension in the left elbow equating to 1% loss of upper limb, as did Dr Pincus. I accept that evidence.

[5] The medical evidence indicated that the main area of difficulty is the right shoulder injury, which was treated with physiotherapy. Dr Johnstone detected tenderness over the rotator cuff and observed wasting of the supraspinatus and infraspinatus muscles. He considered that the plaintiff continued to have significant problems with the right shoulder due to residual loss of motion and weakness consistent with rotator cuff injuries. It was his opinion, based on an ultrasound, that the plaintiff was suffering from continuing rotator cuff tendonitis, with minor calcification in the subscapularis tendon, due to the injuries sustained in the accident. He assessed a 5% disability of the upper limb and weakness, equating to a 5% disability of the whole person. A similar assessment was made by Dr Pincus. I accept that evidence.

[6] The plaintiff was seen by Dr Todman on 25 August 2003, who observed a full range of movement in the cervical spine, some tenderness around the left elbow and in the right shoulder painful abduction beyond 90 degrees. He assessed a whole person disability related to the cervical spine injury of 3%. Neither Dr Johnstone nor Dr Pincus, whose approach to the assessment of the plaintiff's injuries I prefer, took such an approach. There was some evidence, in addition, from Mr Simpson, an acupuncturist, that he treated the plaintiff for lower back pain, which he believed was also the result of the accident. However, no other medical expert referred to any lower back pain being caused by the accident and the plaintiff himself gave no evidence concerning it, nor was he questioned in regard to it. Mr Simpson conceded that his recollection concerning the lower back injury was "not particularly all that clear". Given the state of the evidence, I am not persuaded that such an injury resulted from the accident.

Pre-existing shoulder injury

[7] An issue arose as to whether the plaintiff suffered from a pre-existing shoulder condition. The defendant contended that the plaintiff suffered from a pre-existing condition in his right shoulder, which although asymptomatic, would have interfered with his capacity to work as a roof plumber, even had the accident not occurred.

[8] There was no evidence that the plaintiff had experienced any difficulties with either shoulder prior to the accident. Indeed, the evidence was to the contrary. I find that neither shoulder had been symptomatic over that period, notwithstanding that the plaintiff had undertaken heavy work over a long period.

[9] In his report, Dr Pincus noted that ultrasound findings of the right shoulder indicated some chronic bicipital tendonitis and considered that some of the ultrasound findings predated the accident, given the nature of the plaintiff's work. However, he gave evidence that there was no way of predicting when, if at all, the pre-existing changes would become symptomatic. His evidence in effect was that the risk of that occurring could not be determined.

[10] Dr Johnstone gave evidence that the ultrasound of the right shoulder showed chronic changes in the supraspinatus tendon, a small area of calcification in the subscapularis and tendonitis in the long head of biceps. In cross-examination he accepted that it was possible that some of these signs pre-dated the accident and that the plaintiff may have suffered symptoms even if the accident had not occurred. Dr Johnstone also stated in cross-examination that, had he been aware that the ultrasound findings of the left shoulder indicated evidence of degenerative changes, he would probably have downgraded his assessment of the disability of the right shoulder resulting from the accident by at least 50%. However, in re-examination, he retreated from that position. He gave evidence to the effect that the significance of the ultrasound findings of the left shoulder was of questionable value where the plaintiff had been undertaking vigorous levels of work without symptoms in the shoulder. When specifically asked in re-examination as to the possibility of the symptoms occurring in the right shoulder had the accident not occurred, Dr Johnstone stated:

> "I think it is the same as the opposite shoulder that one may say there is a small possibility over a lifetime that he may get some symptoms, but he is presently showing through vigorous work that he has been able to cope with the changes that may be present without any symptoms and, therefore, no obvious reason to suspect that he will become symptomatic in the near future."

[11] Dr Johnstone's evidence ultimately therefore was that given that the plaintiff's pre-existing changes had not become symptomatic in circumstances where he had performed heavy work over a prolonged period, there was only a small possibility over a lifetime of either shoulder becoming symptomatic. I accept that evidence and find that there is a small possibility over the plaintiff's lifetime of the right shoulder becoming symptomatic.

General damages

[12] The plaintiff sought $40,000 general damages for pain and suffering and loss of amenities. The defendant contended that $25,000 was an appropriate award for this head.

[13] I accept the plaintiff's evidence that prior to the accident he was very fit and had no health problems of note. He has however virtually recovered from all but his shoulder injuries. I find that the plaintiff has a permanent disability in the region of 5% of the right upper limb equating to a 5% whole of person disability. While there was some brief evidence concerning the prospects of spontaneous recovery in respect

of the shoulder injury, given the time that has passed since the injury was sustained, I do not consider that given the nature of the evidence that that should be seen as a real prospect for this plaintiff. The ongoing symptoms from the plaintiff's injuries only interfere with his recreational activities in a minimal way. For example, he now has difficulty when keeping his neck still in weight bearing situations, such as when riding his motor bike wearing a helmet for prolonged periods.

[14] In assessing general damages, I consider that regard ought to be had to "the small possibility" that the plaintiff's pre-existing shoulder condition would have become symptomatic in any event.

[15] I consider that an award of $25,000 sufficiently compensates the plaintiff for this head of damage. I allow interest of $850 (on $17,000 at 2% for 2½ years).

Economic loss

[16] The plaintiff left school at 18 years of age, having completed year 12 studies, although he did not obtain a senior certificate. He spent some years as a carpentry apprentice before turning to roof plumbing, for which he qualified. The plaintiff has spent most of his working life in occupations involving heavy labour, but principally as a roof plumber and was engaged in that occupation at the time of the accident. The plaintiff's evidence, which I accept, was that it was his intention to continue in that work until normal retirement age. The plaintiff gave evidence that he was aware of persons performing that type of work into their 60's and that the main factor in doing so was fitness rather than age.

[17] In 1999, a long-term relationship in which the plaintiff was involved ended. He was at that time living in the Albury-Wodonga area. He has one child from that relationship. As a result of the deterioration of the relationship, the plaintiff decided to relocate to Brisbane where his brother resided. In November 2001, he purchased a house at Woody Point, so as to provide a base from which to work as a roof plumber and a place for his daughter, who was still in Victoria, to visit him. The house was sold a year later because the plaintiff was unable to keep up payments after ceasing to work in late 2002.

[18] There was, as counsel for the plaintiff acknowledged, something of a shift in the plaintiff's fortunes upon the break-up of his relationship. The plaintiff's tax return for the financial year ended 1999, indicates that the plaintiff earned about $50,000 (gross) from roofing work. During that period, the plaintiff also took time off to work on the family farm and to spend time with his daughter. After the 1999 tax year, his earnings were reduced to somewhere in the region of $24,000 to $30,000 for the following years.

[19] On behalf of the plaintiff it was submitted that the reduction in earnings largely reflected the fact that the plaintiff was in the process of re-establishing himself in Queensland in the roof plumbing business. I accept that submission. Upon moving to Queensland, the plaintiff travelled from job to job at various locations, sometimes far afield, doing short term subcontracted work. When away the plaintiff often worked long hours, although he accepted that in other situations, such as when working in Brisbane, where he had his house, he would chose to work somewhat lesser hours. The plaintiff also took time off work to travel interstate to visit his daughter and family between jobs and on special occasions. The documentation

shows that for the period of 7 months immediately prior to the accident, the plaintiff had earned about $28,500 for roofing work for which he was being paid at a rate of $26.50 per hour plus allowances.

[20] In late 2001, the plaintiff worked for a period at Robina for Fair Brothers Roofing, where his supervisor was Mr Decent, who continues to work with that company. Mr Decent gave evidence that the plaintiff was a highly regarded worker with "exceptional" productivity. He stated that a worker of the plaintiff's calibre would currently be paid $33.50 gross per hour (with entitlements). His evidence was that since the accident demand for roofers had been high and that a person with the plaintiff's ability would have had no difficulty in obtaining full time employment. He also stated that, depending on health and fitness, one could continue in the roofing industry until retirement age. Evidence was also given by Mr Hock, of Kepple Bay Plumbing, for whom the plaintiff had also undertaken work in the latter part of 2001. He described the plaintiff as an excellent employee, with very high work quality and good work ethics, who was "always the first one there and the last one to leave". His evidence was that someone of the plaintiff's ability could currently command up to $40 gross per hour and that, over the period since the accident, he could have offered the plaintiff as much work as he wanted.

[21] I accept that the plaintiff was a well regarded worker with a strong work ethic, who was likely to have benefited from the boom in the building and roof plumbing industry over the last couple of years, to which the witnesses referred.

[22] After the accident the plaintiff attempted, over a number of months commencing in April 2002, to return to work as a roof plumber. He said that he finally ceased work in late 2002, because he was physically unable to do the work, due to the ongoing difficulties with his shoulder. I accept Dr Johnstone's evidence that, as a result of his shoulder injuries from the accident, the plaintiff is physically unfit to continue in his former occupation.

[23] When it became apparent to the plaintiff that he was unable to continue to work as a roof plumber, he investigated other career opportunities. After seeking some guidance from a TAFE counsellor, the plaintiff decided to qualify as a youth counsellor/worker. The net weekly pay for such work is $450 per week. The plaintiff has completed a 12 month certificate course and a 6 month diploma course. Although he has been seeking employment in this field, he has so far been unsuccessful. Ms Goodwin, who works in this field, gave evidence that the plaintiff had a flair for youth work, but that there are limited opportunities for employment, with preference being given to those with experience or additional qualifications. The plaintiff does not have those additional qualifications and it would appear that he is unlikely to acquire them. In order to improve his employment prospects, he is currently working part-time with Street Co (about 6 hours per week for which he is paid $14 per hour) so as to gain experience and is also taking part in a 6 month counselling course with Lifeline.

[24] It is conceded that, if the plaintiff is unable to obtain employment in the youth counsellor/worker field within a reasonable period, he will be forced to seek alternative employment, for example as a shop assistant in a hardware store or perhaps as a storeman. It was not in dispute that the plaintiff has a residual earning capacity to engage in such employment or to do similar light physical work not involving significant clerical work. I am satisfied that, based on the award rates

tendered for such alternative employment and the plaintiff's capabilities, the plaintiff's residual earning capacity in broad terms is in the vicinity of $400 to $450 net per week.

Past economic loss

[25] The plaintiff claims $72,500 for past economic loss, calculated in two steps. Firstly, for the period from the date of accident to the issue of proceedings (4 February 2004), an amount of $50,466 ($60,898 less actual earnings in the post-accident period of $10,432) is claimed, calculated on the basis of an average net weekly loss of $585. Roughly speaking the figure of $585 is put forward on the basis of taking the figure of $50,490 as the taxable income for 1999, including some additional earnings in lieu of the period the plaintiff customarily spent on the family farm and deducting GST, expenses and tax. Secondly, a further $21,960 is claimed, based on a net weekly rate of $915, using an increased hourly rate of $33.50 per hour over the period of 24 weeks until the date of trial.

[26] The defendant's approach to the quantification of past economic loss was based on using the higher net weekly income figure of $622, calculated by taking the average net weekly income for the 2002 financial year. The defendant argued that some 14 weeks of the period since the accident ought to be excluded to take into account such matters as downtime between jobs, holidays and additional time off for the plaintiff to visit his daughter interstate. That yields $71,500, from which it was said $15,000 (for actual earnings) should be deducted, leaving $56,530. That figure, it was submitted, ought to be further discounted to $45,000 to $55,000 to reflect contingencies such as the nature of the industry in which the plaintiff worked and personal exigencies. The defendant's figure for actual income earned appears to reflect the plaintiff's gross earnings rather than his net earnings. The defendant's approach also involves an element of double discounting.

[27] On the other hand, I am not satisfied that the plaintiff's approach in utilizing the rate of $33.50, not merely as the current rate, but as the rate applicable over the last 6 months, reflected the evidence. If the net figure of $622 per week is used, and the period of some 2½ years (133 weeks) since the accident is discounted by some 14 weeks to take into account holidays, the possibility of downtime between jobs and of time off for family commitments and other contingencies, the figure of $74,018 is obtained. From that must be deducted the $10,400 net earnings (rounded off) for the period, which yields $63,618. Interest on $53,618 ($63,618 less Centrelink payments of $10,000) at 2.7% for 2½ years, yields $3,620.

Future economic loss

[28] An issue arose in respect of the quantification of future economic loss, concerning whether there should be some discounting on the basis that the plaintiff suffered from a pre-existing shoulder condition, which was bound to affect his future earning capacity regardless of the accident. The plaintiff, relying on decisions such as *Watts v Rake* (1960) 108 CLR 158 and *Purkess v Crittenden* (1965) 114 CLR 164, submitted that the defendant had not discharged the onus resting on it of establishing with "some reasonable measure of precision what the pre-existing condition was and what its future effects, both as to the nature and their future development and progress, were likely to be". The plaintiff contended that the evidence concerning the "possibility" that the plaintiff might in the future have suffered from some symptoms

was insufficient to lead to a conclusion that the plaintiff would have been obliged to cease roof plumbing or alter his work practices in the future. It was said that the evidence did not go so far as to show the possibility that any symptoms may have occurred during the plaintiff's working life, or that they would have prevented the plaintiff from working as a roof plumber.

[29] Notwithstanding those submissions, the plaintiff in fact only sought compensation for future economic loss to age 55. (The defendant's figures were based on the plaintiff working to age 58, but included a further discounting to take into account this issue). I consider that the plaintiff's approach adequately takes into account the contingency of the plaintiff having to cease work prior to the usual retirement age. In those circumstances, no additional discount is warranted beyond the plaintiff's approach of seeking compensation to age 55 only.

[30] The plaintiff claims $261,353 for future economic loss. It was submitted that the plaintiff's putative earning capacity should be assessed at not less than $900 net per week for the purpose of calculating future loss. It was said that currently, the plaintiff, but for his injuries, was capable of earning at least $33.50 gross per hour and would have been working at least a 40 hour week and probably more. The plaintiff thus put forward the figure of $900 net weekly earnings on the basis of $1,474.00 gross per week (44 hours per week at $33.50 per hour) less GST ($147) and expenses and tax (of about $400). The claim of $261,353 is calculated by allowing the plaintiff a loss of $900 per week over the next two years ($90,000), so as to permit the plaintiff to continue with his endeavours with youth work, on the basis that he would by then have either succeeded in building up his current employment or would have turned to alternative work. Thereafter, for the following 10 years a claim is made, taking into account the plaintiff's residual earning capacity, for $171,353 on the basis of $415 net per week ($500 gross) over 10 years (multiplier 412.9).

[31] The defendant submitted that an appropriate award for future economic loss was in the vicinity of $60,000 to $85,000, reflecting a net weekly loss of about $150 for 15 years (to age 58). The defendant argued that the figure for the putative net weekly earning capacity was more in the region of $765 ($1387.27 gross, less GST, less expenses accepted at 10% of gross income) which, it was said, reflected the earnings made at Fair Brothers. However, it was submitted that even if the figure of $900 per week were adopted, it would be necessary, in addition to deducting an amount for residual earning capacity ($360 to $480), to make a further deduction to reflect the fact of the plaintiff embarking on a career that will be likely to provide him with an opportunity to continue working beyond any notional retirement age applicable had he continued as a roof plumber. The assumption underlying this proposition is that the plaintiff will be likely to continue to earn income in circumstances where he would not otherwise have done so if he remained a roof plumber. A deduction in the amount of $269 per week was put forward in this respect, which resulted in a submission that the notional net weekly loss was in the order of $151 per week. I consider that this submission is fundamentally flawed as it proceeded on the assumption as to the nature of the risk that the plaintiff would be unable to continue in his former employment not borne out by the evidence.

[32] The plaintiff argued that on the evidence, the figure of $900 net per week was a conservative one, given that there was evidence that the plaintiff had worked even longer hours. While I accept the figure of $900 is an appropriate starting point and that it is reasonable to allow the plaintiff some time to pursue employment in the field

of youth work/counselling (although the period of 2 years is at the upper limit) some allowance ought to be made for income being derived during that period, at least on a part-time basis, either in the field of youth work or in some alternative area of employment. The figure of $90,000 should in the circumstances be reduced to $50,000 to take into account some earnings during this period and contingencies relating to the nature of the roof plumbing industry, the risk of some downtime between work and the likelihood of time off for family commitments.

[33] As regards the period thereafter, on behalf of the plaintiff it was acknowledged that although the current building boom is unlikely to last, given the plaintiff's fitness and good reputation at the time of the accident, he was likely to have faired well even after the boom period. Even so, some discount in the overall assessment of damages is appropriate to reflect the fact that the rate of $900 figure is based on earnings made during a boom period. The claim of $170,000 should be discounted to take into account the risk of a downturn in the industry, which the witnesses accepted would eventually occur, general down time between jobs, time off for family commitments and other contingencies. A discount in the region of 25% is appropriate and yields $127,500. This results in a total award of $177,500 for future economic loss.

Past and Future Care

[34] The parties are agreed on $1,500 as the component for past care and on $102 for interest thereon. As for future care, the plaintiff argued for a global award of $5,000, pointing to the plaintiff's inability to do heavy work such as his own roofing and restumping, which he was previously able to do. There was no evidence as to the likelihood of the plaintiff engaging in any such work. The evidence indicated that apart from such heavy work the plaintiff is capable of completing all other activities of a household nature and caring for himself. I do not consider that any award is appropriate for future care.

Specials damages

[35] There was agreement as to special damages in the sum of $3,750, with interest agreed as $157.26. No claim was pursued for future medical expenses.

Conclusion

[36]

Pain and suffering and loss of amenities	$25,000.00
Interest	850.00
Past economic loss	63,618.00
Interest	3,620.00
Future economic loss	177,500.00
Past care (agreed)	1,500.00
Interest (agreed)	102.00
Future care	nil
Special damages (agreed)	3,750.00
Interest (agreed)	157.26
	$276,097.26

[37] I give judgment for the plaintiff in the amount of $276,097. I shall hear submissions as to costs.