SUPREME COURT OF QUEENSLAND

CITATION:	*Gibbings-Johns v Corliss (No. 2)* [2010] QSC 78
PARTIES:	**TERRY EDWARD GIBBINGS-JOHNS**
	Plaintiff
	And
	DENNIS BRUCE CORLISS
	Defendant
FILE NO/S:	S76 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Rockhampton
DELIVERED ON:	12 March 2010
DELIVERED AT:	Supreme Court Rockhampton
HEARING DATE:	2-3 February 2010
JUDGE:	McMeekin J
ORDER:	**The defendant pay the plaintiff's costs to be assessed on the standard basis on the scale appropriate for proceedings in the District Court.**
CATCHWORDS:	DAMAGES – PERSONAL INJURIES – PRACTICE – COSTS – where the plaintiff overstated his loss of earning capacity both at conference prior to trial and at trial – where defendant was justified in rejecting plaintiff's methodology of assessment – where proceedings should have been brought in a District Court – whether costs should be awarded on the standard or indemnity basis
	Personal Injuries Proceedings Act 2002 (Qld), s 39, s 40(8)
	Lawes v Nominal Defendant [2007] QSC 092
	Michael v The Nominal Defendant (Queensland) [1995] QSC 001 (88/2962)
COUNSEL:	G. Crow for the plaintiff
	M. Grant-Taylor SC for the defendant
SOLICITORS:	Macrossan & Amiet for the plaintiff
	Suthers Lawyers for the defendant

[1] **McMeekin J:** In this matter I gave judgment in favour of the plaintiff against the defendant in the sum of $196,152. I indicated at the time of delivering my reasons that I would hear from counsel as to costs. I have since received submissions from the parties.

[2] The plaintiff seeks that his costs be paid on the indemnity basis. The defendant concedes costs should follow the event but should be awarded on the standard basis.

[3] The basis for the plaintiff's application is that prior to litigation being brought the plaintiff offered to settle his claim in the amount of $150,000 plus costs on the District Court scale. That offer was made pursuant to s 39 of the *Personal Injuries Proceedings Act* 2002 ("the Act") and was the plaintiff's "mandatory final offer" within the meaning of subsection 40(8) of the Act.

[4] Subsection 40(8) of the Act relevantly provides that "the court must, if relevant, have regard to the mandatory final offers in making a decision about costs."

[5] Obviously the plaintiff's offer was not accepted and the matter went to trial. No other relevant offers of settlement were made by the plaintiff whether pursuant to *Uniform Civil Procedure Rules* or by way of a *Calderbank* offer.

[6] At issue is the significance and effect of such an offer. The terms of subsection 40(8) of the Act, and their contradistinction to the express mandatory requirement in the Act that costs be paid on the indemnity basis where offers are exceeded in matters under $50,000, make plain that the mere fact of the judgment exceeding the amount of the offer does not of itself compel the making of an order on the indemnity basis.

[7] Byrne J analysed the analogous provisions of the *Motor Accident Insurance Act* 1994 (Qld) in *Lawes v Nominal Defendant* [2007] QSC 092. For present purposes the provisions of the Act and the *Motor Accident Insurance Act* dealing with mandatory final offers and their cost consequences are indistinguishable.

[8] I respectfully adopt Byrne J's characterisation of those provisions and his description of their effect. The principles that can be derived from *Lawes* include:

(a) The mandatory final offer made pursuant to the provisions of the Act operates much as a *Calderbank* offer that is bettered at trial – the mere fact that the party making the offer obtains a judgment more favourable than the terms offered does not of itself inevitably demonstrate such special circumstances as would justify departure from the ordinary basis of a cost assessment;
(b) The fact that such an offer has been made is a significant but not decisive consideration in the exercise of discretion to award costs on the indemnity basis;
(c) A relevant matter to consider is whether it appears that the party sought to be made liable for costs on the indemnity basis has "imprudently or unreasonably" failed to accept the offer of compromise;
(d) The onus lies on the party seeking indemnity costs to demonstrate the imprudence or unreasonableness of the other party's conduct and

> that judgment has to be made on the basis of the relevant strengths and weaknesses of the cases that ought to have been apparent to the parties at the time when the offer was made.

[9] Mr Crow, who appears for the plaintiff, submits that the relevant point is that there was no material change in the plaintiff's case after the compulsory settlement conference and the making of the mandatory final offer. The medical evidence remained the same which was to the effect that the plaintiff had lost some 80% of the vision in one eye.

[10] The only significant issue in relation to the assessment of damages related to the impact of that loss of vision on the plaintiff's earning capacity. Effectively the plaintiff contended that he had lost essentially all his pre-accident earning capacity. At the time of the sustaining of the injury the plaintiff was a construction labourer and he contended, at trial, that he could no longer continue in that work. The plaintiff failed on that issue. It was further contended, and I accepted, that he could not return to his trade of a roof tiler. I held that whilst there was an impact on his earning capacity it was much more limited than the plaintiff contended for. I assessed global sums for both the past and future components. It was the sort of assessment that differing minds could easily have very differing views as to what might be appropriate.

[11] In my view there are two relevant points to make. First, where the decision as to the final assessment turned very much upon what can only be considered to be very subjective impressions gained by myself both of the plaintiff and as to the impact of the injury on the plaintiff's earning capacity I find it difficult to describe a defendant's underassessment of those imponderables as necessarily "unreasonable or imprudent".

[12] Second, the plaintiff overstated his case, both at trial and, apparently, at the conference following which the offer was made. Mr Crow informs me in his submission that at conference the plaintiff assessed his damages at some $150,000 approximately above my assessment. The significance of that overstatement is that the defendant was both justified in rejecting the plaintiff's methodology of assessment and was left with no reliable measure himself of assessing damages. This could only be done by an assessment of the personal qualities of the plaintiff. Where the plaintiff's measure was justifiably rejected as overstated the defendant can do little but hazard a guess.

[13] Mr Crow further submits that the fact liability was in contest is not relevant to this decision. I agree with that submission. This is not a case where there could be some justifiable uncertainty about the outcome of the liability issue. My finding was that the defendant threw a glass object into the plaintiff's face causing a penetrating injury to his eye. Whilst the defendant vigorously contested that allegation I resolved the dispute against the defendant. Hence the defendant was well aware that he had thrown the object and was liable for the consequences of his actions.

[14] Mr Crow contends that there are no countervailing circumstances that I need bring into account in making this decision. I disagree. Mr Grant-Taylor of Senior Counsel who appears for the defendant points out that the damages fall well within the damages applicable in the District Court. Thus the defendant was required to incur his own legal costs in defending the claim on the Supreme Court scale, not the

appropriate District Court scale. This is in effect a penalty on the defendant which he should not be required to bear. This was considered to be a relevant factor by Byrne J in *Michael v The Nominal Defendant (Queensland)* [1995] QSC 001 (88/2962) at 9-10. Byrne J there said, so far as is relevant to this point, as follows:

> "Plainly, the claim should have been pursued in a District Court. Prosecuting it in this Court has had at least two undesirable consequences. First, it has entitled the defendant's lawyers to charge their client on the higher scale of costs which relates to proceedings in this court. This has imposed needless additional expense on the defendant. Secondly, other litigants whose cases can only be resolved in this court have been delayed. If the plaintiff receives his costs on the appropriate scale for actions in the District Courts that might encourage the prosecution in this Court of cases which should be litigated elsewhere. Costs are discretionary. I consider that there ought to be a sanction in this case, which is not one in which the defendant could have been expected to seek remitter."

[15] In my view the same considerations apply here. The damages assessed were well under the jurisdictional limit of the District Court. The only basis on which the case could have been brought in this court was one that I expressly rejected and for which I considered there was no acceptable supporting evidence. While the facts in *Michael* were a more egregious example (the damages there being assessed at $59,438.90) nonetheless the considerations seem to me to be the same.

[16] Thus to summarise the competing considerations:

(a) The plaintiff made an offer prior to litigation being commenced which, if accepted, would have avoided the costs of litigation and which was some $45,000 less than the judgement eventually received;

(b) The way in which the plaintiff framed his case both at that conference (according to the plaintiff's submission), in the statement of claim, and at trial overstated significantly the impact on his earning capacity;

(c) The plaintiff having overstated his case, the defendant had no reliable measure on which to gauge the likely assessment;

(d) The plaintiff adopted that basis for bringing the proceedings in the Supreme Court instead of the District Court thereby causing a penalty to the defendant.

[17] Consistently with the approach taken by Byrne J in *Lawes* and in the authorities to which he there refers the issue is whether the defendant was "unreasonable or imprudent" in not accepting the plaintiff's mandatory final offer. It seems to me that in all the circumstances it would be inappropriate to characterise the defendant's refusal of the offer as improper or unreasonable.

[18] The remaining considerations are against an exercise of the discretion in the plaintiff's favour.

[19] I order that the defendant pay the plaintiffs costs to be assessed on the standard basis on the scale appropriate for proceedings in the District Court.