SUPREME COURT OF QUEENSLAND

CITATION:	*Luppino v Estate of Collins (deceased) & Ors* [2012] QSC 363
PARTIES:	**Ana-Maria Vivian Nina LUPPINO** (plaintiff) v **ESTATE OF Anthony Allan COLLINS (Deceased)** (first defendant) **QBE INSURANCE (AUSTRALIA) LIMITED** (ACN 003 191 035) (second defendant) **Courtney Aleese GIBSON** (third defendant) **SUNCORP METWAY INSURANCE LIMITED** (ACN 075 695 966) (fourth defendant)
FILE NO/S:	BS 10282/11
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	22-24 October 2012
JUDGE:	Chief Justice
ORDER:	**1. There be judgment for the plaintiff against the defendants for $286,089.50.** **2. Costs reserved.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – plaintiff injured in a vehicle accident – admission of liability by defendants – plaintiff only 21 at time of trial – assessment of damages generally – assessment of damages in the particular context of assessing damages for young plaintiffs
COUNSEL:	S Anderson for the plaintiff J McClymont for the defendants
SOLICITORS:	Shine Lawyers for the plaintiff

Bray Lawyers for the defendants

[1] The plaintiff claims damages in respect of personal injuries she sustained on 25 July 2010 as the result of a motor vehicle accident. The defendants admit liability, and it falls to me to assess the amount of damages to be awarded.

[2] Because the plaintiff suffered and suffers from post-traumatic stress disorder, it is necessary to say something of the circumstances of the accident. She was driving home from the Gold Coast at night. A female friend was the driver. Their vehicle was travelling in the far right-hand lane of the M1. Headlights came up closely behind their vehicle, and they feared a collision. They were the lights of motorcycles. The plaintiff's driver veered to the left in a defensive way, but one of the motorcycles collided with the rear and then the front of their vehicle. The plaintiff's driver was killed in the accident, as was the driver of the motorcycle. At the scene, the plaintiff realized that her driver had suffered serious injuries, and was shocked to notice the motorcycle driver on the ground apparently dead.

[3] The plaintiff was tearful as, in court, she recounted the circumstances of the accident. Nightmares and flashbacks have characterized her condition of PTSD, although with moderating frequency, and she becomes anxious when on the road if circumstances remind her of the accident. (Flashbacks, nightmares and road anxiety were still featuring in January 2012: Dr Slack's report of 27 January 2012.) The plaintiff's anxiety following the accident was exacerbated by witnessing another accident as she was being driven from the Gold Coast Hospital the following morning.

[4] The plaintiff was born on 1 March 1991, so is currently 21 years of age. The accident occurred on 25 July 2010. On 16 October 2010 she became engaged to marry Robert Luppino, and they were married on 27 March 2011.

[5] The plaintiff suffered an injury to her lumbar spine, described as a soft tissue musculo-ligamentous injury. Her evidence was that she has since experienced chronic low back pain on a daily basis, associated with leg pain and pins and needles, necessitating her lying down for a large part of the day; she is restricted in her every day movements; she was an ardent latin dancer, but has had to forego that activity; and she cannot work for more than four hours without experiencing severe pain.

[6] I accepted the evidence of the plaintiff, her mother Mrs Virginia Stronach, and her husband, about the extensive assistance given by the mother at their house following the accident, though whether it is compensable is another matter. Her mother attended to virtually all of the plaintiff's needs, and seems willingly to have carried out tasks (like washing up dishes) to which one would ordinarily have expected the husband to attend notwithstanding the six day per week hours of his barber shop business.

[7] I do not accept that all of this assistance was necessary following the accident, a matter to which I return. I regarded as significant Mrs Stronach's statement to the plaintiff's solicitors on 23 March 2011 that the plaintiff's new job was "going very well".

[8] I draw from Mrs Stronach's evidence that the plaintiff's condition apparently improved after the first six months. The plaintiff's husband's evidence was to

similar effect: after the accident the plaintiff's mother was attending to tasks at their house "very regularly", whereas now that occurs only on a couple of days per week. Mr Luppino also gave evidence to the effect the plaintiff has improved somewhat over the last six months.

[9] That is consistent with what the plaintiff told her doctors. On 28 October 2010, she told her general practitioner Dr Thomson that she had been "really good" for three weeks, and that her back had been (only) "a bit sore" over the last week. On 5 January 2011, she told Dr Thomson her back was "going well". On 25 January 2011 the plaintiff told her that she was going well at work and would increase her hours.

[10] The psychologist Dr McCulloch saw the plaintiff on 7 March 2011, and concluded she was suffering only mild stress, depression and anxiety, which was within the normal "everyday" range (notwithstanding the psychologist recommended Suncorp pay for further counselling sessions). On 13 May 2011, the plaintiff told Dr Campbell she was managing to work and was tolerating her pain levels.

[11] The plaintiff offered, in her evidence, explanations why she did not report upper limb and neck symptoms to Drs Campbell and Byth, but I thought it surprising, nevertheless, that if those symptoms were substantial, she would not have mentioned them.

[12] In relation to another aspect, I record that I accepted the evidence of the husband and the mother to the effect that the plaintiff's attitude has changed. Before the accident she was bubbly and vivacious, enjoying the company of a large group of friends. Since the accident she has become withdrawn, volatile and prone to irrational outbursts.

[13] The plaintiff and her husband are devoted Jehovah's Witnesses. The extent to which the plaintiff has attended religious meetings and carried out witnessing activity decreased substantially following the accident, which she explains by reference to her pain limitations.

[14] At the time of the accident, the plaintiff was employed as a senior dental nurse. She returned to work in January 2011, on a "graduated" basis. She worked limited hours but found she could not continue because of pain, ceasing work on 7 March 2011. I accepted Mrs Hobson's evidence that to her observation, the plaintiff was apparently suffering considerable pain over this period. Thereafter she worked at Brookside Dental until September 2011.

[15] The plaintiff then worked with a real estate agent for a few weeks, but was required to walk and distribute advertising pamphlets, which she found too much for her. She considered work as a dental technician, but compressing things required more strength than she felt she had. She has had no further employment.

[16] The plaintiff's evidence was that she aspired to be a dental hygienist. Doctor Choi gave evidence that the plaintiff was exceptional, picking up her job quickly, and that she was a bright, smart young woman who enjoyed dental work.

[17] While the plaintiff presented in court as a reasonably intelligent woman with drive, it is difficult to surpass speculation as to whether she would have qualified at the higher paying position of dental hygienist.

[18] That qualification is ordinarily based on a three year university course. The dental surgeon Dr Ganko described that course as competitive and requiring a reasonably high OP score. Doctor Choi described the university degree course as "very challenging".

[19] The plaintiff left school at the year 10 stage, and her school records (document 45 in Ex 1) do not portray a student particularly academically inclined with a scientific orientation.

[20] As to the "alternative entry programme" referred to in the QTAC information, it is likewise purely speculative whether the plaintiff would have been admitted, and whether if so, she would have qualified.

[21] A dental hygienist is paid $45 gross per hour on a full-time basis, according to Dr Ganko, although Mrs Hobson put the figure at $50 per hour. When the plaintiff left Dr Ganko's employment in March 2011, she was earning $808 net per week as a senior dental assistance and practice reception operator.

[22] One of the plaintiff's other claims concerns loss from inability to pursue an ancillary career as an instructor and performer with Mr Baeza's latin dance company.

[23] To qualify as an instructor, the plaintiff would have had to undergo two years tuition, involving six to eight hours training per week, for which she would have had to pay fees. To be accepted as a performer, she would have had to master choreography. Performers are paid for performing overseas and at home.

[24] Mr Baeza's company, now stationed in Japan, appears not to be flourishing: there have been no performance trips over the last two years.

[25] It is again quite speculative whether the plaintiff would have followed through with this possibility, and if so, whether it would have led to any substantial financial return. One view is that it is more likely that with her newly-married husband, also an ardent latin dancer, and with all of the demands of employment, the plaintiff would have been content to dance socially rather than go beyond that. I think that to be the more likely position.

[26] But even had she embarked on that further progression, there is the question whether she would have pursued it to the end, and whether if so, it would have produced a worthwhile financial return anyway. I consider that to be quite speculative.

[27] Doctor Byth, a psychiatrist, prepared a report dated 17 June 2011 – almost 11 months after the accident – recording his diagnosis of post-traumatic stress disorder with pronounced associated anxiety and depression, with a possible additional diagnosis of "adjustment disorder with depressed mood". The stress disorder embraces symptoms resembling "specific traffic phobia". He assessed a consequent 17 per cent whole of person impairment.

[28] Doctor Byth recommended treatment by a psychiatrist over a period of two years, at a cost of $6,000. He expected the plaintiff nevertheless to be left with chronic mild to moderate post-traumatic stress disorder, anxiety and depression. He considered that the performance of her usual work as a dental nurse would be mildly to moderately impaired by that residual psychological state.

[29] After the plaintiff saw Dr Byth, she was treated by another psychiatrist, Dr Slack, from January 2012 – to date, and has benefited from taking Zoloft. There is no psychiatric evidence of her prognosis following upon that treatment, beyond Dr Byth's comment on others' reports. To form a useful up-to-date opinion, as he said, he would need to see the plaintiff again.

[30] Doctors Campbell, Coyne and Eadie gave evidence in relation to the plaintiff's back condition.

[31] Each of Doctors Campbell and Coyne assessed a seven per cent whole person impairment.

[32] Doctor Campbell said that the plaintiff should be able to work as a dental nurse for 12 hours per week: that she should reasonably be carrying out 10 to 20 hours per week sedentary work. He based his limitation beyond that on the plaintiff's own account of her pain.

[33] Doctor Coyne said that he would not have expected the soft tissue injury to lead to the plaintiff's current level of disability, and suggested that her psychological condition may be contributing to that. He considered she should be able to undertake light or sedentary, full-time employment.

[34] Doctor Eadie administered a so-called Waddell test (which Dr Campbell described as a controversial test) to uncover any overstatement of symptoms (see his report of 20 April 2011 and transcript p 2-90, 91), and Dr Eadie was "very suspicious" that there was a non-physical problem. Doctor Eadie considered the plaintiff's physical problem "probably now relatively slight". Doctor Eadie is a vastly experienced neurosurgeon, and I give weight to his conclusions. I do not accept the submission for the plaintiff that his evidence is of little assistance.

[35] Doctor Coyne appeared to agree with Dr Eadie about overstatement of the plaintiff's physical limitations. Doctor Coyne attributed the plaintiff's complaints of ongoing pain "largely" to adverse psychological and social factors, so that if those matters were addressed, her physical limitations should lift (transcript p 2-73, 40).

[36] I conclude that the plaintiff has subconsciously exaggerated her physical symptoms, thence her level of incapacity. I have regard to the opinions of Drs Eadie and Coyne in particular, the previous summary of what the plaintiff reported to doctors and others in the year or so following the accident, and the improvement discerned by the plaintiff's husband and mother.

[37] The bulk of the expert evidence is that the plaintiff's psychological condition is feeding her perception of physical limitation. But for that psychological condition, the plaintiff's physical limitations would by now have substantially abated.

[38] Doctor Byth considered (see his report of 17 June 2011) that after treatment, the plaintiff would nevertheless be left with chronic mild to moderate stress disorder with anxiety and depression, with mild to moderate impairment of her capacity to work as a dental nurse – that is, after two years. But Dr Byth has not subsequently seen the plaintiff.

[39] The plaintiff's evidence was to the effect that her psychological condition improved following Dr Slack's treatment. When Dr Byth saw her on 16 June 2011, he

doubted psychological factors were causing her to believe she experienced more pain than she was in fact. Dr Byth did not again review the plaintiff.

[40] There is therefore no expert evidence linking the plaintiff's current psychological complaints, as related in her evidence, to the accident. I should not conclude on the balance of probabilities that her vocational capacity is substantially limited because of psychological or psychiatric difficulties brought about by the accident.

[41] I proceed now to the assessment of damages, which is governed by the *Civil Liability Act 2003* and its *Regulations*.

General damages

[42] The plaintiff's "dominant injury" (*Regulation*, sch 3) is her lumbar spine soft tissue injury. I consider it should be regarded as falling under item 93, "moderate… lumbar spine injury – soft tissue injury". I note the comment: "An ISV of not more than 10 will be appropriate if there is whole person impairment of eight percent caused by a soft tissue injury for which there is no radiological evidence".

[43] The psychiatric injury should be assessed under item 12, "moderate mental disorder".

[44] Both items have an upper limit ISV of 10. I allow an ISV of 12, acknowledging their combined effect (*Regulation*, sch 3). That leads to general damages of $16,250. No interest is allowable (s 60(1)).

Special damages

[45] These are agreed (including interest) at $8,500.

Past economic loss

[46] The plaintiff had arranged to commence full-time employment with Life Dental from shortly after the accident. She had previously worked on a less than full-time basis.

[47] In the 2008 financial year, after leaving school she worked for one employer, earning net $13,145, or $253 per week. In the 2009 year, she worked for four different employers, earning net $22,655, or $436 per week. In the 2010 year, she again worked for four different employers earning net $27,742, or $534 per week.

[48] At Life Dental, the plaintiff's net full-time wage would have been $808. She returned to work there on 17 January 2011. She ceased work on 7 March 2011.

[49] The plaintiff is entitled to damages for 25 weeks' lost wages at $808 net per week (25 July 2010 to 17 January 2011), which is $20,200. Doing the best I can in light of all the evidence, especially that of Drs Coyne and Eadie regarding the plaintiff's capacity for work, I allow, in respect of the subsequent period to judgment (23 November 2012), $606 per week, which for 96 weeks, is $58,176.

[50] I do not think it appropriate to apply a further discount to that sum.

Future economic loss

[51] Although the plaintiff has not worked in employment since November last year, I accept on the evidence of Dr Coyne that she should be able to work full-time, save that her psychological symptoms may lead to some interruption. I accept the submission for the defendants, that a "global" award of $100,000 (which

approximates 2.5 years' net earnings) makes appropriate allowance for any necessary retraining and residual limitation.

[52] I allow $100,000, and $9,000 lost superannuation.

Care

[53] The plaintiff gave oral evidence of more care than recorded in what she provided to her solicitors (Ex 2). The latter level would not reach the s 59 threshold.

[54] Adjusting her oral account to allow for some subconscious exaggeration of symptoms, and for the circumstance that – as I find – Mrs Stronach rendered assistance, out of the goodness of her heart as a concerned mother, at a level beyond that necessitated by the plaintiff's accident incapacity, I consider the second position advanced for the defendants to be appropriate:

(a) Six months from accident, 8 hours per week for 26 weeks, 208 hours,

(b) January to April 2011, four hours per week for 12 weeks, 48 hours,

(c) April 2011 to date, 2.5 hours per week for 86 weeks, 215 hours.

[55] Those periods total 471 hours. At the agreed rate of $30 per hour, the award is $14,130.

[56] No interest is recoverable (s 60(1)(b)).

[57] As to the future, Ms Gail Smith, an occupational therapist, considered the plaintiff will need four hours assistance per week. That includes two hours of laundry and shopping. I am not satisfied the plaintiff will be unable to attend to those tasks without help. I allow two hours per week to the age of 70 years reduced by one-quarter for contingencies, leading to $43,740 (on the five percent table). As to contingencies, the plaintiff may have required assistance anyway, or may have chosen to pay for it for lifestyle reasons, bearing in mind the very lengthy purchase period – 50 years.

Future expenses

[58] There will be need for some ongoing psychiatric treatment and medication. A global sum of $15,000 should be allowed.

[59] In relation to Ms Smith's recommendations:

(a) there is no medical support for the engagement of a personal trainer;

(b) therapeutic massage costs are not warranted – the plaintiff said hydrotherapy did not help;

(c) there is no need for a special lounge chair – she already has one which is suitable and it would be going overboard to allow for another, or a replacement at some indeterminate future date;

(d) allowance is reasonable for the "tray-mobile walker", an adjustable kitchen stool, and a padded shower stool, as conceded by the defendants, leading to a component of $1,093.50.

Conclusion

[60] I allow the aggregate sum of $286,089.50.

[61] There will be judgment for the plaintiff against the defendants for $286,089.50.

[62] I reserve costs and invite written submissions.