

DISTRICT COURT OF QUEENSLAND

CITATION: *Simmons v Wanless & another* [2014] QDC 42

PARTIES: **ANGELA MARY SIMMONS**
(plaintiff)

v

LEIGH DOUGLAS WANLESS and LEITH WANLESS
(defendants)

FILE NO/S: 1742/12

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 10 March 2014

DELIVERED AT: Brisbane

HEARING DATE: 13 & 14 February 2014

JUDGE: Kingham DCJ

ORDERS:

- 1. The defendants must pay the plaintiff the sum of \$527,462.14.**
- 2. Unless either party applies for a different order as to costs, by filing written submissions and serving a copy on the other party within 14 days of this order, the defendants must pay the plaintiff's costs of and incidental to the proceedings from 11 April 2012, including reserved costs if any, assessed on the standard basis, if not agreed.**
- 3. If either party applies for a different order as to costs, the other party has leave to deliver written submissions in reply within 14 days of service of submissions upon them, and the question of costs will be determined on the papers.**

CATCHWORDS: CIVIL – PERSONAL INJURIES - WHERE LIABILITY ADMITTED – WHERE QUANTUM IN DISPUTE

General damages – reference point for calculating past economic loss – discount for uncertainty about possible sedentary occupation for past economic loss – discount for contingencies for future economic loss

COUNSEL: Mr RC Morton for the plaintiff

Mr BF Charrington for the defendants

SOLICITORS: Morton and Morton for the plaintiff

Hede Byrne & Hall Pty Ltd for the defendants

- [1] Ms Simmons' left hand was severely lacerated while she was working as a kitchen hand at the Westside Tavern in Maryborough. On the morning of 20 April 2010, she was cleaning the large metal drip tray for the grill. It fell from the bench and, instinctively, she reached out and tried to catch it. A sharp edge of the grill cut her hand from the webbing between her second and third fingers halfway down her palm.
- [2] After surgery, Ms Simmons tried to return to work but was unable to fully use her left hand, experiencing pain, loss of sensation and reduced grip strength. After successful treatment for a wound infection, she was diagnosed with carpal tunnel syndrome. The defendants concede there is a causal connection between the accident and the carpal tunnel condition.
- [3] Ms Simmons underwent carpal tunnel decompression surgery in October 2010. This provided initial relief, except for residual weakness in her hand. Later, Ms Simmons said the pain and loss of sensation returned.
- [4] Apart from another unsuccessful trial in a hospitality role and a few short term engagements, Ms Simmons has not worked since the carpal tunnel surgery. Over time, she says her symptoms have worsened. Now she is unable to use her left hand for any repetitive or weight bearing tasks without experiencing pain either at the time or later.
- [5] Although the defendants admit liability to compensate her for her injury, the amount of the damages is in dispute. I have determined compensation in the sum of \$527,462.14 based on amounts for these heads of damage:

1.	general damages	\$45,000.00
2.	interest on general damages (\$27,000 for past damages for 3.83 years @ 2%)	\$2,068.20
3.	past economic loss (\$107,691.43 less \$443.00 earned)	\$107,248.43
4.	interest on past economic loss (after Workers Compensation and Centrelink payments of \$56,181.55 interest on \$51,066.88, or 3.83 years at 5%)	\$9,779.30
5.	past employer superannuation contributions @ 9%	\$9,652.35
6.	future economic loss	\$325,600.00
7.	future employer superannuation contributions @ 11%	\$35,818.20
8.	Fox v Wood	\$2,161.00
9.	past special damages	\$18,491.11
10.	interest on past special damages @ 5%	\$123.15
11.	future special damages (allowance made for medication, hand & other therapy, travel & miscellaneous expenses)	\$8,000.00
	Sub-total	\$563,941.74
	Less WorkCover refund of	\$36,479.60

Total

\$527,462.14

- [6] A number of items were agreed between the parties. There were some small differences between them about some past and future expenses, and the basis for the award for such items is evident in the award. The real disputes were in relation to damages for pain and suffering and for past and future economic loss. They are addressed under the following headings:
- (a) What should Ms Simmons be awarded by way of general damages?
 - (b) In calculating her past economic loss, should the reference point be her average weekly wage at the time of the accident or the average taken over the preceding 6 years?
 - (c) In calculating her past economic loss, should there be any discount for uncertainty about what she might have earned in sedentary work?
 - (d) In calculating her future economic loss, to what extent should the award be discounted for contingencies?

(a) General Damages

- [7] The parties led evidence from orthopaedic surgeons engaged to assess Ms Simmons' condition: Dr Van der Walt, for the plaintiff; and Dr Coleman, for the defendants. Both specialists provided reports and, at trial, gave evidence in a concurrent evidence session. Each proffered their assessment of Ms Simmons' percentage whole body impairment using the American Medical Association *Guides to the Evaluation of Permanent Impairment* 5th ed.
- [8] Dr Van der Walt considered only the restriction of movement in Ms Simmons' left hand in making his assessment of 14% whole body impairment. Dr Coleman assessed her whole body impairment at 8%: 6% for restricted movement in the hand; 1% for residual intra-neural scarring from the initial surgery and the carpal tunnel decompression; and 1% for scarring of the skin. Dr Van der Walt agreed that he did not make any allowance for the intra-neural scarring. He had not specifically referred to the nerve conduction reports by Dr Todman, neurologist, which showed a delay in the left median sensory latency. Both Dr Coleman and Dr Van der Walt thought this result was an objective indication for some of Ms Simmons' symptoms.
- [9] Neither thought the difference in their assessment of whole body impairment based on the restricted movement (14% and 6%) was particularly significant. Both had used the same methodology for testing the range of movement in Ms Simmons' hand. While Dr Van der Walt suggested the most recent assessment might be the more reliable (which was done by Dr Coleman), Dr Coleman said a test performed now could fall somewhere in between the two.
- [10] A permanent impairment should not be equated with one that is unchanging. It is one that is medically stable, having not changed significantly for some time and being unlikely to do so in the near future with medical intervention. The test for restriction in movement relies on the patient making the best effort she can to move her fingers individually and together. The patient is encouraged to move as far as she can. Pain will have an impact on the range of movement achieved and the patient's experience of pain can vary from day to day.

- [11] Further, an impairment assessment does not equate to a finding about a person's disability. It is a functional assessment of restriction. The extent to which that is a disability will depend on personal factors, including their occupation and lifestyle and the extent to which the impairment impacts upon their ability to maintain their pre-injury occupation.
- [12] The question of Ms Simmons' pain was controversial, but only as to its cause. Neither specialist expressed the view that Ms Simmons' did not actually experience the pain that she described. They agreed that a recurrence of carpal tunnel syndrome was rare, but thought Dr Todman's report was evidence of some intra-neural scarring that her symptoms might relate to. Dr Coleman did not try to distinguish between scarring caused by the original injury and scarring from the carpal tunnel decompression. He said some people experience residual symptoms post surgery but either do not seek treatment or are not offered further surgery because of the risk that it will exacerbate rather than improve the condition.
- [13] Dr Van der Walt went further. In his opinion, Dr Todman's findings supported his diagnosis of chronic neuropathic pain, chronic in the sense of enduring beyond healing post injury. He told the court about a course he attended which was run by the College of Surgeons about the changes that have been identified in the cerebral cortices of patients with chronic pain. He said this research indicated that patients suffering chronic pain have something specifically wrong with them.
- [14] However, he said Ms Simmons does not have any of the signs normally associated with a case of complex regional pain syndrome. Although there are some experimental methods for identifying changes in the cerebral cortex of a patient suffering chronic pain, he could not suggest this could be the basis for an assessment by the court. Ultimately, Dr Van der Walt considered I would need to accept the veracity of her description of pain.
- [15] Dr Coleman did attribute some impairment to intra-neural scarring but did not believe this accounted for all of the symptoms Ms Simmons described, particularly in her arm and elbow. In his view Ms Simmons' pain was more likely to be soft tissue pain caused by disuse of the hand and limb. Dr Van der Walt agreed that this could be the cause of some pain.
- [16] Had he been the treating physician, Dr Coleman would have referred Ms Simmons to a hand physiotherapist at an early stage to mobilise her hand. While activity could well improve the condition, his prognosis after such a long period of disuse was pessimistic.
- [17] The defendants urged the court to accept Dr Coleman's diagnosis. In the end, it is not necessary for me to decide between the two. Both surgeons have provided explanations that are causally connected to her injury. The assessment of damages must be the same as neither Dr Van der Walt nor Dr Coleman consider further treatment will significantly improve her condition. Ultimately, then, as Dr Van der Walt suggested, my decision about what damages award to make must depend to a significant degree on my assessment of Ms Simmons' veracity. For the reasons that follow, I am satisfied that Ms Simmons gave truthful evidence about her experience of pain.
- [18] Ms Simmons is a mature woman with a lengthy history of continuous work in manual and physically demanding activities. Before the injury she had little time off work and those periods she was out of the workforce were explained. She made a number of attempts to return to work post injury. Her history of activity before and

after injury is not consistent with malingering. She made a number of attempts to return to work. Her last position ended when the hotel she was working at changed hands and the incoming owner decided not to keep her on, although all other staff were retained.

- [19] The court received video footage taken of Ms Simmons as she walked to an appointment with an occupational therapist earlier this year. At times she swung her left arm freely as she walked and adjusted a shoulder bag strap with her left hand. At other times she rested her left hand on her thigh and kept her left limb relatively still. This footage did not conflict with Ms Simmons' evidence. She did not say she could not use her left hand at all, rather that if she used it for any period or to bear weight, she experienced pain then or later. She did not deny being able to manoeuvre her bag strap with her left hand. She said that she usually does it with her right. Ms Simmons' description of her limitations was supported by the evidence given by her partner, Mr Swalwell.
- [20] The only potential conflict I noted in the evidence about matters Ms Simmons spoke of related to the method that Dr Coleman used to test her range of movement. When asked about the greater range of movement achieved when Dr Coleman, rather than Dr Van der Walt, tested her, Ms Simmons said that Dr Coleman had forced her fingers. Dr Coleman denied doing so. He said that he verbally encouraged her to flex the fingers as far as she could. He said there would be some pressure from goniometer (the instrument used to record the range of movement) as it rested against the hand. Although the two accounts of testing are not at one, I do not consider Ms Simmons evidence necessarily impairs her credit as a witness generally. While I prefer the evidence of Dr Coleman on this point, I also accept that Ms Simmons was a truthful witness and gave evidence of what she recollected from that recent examination.
- [21] Ms Simmons has been compliant with the treatment recommended by her treating practitioners. There is evidence of her desire to rehabilitate from her injury in the letter from her General Practitioner Dr Kieran,¹ who referred Ms Simmons for investigation of her carpal tunnel. Dr Kieran considered Ms Simmons' carpal tunnel symptoms were likely a sequelae of gripping exercises aimed at strengthening her left index and third finger post infected laceration. The GP advised Ms Simmons to stop gripping exercises.
- [22] This suggests that Ms Simmons was diligent about mobilising her hand post the initial surgery. I have not been referred to any treatment recommendation post carpal tunnel surgery that Ms Simmons has not complied with. If Ms Simmons has developed a pain syndrome caused by disuse, then, as Dr Coleman accepted, that is a consequence of the pain that she experienced from the injury or subsequent condition. It is unfortunate that she was not referred for specific hand physiotherapy at a time when there were real prospects of improvement. However, Ms Simmons relied upon her treating practitioners' advice and, apparently, followed their recommendations.
- [23] Ms Simmons seeks an award for general damages of \$65,000. Her counsel referred me to the decision of McMeekin J in *Stewart v Fehlberg & Anor* [2008] QSC 292 in which case his Honour awarded that sum for a minor physical injury which led to a significant psychiatric injury which manifested itself in a difficulty in the claimant using his dominant right arm. Mr Morton submitted an award of \$65,000 would be

¹ Letter Dr Elaine Kieran to Netta Dorrough, 1 July 2010, Exhibit 1, Document 2.1

modest as: the decision was made six years ago; the award was discounted for an unrelated condition the plaintiff suffered from; and his Honour considered there would be significant improvement in the future.

- [24] Against that, he was assessing damages for the dominant hand. Although Ms Simmons played sports with both hands, her dominant hand is uninjured. Further, there is not the complication of a psychiatric injury.
- [25] The defendants referred me to awards in *Drew v Makita [2008] QDC 223*; *Caird v State of Queensland [2004] QSC 217* and *Pethtel v Thor Plastics Pty Ltd [2004] QDC 462*. In *Drew*, Judge Tutt awarded a 59 year old man \$75,000 for a 100% laceration of all the digital nerves of his thumb and fingers which resulted in nine surgical procedures. Dr Coleman assessed 28% whole person impairment. In *Caird*, Chesterman J awarded \$30,000 for injuries to a 37 year old man that are similar to those sustained by Ms Simmons. However, the award was affected by the intervention of a causally independent condition that emerged 2 years after the injury. In *Pethtel*, Judge McGill awarded \$27,000 to a 53 year old man whose injuries to his hand resulted in Dr Coleman's assessment of s 10% whole body impairment.
- [26] Mr Charrington, counsel for the defendants, submitted an award of \$35,000 was appropriate taking into account that the impairment is lower than in *Drew*, there is an absence of objective proof of the severity of the injury, there are inconsistencies in the range of motion testing, and the decisions in *Pethtel* and *Caird* are dated.
- [27] There is some evidence consistent with some symptoms described by Ms Simmons in the nerve conduction studies performed by Dr Todman. Both surgeons have provided diagnoses that could explain Ms Simmons' symptoms. Neither thought the difference in their assessments was significant. It has not been suggested that further testing might establish the veracity of Ms Simmons' evidence one way or the other. I have given my reasons for accepting Ms Simmons' evidence about her pain. There is no basis, therefore, to discount her award because there is only limited objective proof of her pain.
- [28] As for the inconsistencies in the range of movement testing, the surgeons were agreed that there was little between them. They did not consider the different results were significant. To the extent that this submission relies on a report given by Ms White, an occupational therapist, I have addressed her evidence at [38] below. In any case, I prefer the evidence given by the orthopaedic surgeons about what they observed. If they did not consider the difference between them significant, I see no basis for reaching a contrary conclusion.
- [29] The assessment of damages is not a matter of mathematical calculation or equation to awards in other cases. Taking some guidance from the decisions I have been referred to, and bearing in mind the age of those decisions, however, I consider an award of \$45,000 is appropriate taking into account both the physical impairments and Ms Simmons' chronic pain. It is less than the award in *Stewart*, which involved a psychiatric as well as physical injury and the claimant's dominant hand. It is more than the award in *Pethtel*, which involved a similar level of impairment but is an award made some 10 years ago.

(b) Past economic loss – what should be the reference point for calculating loss?

- [30] Mr Morton for Ms Simmons submitted the reference point for past economic loss should be her net earning at the time of the injury (\$540.00 per week). Mr Charrington, for the defendants, argued her earnings should be averaged out over 6

years, resulting in the lower reference point of \$505.50 per week. He submitted her role with the defendants was casual and of relatively short duration (30 weeks) and that the earnings over the six years provided a more accurate assessment of her earning capacity.

- [31] I am not persuaded that is a proper basis for assessing Ms Simmons' past economic loss. Although Ms Simmons only worked for the defendants for 30 weeks, she had worked continuously in the position of kitchen hand at the Westside Tavern from 17 November 2008, some 17 months before the accident. The period of 30 weeks relates to the time she worked there after the defendants purchased the business. Ms Simmons' income over the 17 month period appears relatively stable. I am not persuaded I need to look backwards and average across such a lengthy period because she was engaged as a casual worker.
- [32] Adopting \$540 per week as the reference point, her past economic loss over 199.5 weeks to the commencement of the trial is \$107,691.43.

(c) Past economic loss – should the award be discounted for some uncertainty about what Ms Simmons might have earned in a sedentary occupation?

- [33] Mr Charrington submitted the award for past economic loss should be discounted by 10% to reflect the uncertainty about the earning capacity that might have been exercised in sedentary work during this period. I take this to mean that Ms Simmons might have been able to work in a sedentary capacity during this intervening period. This submission is difficult to maintain in the face of the defendants' acknowledgement that Ms Simmons did not fail to mitigate her loss; that she did make attempts to obtain work; and that she undertook extra training in order to improve her prospects.
- [34] Ms Simmons told QComp Return to Work Assist in 2011 that she had made her own arrangements and did not require assistance with rehabilitation or return to work. She did do a second work trial at the Shamrock Hotel in Maryborough in 2011 and worked for a time at both the Park Avenue Hotel and Best Western Hotel in Rockhampton in 2012. There is no evidence that Ms Simmons declined a particular training or occupational opportunity.
- [35] It seems that the defendants' submission is made on the assumption that I would accept that Ms Simmons had overstated her limitations and was suitable for office work. Because Ms Simmons was not able to provide documentary evidence of attempts to find work in an office environment, the defendants argued her earnings in this period are not a true reflection of her earning incapacity during that time.
- [36] It is open for the court to accept Ms Simmons' evidence about her attempts to obtain office work without supporting documentary evidence. I have already given my reasons for accepting Ms Simmons gave truthful evidence.
- [37] Further, the evidence given by both occupational therapists called by the parties was that Ms Simmons was not suitable for office work and unlikely to be employed for such given the limited use of her left hand.
- [38] Mr Charrington relied on the report of Ms White, an occupational therapist, in which she described some inconsistencies observed in Ms Simmons' range of movement during testing. However, that ignores the evidence given by Ms White during the trial that Ms Simmons was not suitable for most sedentary occupations, including office work, given she was effectively one handed.

- [39] During questioning by Mr Charrington, Ms White was referred to her report in which she had expressed a quite different opinion. She disavowed those opinions, given Dr Coleman's diagnosis of a disuse component to her condition. It seems to me that Ms White read into Dr Coleman's report a finding that there was no identifiable cause for the pain Ms Simmons described. Once that was clarified and she understood his diagnosis of soft tissue pain caused by disuse, Ms White gave evidence that Ms Simmons is not now, and therefore presumably was not during the pre-trial period, suitable for office work.
- [40] I will not discount the award for past economic loss on the basis submitted for by the defendants.

(d) Future economic loss – how much should the award be discounted for contingencies?

- [41] Mr Morton submitted I should award the sum of \$325,600, based on a net weekly wage of \$600 (allowing for wage increases since the accident) to age 67 (multiplier 603) with a 10% discount for contingencies.
- [42] Mr Charrington used the reference point of \$505.50 per week, the average net earnings over 6 years. He accepts the calculation to age 67, but submitted the discount for contingencies should be 30%.
- [43] As I have already explained my reasons for rejecting \$505.50 as the reference point for assessing economic loss, the real issue is the extent by which the award should be discounted for contingencies.
- [44] It is accepted that a practice of discounting awards for future economic by 15% has been adopted by courts in Australia. Mr Morton urges me to follow the lead of Martin J in *Waller v McGrath & Anor* [2009] QSC 159 and Douglas J in *Cameron v Foster* [2010] QSC 372 in adopting a lower starting point for discounting for contingencies. Justice Martin referred to the opinion expressed by Professor Luntz in *Assessment of Damage for Personal Injury and Death* (4th ed) at 6.4.5 – 6.4.17.
- [45] I note that McMeekin J considered the Court of Appeal should signal any change in the conventional discount. However, the application of a discount is just one aspect of the process of arriving at a fair compensation for the effect of a claimant's injury. Future loss is discounted because the court must assess loss on a prospective basis. While there may be a practise of adopting a standard percentage, the trial judge's hands are not tied by past practice where there is a rational basis for adopting a different approach. I am persuaded that discounting Ms Simmons' award for future economic loss by 10% is appropriate taking into account the following factors.
- [46] Firstly, although Ms Simmons was only in casual employment, she had been engaged in that position for 17 months continuously prior to the accident, at times earning more than the net weekly wage at the time of injury. She had an excellent work history. Although she had limited education and no experience in skilled occupations, she was in good health, with a good work record and it can be safely expected she would have worked in that way until retirement.
- [47] Secondly, although the orthopaedic surgeons disagreed about the diagnosis for her pain, neither considered she was likely to be rehabilitated. Dr Coleman was more optimistic that activity could lead to improvement. He agreed the prospect of Ms Simmons being commercially employable was "pretty remote". The likelihood of

increased activity significantly improving Ms Simmons' condition, he said, was "small".

- [48] Thirdly, the occupational therapists agreed that Ms Simmons was not suitable for sedentary work in an office environment, for which she had recently retrained. The possibility of obtaining receptionist or retail work was small given Ms Simmons' physical limitations and lack of experience. Although they differed about the impact of age on her prospects, Mr Hoey and Ms White both considered time out of the workforce was relevant.
- [49] Mr Hoey referred to a Consensus Statement by the Australian Faculty of Occupational and Environment Medicine which drew a correlation between the length of time off work and the likelihood of returning to employment.² Ms White considered the issue was more complex, involving factors such as: the nature of the injury; the nature of the employment; whether it is the injury or some intervening issue that is preventing return to work; and whether the person could return to their former position.
- [50] As I understood the document that Mr Hoey referred to, what was represented was a statistical analysis of one factor in relation to returning to work. I did not understand him to be arguing that it is the sole or even always the dominant factor.
- [51] Ms White and Mr Hoey agree that it is a factor to be considered. I consider it reasonable to infer that a person fully rehabilitated from a work injury might not be so limited by time out of work, if that is explained by the rehabilitation process. In Ms Simmons' case, however, she cannot present to a future employer as a rehabilitated worker. I accept that the time she had been out of the workforce would, in that case, present a further barrier to her securing employment.
- [52] In the light of Ms Simmons' very limited prospects of improvement in her condition and her unsuitability for most unskilled sedentary occupations without greater use of her left hand, I am not persuaded it is appropriate to discount her award by any more than 10%.

Conclusion

- [53] The total award and the items comprised in it are set out at [5]. Unless either party contends for a different order as to costs, the defendants must pay the plaintiff's costs of and incidental to the proceedings, including reserved costs, assessed on the standard basis, if not agreed.

² The statement referred to this report: Johnson D. & Fry T., *Factors Affecting Return to Work after Injury: A study for the Victorian WorkCover Authority* Melbourne Institute Working Papers no 28/02, Dec 2002