

DISTRICT COURT OF QUEENSLAND

CITATION: *Ernst v Kumar* [2020] QDC 258

PARTIES: **MELISSA LEE ERNST**
(plaintiff)
v
PRAVEEN KUMAR
(defendant)

FILE NO/S: BS No 9216 of 2018

DIVISION:

PROCEEDING: Damages Assessment Hearing

ORIGINATING COURT:

DELIVERED ON: 9 October 2020

DELIVERED AT: Brisbane

HEARING DATE: 6 October 2020

JUDGE: Jarro DCJ

ORDER: **Damages are assessed at \$235,703.36.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TRIAL – JUDGMENT BY DEFAULT WITH DAMAGES TO BE ASSESSED – where plaintiff commenced proceedings in the Supreme Court against defendant by way of claim – where defendant did not file a notice of intention to defend – where plaintiff obtained default judgment – where matter remitted to this court for assessment of damages – what amount of damages should be awarded

Civil Liability Act 2003, s 55, s 60

Civil Liability Regulation 2014

Uniform Civil Procedure Rules 1999, r 509

Allianz Australia Insurance Limited v McCarthy [2012] QCA 312, cited.

Nucifora & Anor v AAI Limited [2013] QSC 338, cited.

COUNSEL: Mr P de Plater for the plaintiff
No appearance for the defendant

SOLICITORS: Gouldson Legal for the plaintiff
No appearance for the defendant

- [1] On 10 March 2020 the plaintiff obtained default judgment in the Supreme Court of Queensland as a consequence of the defendant not having filed a notice of intention to defend. It was ordered that the defendant pay to the plaintiff damages to be assessed upon the plaintiff's statement of claim by the District Court of Queensland. The judgment was conditional upon damages being assessed.
- [2] The hearing of this matter was fixed and I am satisfied, in accordance with r 509(3) of the *Uniform Civil Procedure Rules* 1999, that the plaintiff served notice of the hearing date upon the defendant. Despite the defendant's knowledge of the hearing date, neither the defendant (nor what appears to be his solicitors) appeared at the hearing.¹
- [3] The plaintiff, who is approaching her 37th birthday, was given leave to appear by audio-visual link because she resides in Western Australia and the current COVID-19 restrictions would have required her to hotel quarantine before physically attending in person. Her evidence, together with expert written reports from a plastic and reconstructive cosmetic surgeon and a forensic psychologist, were relied upon for the purposes of the damages assessment hearing.
- [4] The plaintiff seeks to recover damages from the defendant, a qualified general practitioner, as a consequence of a surgical procedure which took place on 12 November 2013. Relevantly the plaintiff attended upon the defendant to seek medical advice in relation to the presence of scarring on top of her head. The scarring had resulted from a removal, approximately three months previously, of a nodular basal cell carcinoma. The defendant diagnosed residual basal cell carcinoma in the scalp wound scar and recommended that the plaintiff undergo further tissue excision as well as revision and repair of the scalp scar. The defendant recommended that such procedure occur urgently. Consequently, on 12 November 2013, he performed the excision, revision and repair by way of flap procedure, namely a V Y flap skin graft. The procedure took less than an hour to perform. The procedure, it is pleaded, resulted in:
- (a) a significant portion of the surgical repair failing to heal with resulting full-thickness scalp skin loss;
 - (b) the tissue within the flap graft becoming necrotic;
 - (c) substantial hair loss and alopecia; and
 - (d) ongoing and significant cosmetic defect.
- [5] Consequently the plaintiff seeks to recover damages arising from the procedure, more particularly:
- (a) the injury to the scalp;
 - (b) psychiatric/psychological injuries; and
 - (c) shock, pain and discomfort.

¹ No appointment of solicitor has ever been filed despite NSW solicitors appearing for the defendant on a number of previous mentions of this matter before another judge of the District Court.

- [6] In the weeks that followed the surgery, the plaintiff became distressed when the area where the defendant's surgery was performed had become black and was peeling.² She suffered pain, headaches, recurrent sores, distress, embarrassment, social withdrawal, disfigurement from scarring and hair loss, loss of confidence, low self-esteem and energy, irritability and anger.
- [7] In or about January 2014, the plaintiff consulted her general practitioner to enquire in relation to the lack of healing of the skin graft. The area had become gangrenous. She was quite upset about this and was referred to a skin specialist.³ She consulted Dr Damien McCann of the Freemantle Skin Cancer Clinic as the skin flap had developed a full-thickness necrosis. Dr McCann performed a procedure in an attempt to remove and correct the necrosis. He referred her to a plastic surgeon to undergo a procedure to protect and undergo cosmetic surgery to reconstruct the flap.⁴
- [8] On 26 August 2014 the plaintiff consulted plastic surgeon, Dr Christopher Allen who recommended the plaintiff undergo a revision scar scalp and a flap repair. This surgery was performed by Dr Allen on 23 February 2015. Dr Allen performed a second corrective plastic surgery on 31 July 2015. The plaintiff was then subsequently referred for various appointments for hair transplant which was completed on 21 July 2016 under the care of Dr Martinick.⁵
- [9] In a medicolegal report dated 21 December 2017, plastic and reconstructive surgeon Dr Paul Belt noted the plaintiff required debridement and two subsequent flap surgeries and then hair transplantation as a result of a fail to flap to the scalp. He examined the plaintiff's scars on the vertex of the scalp of the right and left parietal scalp and on the posterior occipital scalp as a result of the previous surgery. Using the AMA 5th Ed, Chapter 8, Page 179, Dr Belt assessed the plaintiff as having a 4 per cent whole person impairment.⁶
- [10] In a report of 8 December 2017, forensic psychologist Dr Steve Morgan diagnosed the plaintiff with an Adjustment Disorder, with Mixed Anxiety and Depressed Mood. He assessed a Psychiatric Injury Rating Scale of 6 per cent.⁷
- [11] It is against these brief matters that I will assess the relevant heads of damage applicable to the plaintiff's claim against the defendant. Her damages are to be assessed pursuant to the provisions of the *Civil Liability Act 2003* and the *Civil Liability Regulation 2014*.

General Damages

- [12] The plaintiff seeks \$22,410 for pain, suffering and loss of amenities of life.
- [13] The plaintiff's evidence was that during the procedure performed by the defendant she "felt him cutting into the skin and [she] started screaming in pain".⁸ She

² Exhibit 3 at [12].

³ Exhibit 3 at [13].

⁴ Exhibit 3 at [21].

⁵ Exhibit 3 at [22], [23], [26] and [29].

⁶ Exhibit 1.

⁷ Exhibit 2.

⁸ Exhibit 3 at [9].

required a number of revision procedures in an attempt to improve the area that was treated by the defendant. Earlier in these reasons, I have noted that procedures have been performed by specialist doctors McCann, Allen and Martinick. She described that after having undergone a major hair transplant surgery under the care of Dr Martinick, “there was at last a sense of minor optimism”. Prior to then, and not unsurprisingly in my view, the plaintiff experienced emotional distress and anxiety. She said she could not wash her hair for an extended period of time.⁹

- [14] The plaintiff suffered and continues to suffer from significant and regular headaches which are related to the tightness of the skin on the top of her head. It is sensitive. She is prone to “sores” on the top of her head.¹⁰ She is particularly careful when she is out in the sun as the top of her head burns very easily.¹¹ She describes her hair as “very sparse in areas of the hair transplant and scar areas”. When she has her hair cut, she has to forewarn hairdressers to be gentle so as to avoid them using hair brushes or giving her head massages. She is now unable to wear a ponytail without a specific tension reducing accessory. The plaintiff has only recently been able to return to swimming without experiencing pain to the top of her head due to the pressure from the water.¹²
- [15] On 19 December 2017, plastic and reconstructive surgeon Dr Paul Belt assessed the plaintiff. On examination, he noted as follows:

“Examination of the midline vertex of the scalp reveals an area of reduced hair density. This has a maximum longitudinal length of 34mm and a maximum transverse width of 20mm. This is consistent with the original excision and a subsequent hair transplant that has been performed. This area has some hair follicles but has much reduced density.

Radiating out to the right lateral parietal scalp is a transverse scar. This area also has mid hair transplantation but has reduced follicular density. This is a white mature scar measuring 100mm in maximum length by 5mm in width.

On the left lateral parietal scalp there is a small scar measuring 50mm maximum length with a maximum width of 4mm.

Examination of the posterior scalp reveals a mature transverse scar which is used for the transplantation. This has a slightly reduced area of hair density and alopecia and measures 150mm in transverse width with a maximum separation of the scar of 3mm.”¹³

- [16] Dr Belt was of the view that the plaintiff’s condition was stable and stationary and unlikely to improve with a passage of time. He did not recommend that any treatments would improve her scar quality. He assessed the plaintiff’s scalp injury at 4 per cent whole person impairment. That assessment took into account the pre-

⁹ Exhibit 3 at [31].

¹⁰ Exhibit 3 at [37].

¹¹ Exhibit 3 at [38].

¹² Exhibit 3 at [47].

¹³ Exhibit 1.

existing scar that she had formed from the original excision as the scar would have resulted from a necessary surgery to remove the basal cell carcinoma.¹⁴

[17] The plaintiff was assessed by a psychologist, Dr Steve Morgan, on 22 November 2017 who diagnosed her with an Adjustment Disorder, with Mixed Anxiety and Depressed Mood. A PIRS rating of 6 per cent was ascribed.

[18] In light of the evidence, I consider the plaintiff's dominant injury to relate to the scalp. I am of the view that the injury should be assessed under Item 156 of the *Regulation* in light of the example given, namely, "total permanent loss of head hair". That provides for an ISV range between 11 and 15 points. That range sufficiently takes into account the plaintiff's psychiatric/psychological injury arising from the surgery. An ISV of 14 points seems appropriate. The consequence is an award of general damages in the sum of \$22,410.

Past Economic Loss

[19] The plaintiff's cause of action arose some 360 weeks ago. At the time of her injury, she was employed with BHP in the Safety Team. Immediately after returning to Perth from Townsville, the plaintiff required a few weeks extra off work.¹⁵ Because she had difficulty wearing a hard hat, she "ended up having to do administration work with BHP for a period of six months".¹⁶ She was then made redundant.

[20] It seems that following her redundancy, the plaintiff commenced working with ESS Health and Safety on a mine site at Barrow Island, Western Australia. However that position lasted only three months. She said that her injuries were "just too much" so she resigned from that role. She then set up a business with her brother. They are co-directors of a company involving electrical and refrigeration maintenance on commercial and industrial areas in Perth. The plaintiff's brother provides labour and the plaintiff performs "behind the scenes doing the admin work mostly".

[21] Taxation and income documents were provided from the 2010 financial year.¹⁷ In the three full years prior to her injury, the plaintiff's average net weekly income from employment was \$1,288.21.

[22] It was highlighted on behalf of the plaintiff that in the full financial year which immediately pre-dated her injury (2012-2013), the plaintiff's average net weekly income was \$1,691.63. It was further highlighted that whilst at first blush it may seem that the plaintiff earned a similar level of income in the financial year during which she was injured, she took an extra two and a half months off work, was made redundant in April 2014 and her income from her employment was inflated by lump sum payments totalling \$32,422. These are matters that I accept. Whilst she obtained some labouring work (mid-April 2014 – 22 May 2014), the plaintiff was out of work for the remainder of that financial year (some five weeks). Even though the redundancy causes some difficulty with the assessment of past economic loss during that financial year, it was submitted that it was reasonable to allow for a loss of income during the 2013-2014 financial year of about 10 weeks at roughly the

¹⁴ Exhibit 1.

¹⁵ Exhibit 3 at [55].

¹⁶ Exhibit 3 at [57].

¹⁷ See Exhibit 4.

three year average of say, \$1,300 net per week (i.e. \$13,000). I accept this submission.

[23] It was also highlighted that the plaintiff earned considerably less than what she enjoyed pre-injury during the following four financial years in that her average net weekly earnings from employment were:

- \$657.62 over 2014-2015;
- \$206.99 over 2015-2016;
- \$333.72 over 2016-2017;
- \$826.70 over 2017-2018.

[24] If these figures are compared with the pre-injury three year average, then the plaintiff's reductions in net income earned during those years is \$170,271.64 based on:

- \$39,916.66 over 2014-2015;
- \$56,439.66 over 2015-2016;
- \$49,824.66 over 2016-2017;
- \$24,090.60 over 2017-2018.

[25] It was submitted on behalf of the plaintiff that it would not be unreasonable to attribute 50 per cent of those losses (i.e. \$85,135.82) to the plaintiff's absences from employment due to the time she required away from work to undergo medical procedures and her ability to return to the type of work in which she had been engaged for some four years before suffering the injuries. I accept this submission.

[26] Therefore, accepting that it would not be unreasonable to attribute 50 per cent of those losses to the plaintiff's absences from employment due to the time she required away from work as a consequence of the defendant's actions, that figure, together with \$13,000 for loss of income during the 2013-2014 financial year, in addition to a modest allowance being made for 2018-2019 financial year, should be allowed. Consequently the amount of \$100,000 is awarded with respect to past economic loss.

Interest

[27] Interest on past economic loss at 0.45 per cent over 360 weeks is \$3,105.¹⁸

Past Loss of Superannuation Entitlements

[28] Allowing 9.5 per cent for superannuation on the above award for past economic loss, I calculate \$9,500.

Interest on Past Lost Superannuation Entitlements

¹⁸ The 10 year Treasury Bond rate, as at 1 October 2020, is 0.90 per cent.

- [29] In accordance with s 60 of the *Civil Liability Act 2003*, interest of \$294.98 is permitted.

Loss of Future Earning Capacity

- [30] An award of \$100,000 is sought.
- [31] The plaintiff is a young lady with the expectation of some 30 years in the workforce until usual retirement age. It is unclear to me what qualifications the plaintiff holds. However I do note the plaintiff's employment history as detailed in the reports from the experts revealing that she is educated to Grade 12 and has completed multiple diplomas through TAFE. She attempted to study accountancy but withdrew due to difficulties with concentration and associated headaches.
- [32] Under s 55(2) of the *Civil Liability Act 2003*, the court may only award damages in the event it is satisfied that the person has suffered, or will suffer, loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters. This involves a consideration of whether the plaintiff has demonstrated, on the balance of probabilities, that her earning capacity has been diminished by reason of the accident-caused injuries and, if so, whether that diminution in earning capacity is or may be productive of financial loss.¹⁹ It remains with the plaintiff to show that her earning capacity has been diminished by the accident-caused injury and "that diminution is or may be productive of financial loss".²⁰
- [33] Dr Belt's view is that given the plaintiff's treatment was complete (at the time he saw her), he did not feel that there would be any effect on her occupation in the future. He opined that the plaintiff would be able to wear a safety helmet now and return to her original occupation. Yet the plaintiff gave evidence that she has continued difficulty wearing a hard hat. She said in her evidence that the weight of the safety helmet on her head creates difficulty with wearing the correct head protection when on-site.²¹ She said:

"So with hard hats, you need to tighten them around the back. So if I lean over, they need to be quite tight. So just the tension around the top of my head and around the top.

...

So usually, I'll get – it'll feel like its starting bruise and then I'll start to get headaches and then I just have to take it off for a while and then put it back on."

- [34] I am satisfied that the plaintiff's accident related injuries render her at risk on the open labour market and therefore her earning capacity has been diminished. That diminution has, indeed, been productive of financial loss in the past, and will, on balance, be productive of future financial loss.

¹⁹ See generally *Allianz Australia Insurance Limited v McCarthy* [2012] QCA 312 at [47]-[51] per White JA.

²⁰ *Nucifora & Anor v AAI Limited* [2013] QSC 338 at [30].

²¹ T22-23.

- [35] It was submitted that a useful way to quantify this head of damage could be to adopt the plaintiff's net income for the 2012-2013 financial year (\$89,294.13), alternatively the present value of a net weekly loss is \$171.06 (that is, 10 per cent of the pre-accident net income) for 30 years (to age 67) discounted at 5 per cent (multiplier 822) and discounted by 15 per cent for contingencies and vicissitudes of life (\$119,519.62).
- [36] The plaintiff is a stoic individual who has many years ahead of her in the workforce. Her business with her brother is continuing to evolve and is becoming more profitable. In light of the medical evidence, the plaintiff's injuries do not preclude her from returning to her pre-accident employment. However I do accept the evidence from the plaintiff that she is restricted in her capabilities especially as concerns wearing a safety helmet. In light of these matters and based on the financial records, I assess a net weekly loss of no more than \$100. Reflective of all of these matters and the fact that it is impossible to precisely calculate this head of damage, I will allow \$70,000 as a global award for future economic loss. The figure is calculated roughly to the extent of \$100 net weekly loss for 30 years (to age 67) discounted at 5 per cent per annum (multiplier 822) and discounted by 15 per cent for contingencies and the vicissitudes of life.

Future Loss of Superannuation Entitlements

- [37] Allowing 11.42 per cent for superannuation on the above award, I calculate \$7,994.

Special Damages and Past Out of Pockets

- [38] Based on the refund owing to Medicare (\$2,851.40), the plaintiff's private health insurance refund (\$3,080.60) and the schedule of special damages, I am satisfied the figure of \$17,192.25 should be awarded.²² Interest on the amount of \$11,260.25 is allowed at \$349.63.

Future Out of Pockets

- [39] The amount of \$9,715 is sought on behalf of the plaintiff comprising:
- (a) six months of psychological treatment at an estimated cost of \$2,420 as suggested by Dr Morgan;
 - (b) over the counter pain relief medication, special hair shampoos and conditioners (\$40 each), specialist hair dryers (\$525) as well as special pillows (\$200 each).
- [40] It was submitted that it would be reasonable to make an allowance of \$10 per week (approximately \$500 per year) for the plaintiff's life expectancy of 49 years.
- [41] Whilst I am not particularly persuaded that the plaintiff will seek psychological treatment given the passage of time since the surgery, I agree that some allowance needs to be made. Noting the plaintiff's evidence (including that she spends approximately \$8 to \$9 per month for soluble panadeine forte), I make an allowance of \$5 per week. Therefore future needs are assessed at \$4,857.50.

²² See Exhibits 7, 8 and 6 respectively.

Conclusion

[42] I therefore assess the plaintiff's damages as follows:

General Damages	\$22,410.00
Past Economic Loss	\$100,000.00
Interest	\$3,105.00
Past Loss of Superannuation Entitlements	\$9,500.00
Interest	\$294.98
Future Economic Loss	\$70,000.00
Future Loss of Superannuation Entitlements	\$7,994.00
Special Damages and Past Out of Pockets (incl. interest)	\$17,541.88
Future Expenses	\$4,857.50
TOTAL	\$235,703.36

[43] Accordingly there will be judgment for the plaintiff against the defendant for the sum of \$235,703.36. I will hear from the parties as to costs.