

JACKSON v MAZZAFERO [2012] NSWCA 170

Background:

- Plaintiff was born in 1950 (60 years old as at date of trial) and worked as a registered nurse for over 40 years. At the time of her incident she was divorced and living on her own in a 3 bedroom townhouse with a small garden.
- In 2007, she had been working at Bankstown Hospital since 1988 as a nurse, doing approximately 30 hours per week. Over the years she had suffered some back injuries and developed an anxiety condition, particularly after the death of her mother in 2003, but had remained employed.
- In July 2007, plaintiff suffered a fall and fractured her right wrist, she took time off work and did not return until October 2007. Upon her return she was working 20 hours per week.
- On 3 December 2007, plaintiff had a fall at the entrance to commercial premises which was the subject of these proceedings and again went off work.

Injury:

- Plaintiff suffered a fracture of the left wrist which required surgery. Thereafter, she was diagnosed with regional pain syndrome in her left wrist. The condition gradually resolved.
- The appellant became anxious and depressed about her situation, particularly with regard to whether or not she would be able to return to work. She underwent psychological treatment and was placed on medication which assisted her with her anxiety. It was found at trial that her psychological difficulties caused by the fall had largely resolved.

Employment:

- Returned to work on 26 May 2008 but as she was unable to perform the heavy lifting work required in the orthopaedic ward, she was transferred to the neonatal ward. In the neonatal ward, the appellant worked 24 hours per week or 30 hours per week, depending on the roster.

Assistance:

- For approximately six months after the fall, the plaintiff received assistance in relation to her housework from a friend, Ms Zieba, and her daughter. At the time of trial, the appellant had engaged a commercial lawn mowing service because she was not able to perform that activity.

DAMAGES AT TRIAL

Head of Damage	\$
Non-Economic Loss	\$40,000 (26%MEC)
Past out-of-pocket expenses	\$17,832
Past economic loss	\$42,000
Past superannuation loss	\$4,620
Future economic loss	\$30,000
Future superannuation loss	\$3,300
Past domestic assistance	\$13,455
Past lawn mowing	\$2,500
Future lawn mowing	\$10,000
Future domestic assistance	\$10,000
TOTAL	\$173,707

DAMAGES ON APPEAL

Head of Damage	\$
Non-Economic Loss	\$40,000 (26%MEC)
Past out-of-pocket expenses	\$17,832
Past economic loss	\$52,508.72
Past superannuation loss	\$5,776
Future economic loss	\$40,000
Future superannuation loss	\$4,400
Past domestic assistance	\$13,455
Past lawn mowing	\$2,500
Future lawn mowing	\$10,000
Future domestic assistance	\$25,000
Future out-of-pocket expenses	\$17,527
TOTAL	\$228,998.72

APPEAL FINDINGS

Non-economic loss

- The question of whether the plaintiff also injured her shoulder in the fall was not easily resolved on the medical evidence. In any event, it was held that 26%MEC was well-within range.

Past Economic Loss

- It was found that the Trial Judges should not have taken into account long service leave payments received by the plaintiff while she was off work in the first 22 weeks post accident. Accordingly, his award of \$10,000 for this period was increased to \$22,508,72 to reflect full wage loss for that period. The total award of damages for past economic loss was increased from \$42,000 to \$52,508,72.

Future Economic Loss

- It was found that there was no-basis for Trial Judge to take into account pre-existing psychological and back problems as a discounting factor for the future when there was no evidence that they had adversely affected her employment in the past.

- Buffer awarded by Trial Judge made no allowance for the chance that plaintiff might have to undergo future surgery which would cause her to lose time from work or force her to retire.
- The buffer was increased from \$30,000 to \$40,000 with a commensurate increase in the award for loss of superannuation.

Future Domestic Assistance

- Trial Judge did not take into account deterioration of the plaintiff's condition in the future.
- Found that plaintiff was likely to need an operation (wrist fusion) in the future which would leave her more disabled and in need of more assistance over the next 27 years (life expectancy).
- Ms Zieba and her daughter may be unable to assist her in the future and therefore paid assistance may be required.
- Damages award increased from \$10,000 to \$25,000 in addition to the \$10,000 awarded for lawn mowing.

Future Out-Pocket-Expenses

- The Trial Judge forgot to make an allowance for the cost of an operation which all the doctors opined that she would need.
- An allowance was also made for likely future expenditure on analgesics and attendances to a GP.
- On appeal, future out-pocket expenses were assessed at \$17,527.

Tony Kulukovski
Principal
Thompson Cooper Lawyers

30 August 2012