

Assessment of damages on uncontested evidence: *Patterson v Khalsa* (No 3)

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In these proceedings,¹ the plaintiff brought an action in negligence against a midwife, claiming that the midwife was negligent in recommending a home birth and also negligent in the performance of her duties during the birth. The NSW Supreme Court had found for the plaintiff in earlier proceedings and *Patterson v Khalsa* (No 3)² fell to the assessment of the plaintiff's damages in circumstances where the defendant elected not to participate in the proceedings and was unrepresented.

Background

On 20 October 2009, the plaintiff, Will Patterson, filed a statement of claim in which he alleged that the defendant, Akal Khalsa, was negligent in her provision of midwifery care. Ms Khalsa, an independent midwife, was engaged by the plaintiff's mother to attend and assist the plaintiff's home birth on 21 October 2006. The plaintiff's birth was complex and he sustained a hypoxic brain injury. At the age of six, the plaintiff was assessed by a paediatric rehabilitation specialist, who diagnosed him with cerebral palsy and moderate intellectual disability.³ The evidence before the court was that the plaintiff would require lifelong care.

The court's findings on liability: *Patterson v Khalsa*

The plaintiff claimed that the defendant had been negligent in the care provided to the plaintiff's mother. The defendant claimed that she was not liable because she had acted in a manner that was widely accepted by peer professional opinion as competent professional practice, as provided for in s 50 of the Civil Liability Act 2002 (NSW).⁴ The defendant also provided two expert reports from midwives, which offered qualified support.

However, the defendant failed to provide further expert evidence, citing her lack of financial resources, and a hearing date was set for 19 August 2013. On 14 August 2013, the defendant wrote to Garling J to say that she had "no fixed address and minimal income with little to no prospects in the future".⁵

The court considered whether, in these circumstances, the defence should be struck out. Justice Garling considered the case of *Steel Building*

Solutions Pty Ltd v Wright,⁶ in which it was held that the court has to weigh up the injustice which would be done to both parties when exercising its power to make such an order.⁷ In doing so, the court concluded that the "defendant ha[d] renounced the duties imposed upon her as a litigant under s 56(3) of the Civil Procedure Act"⁸ and that "there [was] no prospect of a substantive hearing of the issues identified ... as constituting a hearing into all matters of real dispute between the parties".⁹ Furthermore, given the defendant's decision not to participate in the proceedings, the "plaintiff should not be required to expend any additional time or costs in establishing his case on liability".¹⁰ Justice Garling therefore ordered that the defendant's defence be struck out and gave judgment for the plaintiff with damages to be assessed.

Enforcing the asset freeze order: *Patterson v Khalsa* (No 2)

In this proceeding, the court ordered that an arrest warrant be issued for Ms Khalsa pursuant to s 97 of the Civil Procedure Act 2005 (NSW)¹¹ for deliberate and/or intentional defiance of the court's orders. This order was made because the defendant had not complied with a series of orders made by the court to freeze her assets and provide the court with further information. In these circumstances, the court was prepared to "infer that [the defendant] ha[d] intentionally, or deliberately, failed to comply with the Court's Order".¹²

The court's assessment of damages: *Patterson v Khalsa* (No 3)

The plaintiff sought unliquidated damages for personal injury caused by the defendant's negligence. The court relied on the plaintiff's uncontested evidence to support his assessment of damages.

The expert evidence

Dr Antony, a paediatric neurologist, examined the plaintiff when he was three years old. In a report of 19 January 2009, Dr Antony recorded that it was her "impression that [the plaintiff] had probably had some acute upon chronic hypoxic ischemic brain injury, rather

than just an acute hypoxic injury towards the end of labour".¹³ Dr Scheinberg, a paediatric rehabilitation specialist, examined the plaintiff on 14 November 2012 and expressed his diagnosis of the plaintiff as including "mixed tone quadriplegic cerebral palsy" and "moderate intellectual disability".¹⁴

The court was prepared to accept the evidence tendered by the plaintiff. In doing so, the court noted that:

... whilst it is not an absolute principle of law that a witness' evidence must be taken to be true if it is not the subject of cross-examination, in [the Court's] view, in this case, in the absence of cross-examination then [the Court] ought to accept all of the unchallenged evidence.¹⁵

In doing so, Garling J explained that:

There is nothing about the evidence which I have read which on its face is illogical or inherently inconsistent, nor is there any material in the expert opinions which suggests that the history or assumptions upon which those opinions are based, were incorrect or incomplete. I accept all of the evidence which has been tendered by the plaintiff, and I accept the description provided of the plaintiff's development, and his present condition which I have set out above. The assessment of damages will proceed on that basis.¹⁶

The court then proceeded to make an assessment of damages on the evidence tendered by the plaintiff in accordance with Pt 2 of the Civil Liability Act.¹⁷ The plaintiff's damages claim included the following, which was adjusted to reflect his life expectancy:

- non-economic loss;
- past and future out-of-pocket expenses;
- domestic and attendant care; and
- funds management.

Non-economic loss

The court noted that:

Section 16 of the Civil Liability Act (2002) NSW precludes an award for non-economic loss unless the severity of the non-economic loss "... is at least 15 per cent of a most extreme case".¹⁸

The court also noted that non-economic loss is capped and, to award a plaintiff the maximum compensation, the plaintiff's case would have to fall within the parameters of "a most extreme case". The court considered the wording "a most extreme case" and held that the plaintiff's case did fall within this definition, because quadriplegia has been accepted as within the class of "most extreme cases".¹⁹ Accordingly, the court assessed non-economic loss at the maximum amount of \$535,000.²⁰

Economic loss

The court accepted the medical evidence that the plaintiff's earning capacity has been "totally destroyed".²¹ The court awarded damages for the loss of the plaintiff's future earning capacity (\$365,000)²² and associated superannuation (\$40,105)²³.

The plaintiff's claim was premised on 40 years of full-time employment (between the ages of 21 and 61 years). However, the court commented that the plaintiff would have been entitled to compensation for 44 years of full-time employment (between the ages of 21 and 65 years).²⁴

Past and future out-of-pocket expenses

The court noted "that the plaintiff is entitled to all reasonable past out-of-pocket expenses and a sum to represent his expenditure on future out-of-pocket expenses".²⁵ Justice Garling continued to state that he "would have been prepared to have allowed them in full insofar as they were reasonable, and they were incurred, or else would be incurred, as a consequence of the injuries and disabilities from which the plaintiff suffers".²⁶ However, the plaintiff did not press a claim for such expenses, and Garling J stated that it would be inappropriate in such circumstances to make an award of those amounts.²⁷

Domestic and attendant care

The court accepted that the plaintiff would require a full-time attendant carer. The court also accepted the plaintiff's assessment that providing such care over the plaintiff's projected life expectancy of a further 59 years would cost \$4,247,311.²⁸

Justice Garling further noted that the plaintiff was also "entitled to a sum which would reflect the value of the gratuitously provided attendant care services" that was provided by the plaintiff's parents.²⁹ However, such compensation was not claimed and therefore not awarded.

Funds management

Having regard to the plaintiff's moderate intellectual disability, the court was satisfied that the plaintiff would be unable to manage large sums of money. The court accepted the tendered evidence that a fair and reasonable amount to cover the cost of future funds management is \$1,419,177.³⁰

Total assessed damages

The court assessed the plaintiff's total damages to be \$6,606,583 and ordered the defendant to pay the plaintiff's costs.

Conclusion

In this case, the defendant was uninsured and, for the most part, did not participate in the proceedings. Further, because the defendant was uninsured, the plaintiff did not claim for the maximum amount of damages to which he would have been entitled. The court relied on the plaintiff's uncontested evidence of his loss and awarded damages on that basis.

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Footnotes

1. *Patterson v Khalsa* [2013] NSWSC 336; BC201301854 (22 March 2013); *Patterson v Khalsa (No 2)* [2013] NSWSC 901; BC201310832 (21 June 2013); *Patterson v Khalsa (No 3)* [2013] NSWSC 1331; BC201313319 (27 September 2013).
2. *Patterson v Khalsa (No 3)*, above, n 1.
3. *Patterson v Khalsa (No 3)*, above, n 1, at [27].
4. *Patterson v Khalsa*, above, n 1, at [7]. Section 50 of the Civil Liability Act 2002 (NSW) provides that a person practising a profession does not incur liability in negligence from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as a competent professional practice.
5. *Patterson v Khalsa*, above, n 1, at [16].
6. *7Steel Building Solutions Pty Ltd v Wright* [2011] NSWSC 779; BC201105719.
7. *Patterson v Khalsa*, above, n 1, at [20], quoting above, n 6, at [18].
8. *Patterson v Khalsa*, above, n 1, at [23]. Section 56(3) of the Civil Procedure Act 2005 (NSW) provides that a party to civil proceedings is under a duty to assist the court to facilitate the just, quick and cheap resolution of the real issues in the proceedings and, "to that effect, to participate in the processes of the court and to comply with directions and orders of the court".
9. *Patterson v Khalsa*, above, n 1, at [24].
10. *Patterson v Khalsa*, above, n 1, at [26].
11. Section 97 of the Civil Procedure Act 2005 provides that if, by subpoena or otherwise, the court makes an order for a person to attend court for any purpose, or for a person to produce any document or thing to the court, and the person fails to comply with the order, the court may issue, or make an order for the issue of, a warrant for the person's arrest.
12. *Patterson v Khalsa (No 2)*, above, n 1, at [5].
13. *Patterson v Khalsa (No 3)*, above, n 1, at [22].
14. *Patterson v Khalsa (No 3)*, above, n 1, at [27]–[28].
15. *Patterson v Khalsa (No 3)*, above, n 1, at [41].
16. *Patterson v Khalsa (No 3)*, above, n 1, at [42].
17. Part 2 of the Civil Liability Act 2002 sets out personal injury damages.
18. *Patterson v Khalsa (No 3)*, above, n 1, at [44] (emphasis in original).
19. *Patterson v Khalsa (No 3)*, above, n 1, at [47]–[49].
20. At the time of judgment, the cap on non-economic loss was \$535,000. Pursuant to s 17(1) of the Civil Liability Act 2002, the cap is subject to annual indexation.
21. *Patterson v Khalsa (No 3)*, above, n 1, at [56].
22. *Patterson v Khalsa (No 3)*, above, n 1, at [60]–[61].
23. *Patterson v Khalsa (No 3)*, above, n 1, at [62].
24. *Patterson v Khalsa (No 3)*, above, n 1, at [58]–[59].
25. *Patterson v Khalsa (No 3)*, above, n 1, at [66].
26. *Patterson v Khalsa (No 3)*, above, n 1, at [67].
27. *Patterson v Khalsa (No 3)*, above, n 1, at [65].
28. *Patterson v Khalsa (No 3)*, above, n 1, at [55], [71]–[73].
29. *Patterson v Khalsa (No 3)*, above, n 1, at [69], based on *Griffiths v Kerkemeyer* (1977) 139 CLR 161; 15 ALR 387; 51 ALJR 792; BC7700069.
30. *Patterson v Khalsa (No 3)*, above, n 1, at [75].