

Patterson v Khalsa [2013] NSWSC 1331

The plaintiff, Will Patterson, was delivered in a home birth on 21 October 2006. The defendant, Akal Khalsa, was engaged by the plaintiff's mother as an independent midwife to assist with and be in attendance at the birth. The plaintiff's birth was hampered by complications with his head descending slowly and his shoulders releasing with considerable difficulty. The plaintiff was slow to breathe and required oxygen therapy. He was admitted to the Neonatal Intensive Care Unit at Royal Hospital for Women.

The plaintiff was noted to have a right Erb's palsy, and developed encephalopathy and diffuse hypoxic brain injury. The plaintiff was diagnosed with the following conditions:

- mixed tone quadriplegic cerebral palsy, low central tone and dystonia affecting right upper limb;
- microcephaly;
- mobility at gross motor function classification system level 4;
- upper limb function at manual ability classification system level 2;
- epilepsy not requiring anti-epileptic medication;
- alternating bilateral squint;
- moderate intellectually disability;
- drooling;
- functional independence significantly below his able bodied peers.

The plaintiff commenced proceedings against the defendant in the New South Wales District Court for a claim in negligence. The defendant elected not to take any further defence of the plaintiff's claim. Her defence was struck out and judgment entered for the plaintiff.

Assessment of Damages

With the issue of liability resolved in favour of the plaintiff, Garling J proceeded to undertake an assessment of the plaintiff's damages. The plaintiff's medical evidence in support of quantum were not challenged by the defendant. The defendant did not cross-examine the plaintiff's evidence nor did she tender evidence to the contrary. His Honour accepted the plaintiff's evidence in relation to his medical conditions.

Under section 16 of the Civil Liability Act 2002 (NSW), general damages are capped with a maximum amount to be awarded in 'most extreme cases', which at the time of the assessment of damages was prescribed at \$535,000.00. His Honour concluded that the plaintiff's condition, "all of which are consequential upon the defendant's negligence" and which included quadriplegia, cerebral palsy, intellectual disability and epilepsy, amounted to

a most extreme case. Garling J thus awarded the plaintiff the maximum amount of general damages.

In assessing economic loss, his Honour found that the plaintiff's earning capacity had been "totally destroyed" by his condition. He estimated the plaintiff to have a life expectancy of 59 years and a working life of 44 years. Garling J agreed with the plaintiff's claimed sum of \$826.16 net per week (gross of the multiplier).

The plaintiff made no claim for past and future out-of-expenses nor did he claim for past domestic and attendant care. His Honour noted that had the plaintiff claimed amounts for those items, he would have been awarded them. The plaintiff did however claim for future domestic and attendance care at a rate of 12 hours per day for ages 13 to 18 and 24 hours per day from ages 18 to 61, which the plaintiff was ultimately awarded.

Finally, Garling J found in favour of the plaintiff's claim for the cost of future funds management for investment of an amount of \$5million for a period of fifty-five years at \$1,419,177.00.

Our observations

This case is a timely example of 'a most extreme case' of loss of enjoyment of life arising from negligence at a birth. Logically, such severe cases correlate in sizeable awards for economic loss and care assistance. This case illustrates the extent to which a plaintiff, suffering from both physical as well as intellectual incapacity and whose earning capacity is largely indeterminable, will be awarded damages for economic loss and care and assistance.

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