

AUSTRALIA / JUDGMENT

APC v Mr B (No. 3)

[2025] NSWSC 142**COURT**

Supreme Court

DECIDED

06 March 2025

BEFORE

Schmidt AJ

CASE / FILE NUMBER

2022/302110

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Supreme Court**New South Wales****Medium Neutral Citation:** APC v Mr B (No. 3) [2025] NSWSC 142**Hearing dates:** 8-10 October 2024; 27 February 2024**Date of orders:** 6 March 2025**Decision date:** 06 March 2025**Jurisdiction:** Common Law**Before:** Schmidt AJ

Decision:

(1) APC recalculate her damages for future care in accordance with the conclusions which I have reached.

(2) APC file and serve her proposed final orders within 7 days, together with a short explanation of the final calculation of her damages.

(3) If Mr B disagrees with those orders, that he file and serve the orders he proposes with a short explanation of his calculation.

(4) Mr B pay APC's costs, as agreed or assessed to 19 July 2024 and thereafter, on an indemnity basis.

Catchwords: DAMAGES – where defendant has been found to have committed historical child sexual abuse -- where defendant did not respond to damages claim – where plaintiffs' calculations revised -- where claim for damages for future care has to be recalculated

Legislation Cited: Civil Procedure Act 2005 (NSW)
Uniform Civil Procedure Rules

Cases Cited:	APC v Mr B (No 2) [2024] NSWSC 1608 Diamond v Simpson (No 1) [2003] NSWCA 67 State of NSW v Riley (2003) 57 NSWLR 496; [2003] NSWCA 208 MacDougal v Mitchell [2015] NSWCA 389 Malec v J. C. Hutton Pty Ltd (1990) 169 CLR 638; [1990] HCA 20 Lee Transport Co Ltd v Watson (1940) 64 CLR 1 Sharman v Evans (1977) 138 CLR 563 Leichhardt Municipal Council v Green [2004] NSWCA 341 Herning v GWS Machinery Pty Ltd [No. 2] [2005] NSWCA 375 Wilcox v Chapple (No 2) [2024] NSWSC 1655 State of NSW v Moss (2000) 54 NSWLR 536; [2000] NSWCA 133
Category:	Consequential orders
Parties:	APC (Plaintiff) Mr B (Defendant)
Representation:	
Counsel:	M Robinson SC / J McEnaney (Plaintiff)
Solicitors:	Shine Lawyers (Plaintiff) Self-represented (Defendant)
File Number(s):	2022/302110
Publication restriction:	Nil

JUDGMENT

In December 2024 I gave judgment for APC, concluding that she had met the onus which fell upon her to prove her case that Mr B had repeatedly sexually abused her while she was a child, with the result that she had to be awarded damages, including aggravated and exemplary damages: APC v Mr B (No 2) [2024] NSWSC 1608.

In December I directed APC to file and serve the final orders which she proposed, including as to freezing orders which remain in force, together with short submissions and that if there was any disagreement, that Mr B file and serve the orders he proposed, together with his submissions. Mr B did not comply with those orders and did not appear in February 2025, when the matter was listed for directions.

The freezing orders had been made by Wright J in August 2024 and continued by Lonergan and finally Campbell JJ, until further order. His Honour being satisfied that Mr B “does have in mind, if he can, rendering himself judgment proof”: at [8]. Further, that his then non-appearance “may be part of a deliberate strategy to evade the Court's jurisdiction”: at [10]: APC v Mr B [2023] NSWSC 988.

Shortly before the February 2025 listing APC discovered that Mr B had disposed of the properties the subject of the freezing orders. She obtained further orders from the duty judge in relation to the property. She then filed a motion seeking to have Mr B dealt with for contempt and also obtained orders requiring him to disclose his other assets, as well as the details of the transactions by which he had dealt with the properties the subject of the freezing orders.

The contempt motion is being dealt with by another member of the Court and presently requires no further consideration. Nor do the freezing orders, which remain in effect.

This judgment deals with APC's damages, she having filed her 28 January 2025 written submissions, supported by affidavits relied on to advance the proposed costs order and having addressed questions I raised about the proposed orders in further written submissions and by further oral submissions advanced at a further hearing on 27 February.

Mr B did appear at that hearing, still not having taken any steps to advance his case on damages. Having heard the further oral submissions advanced for APC, Mr B sought and was given the opportunity to respond. It was not one that he properly availed himself of, with the result that his submissions had to be brought to an end.

It is not necessary to explain his submissions in detail. They were not responsive to the submissions advanced for APC, or relevant to the assessment of the various heads of damages which she pressed. They were rather concerned with Mr B's life, his views about the incorrectness of the December judgment, the claimed villainy of APC and those who she had called to give evidence to support the false claims she had pursued against him and his opinion of her.

This was finally expressed in such a way that despite my repeated requests that Mr B confine himself to the question of damages and repeated objections, including about contempt in the face of the Court, that I brought Mr B's submissions to an end. I being then satisfied that he had been given a fair opportunity to make his submissions about damages, including by being given an adjournment so that he could compose himself, at a time when security had to be called.

Mr B had said he would make short submissions about the damages claimed. But he did not do so. His submissions necessarily had to be confined to matters relevant to the assessment of APC's outstanding damages. That he was unrepresented did not permit the course he sought to pursue, instead of addressing how APC's damages should be calculated.

That Mr B was upset about the outcome of the proceedings, with which he does not agree, may be accepted. But that cannot alter the fact that final orders as to damages must now be arrived at. The result of his approach is that they must be assessed without real assistance from a contradictor, which the Court usually receives in litigation such as this.

All that the Court can do, however, is to give a party such as Mr B a fair opportunity to be heard. It cannot ensure that advantage of that opportunity is taken. APC's damages being assessed without the Court having the benefit of Mr B's submissions about the claims she pressed, is the result of the course he decided to pursue and cannot preclude the assessment of her damages on the evidence and case which she advanced.

This does not mean that APC's case may unthinkingly be accepted. That is why further submissions were sought from her about matters which were not clear from the written submission which she advanced in January. That resulted in the recalculation of the claimed damages and their reduction by a considerable sum, as well as further written and oral explanations of what she pressed.

Despite the approach Mr B persisted in, as I explained in the December judgment, the Court must be satisfied that the damages it awards reflect fair compensation for what the evidence has established, arrived at in accordance with the applicable principles.

Conclusion

For reasons which follow I have concluded that apart from the damages APC pressed in relation to one head of damage, which I am not persuaded can all be awarded, they not having the necessary evidentiary foundation, with the result that it must be recalculated, the damages which she finally pressed must be awarded.

The claim finally pressed

In the December judgment I dealt with the claim APC had to that point advanced and explained: at [275]-[364]. The parties had agreed at the earlier hearing that if it was concluded that APC was entitled to damages, that they would need to further address their calculation: at [299].

APC's January submissions were directed to the calculation of her claimed damages, having taken into account conclusions I had reached about the evidence and the applicable principles, including as to deductions for vicissitudes. What was finally pressed in further written submissions after various problems and questions about their calculation had been raised was considerably more than the \$3,735,581 earlier indicated: at [290] of the December judgment.

What was finally pressed being:

General and Aggravated Damages:

\$450,000

Exemplary Damages

\$350,000

Past Expenses (including Medicare buffer):

\$10,000

Future Expenses:

\$73,505

Past and Future Economic Loss (including Superannuation

\$1,429,373

Past and Future Domestic Care

\$3,757,844.25

Damages Total:

\$6,070,722.25

Mr B resisted the orders which APC pressed, but did not explain why, other than his disagreement with the conclusions arrived at in the December judgment.

Still the Court must be satisfied that in arriving at the final damages award, the principles discussed [300]-[305] of the December judgment are complied with.

The reasons which follow must be read in light of those given in the December judgment. There I explained how the assessment of APC's damages must be approached, in accordance with the applicable principles there discussed. APC accepted that explanation in the case which she finally advanced and Mr B did not challenge it.

Importantly, in arriving at total damages, not only must the aggregate sum arrived at in respect of each head of damage be considered, but so must a total sum which provides fair compensation for the damage which APC has suffered: *Diamond v Simpson (No 1)* [2003] NSWCA 67 at [22]- [25]. That precluding the simple acceptance of all that APC finally pressed by her written submissions, to which Mr B did not respond.

The result was the listing of the matter for further hearing, because I considered that APC's January 2025 submission had not adequately explained how what was claimed at the October 2024 hearing had increased so markedly. In the further written submissions APC acknowledged errors which had been made in the calculations, that resulting in the significant reduction of what was claimed.

Given the evidence on which APC relied, including as to an order for indemnity costs, about which Mr B said at the February hearing he could say nothing, the finally pressed heads of damages cannot be rejected or discounted out of hand. But still, as explained in *Diamond* at [19]-[25], as well as considering each head, the aggregate sum to be awarded must also be considered, it being the total amount of damages appropriate to be awarded to APC, which is the ultimate question for the Court to decide.

General and aggravated damages

The nature of the abuse which Mr B pursued and what it resulted in was in issue at trial. In his February submissions Mr B did say he regretted how he had conducted his case, but that was not in the Court's control and could not be revisited when damages were calculated,

I concluded in the December judgment that Mr B's denials could not be accepted and that the evidence which APC gave about what he had done to her and its consequences, supported as that was by the other evidence which had to be considered, had to be accepted. Further, that the wrongdoing which he claimed APC was pursuing with the support of other witnesses, could not be accepted. This was all dealt with at [42]-[229] of the December judgment.

The result was that I concluded that Mr B did contribute to the injuries and damages which APC pursued: at [230].

On the assessment of damages Mr B is not entitled to revisit the conclusions which I arrived at in the way that he finally sought to do. He has indicated that he intends to appeal the December judgment, as is his right. Despite that, APC's damages must still be assessed. Mr B will be entitled to also deal with that on his appeal, if he wishes.

APC originally claimed \$450,000 general damages and \$350,000 aggravated and exemplary damages to reflect the injuries and damage which Mr B had caused her. These matters were dealt with at [169]-[274] of the December judgment, where I concluded that Mr B did abuse APC as she claimed and that he was responsible for injuries and damage which she suffered as a result.

In the December judgment I also discussed the applicable principles at [300]. They including that:

- (1) Ordinary compensatory damages are supposed to be an amount adequate to compensate a plaintiff for all consequences of the defendant's wrongful conduct that are not too remote. "Damages for some aggravating feature of the defendant's wrongful conduct are still supposed to do no more than compensate for consequences of that conduct": *State of New South Wales v Riley* (2003) 57 NSWLR 496; [2003] NSWCA 208 at [127].
- (2) Aggravated damages, "in contrast to exemplary damages, are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like": *Lamb v Cotogno* (1987) 164 CLR 1 at 8; [1987] HCA 47. The injury compensated by an award of aggravated damages may be "intangible": *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 at [31].
- (3) Their calculation requires care to be taken to avoid double counting: *Riley* at [130]. Thus "the court must assess damages for hurt damages neutrally and aim towards the centre of the wide range of damages that might conceivably be justified."

I also concluded that to ensure that there was no double counting, APC must be awarded one amount for both general and aggravated damages, given their respective purposes and what the evidence had established: at [313]-[321].

APC finally pressed \$450,000 for both general and aggravated damages as an appropriate award for both heads, given the conclusions I had arrived at about the nature of Mr B's serious and repeated sexual assaults while she was a child and their consequences. I having accepted the evidence she led, including her own evidence and the unchallenged opinions of Associate Professor Robertson. They including that:

APC suffered chronic PTSD with dissociative features, with her clinical problems in the moderately severe category, their substantial and main cause having been the sexual abuse she had suffered, that being the most serious of her childhood traumas. Her subsequent re-traumatisation and sexual re-victimisation being recognised sequelae of childhood sexual abuse and not competing causal factors: at [240];

APC had suffered 45% whole person impairment: at [246];

APC's prognosis was likely to be poor: at [243];

APC's education had been truncated because of the severity of her dissociative symptoms and mood disturbance. Her chronic state of psychopathy made her incapable of making good her educational shortfall: at [244]; and

Mr B's sexual abuse was the substantial and main contributing factor to APC's chronic psychopathological disturbances and psychosocial morbidity and while there was no reliable means of quantification, Associate Professor Robertson concluded that 65% of causation had resulted from her sexual abuse: at [251].

I explained in the December judgment why I was satisfied that Associate Professor Robertson's unchallenged opinions about APC's mental health problems and their cause had to be accepted, as well as Mr B's contribution to them. Having considered the case APC finally pressed in light of what the evidence established, I have concluded that she should be awarded \$425,000 general and aggravated damages.

That reflecting the considerable non-economic loss the evidence established APC has suffered as the result of the serious sexual assaults Mr B repeatedly pursued while she was a child. As well as the pain and suffering which he thereby caused her, which resulted in her attempted self-harm and their considerable ongoing consequences, which his pleas for forgiveness did not improve. Those consequences including the serious mental health problems which APC has, which Associate Professor Robertson explained and which Mr B did not challenge, to which he so significantly contributed.

The result was that he caused her considerable pain, disability, loss of enjoyment and amenities of normal life, which she continues to suffer and for which the damages she is awarded are directed.

The sum awarded also reflecting the insult and humiliation which Mr B continued to cause APC for years while she was a child, in obvious pursuit of his own sexual gratification, without thought for the harm he was causing her or its ongoing, serious consequences.

Mr B's further denials at the February hearing can lead to no other conclusion, given what arose to be determined on the evidence which the parties led and the conclusions which I had already arrived at, for the reasons explained in the December judgment.

I also note that I arrived at \$425,000 for these heads of damage bearing in mind what was explained in *State of NSW v Riley* (2003) 57 NSWLR 496; [2003] NSWCA 208 at [131], considered in *MacDougal v Mitchell* [2015] NSWCA 389. Namely, that in a case such as this, where Mr B's wrongdoing went far beyond ordinary human fallibility, involving such serious misconduct that it is difficult to quantify appropriate damages, the Court must be astute to avoid the risk of under-compensating APC. That is achieved by aiming towards the upper limit of the wide range of damages which might conceivably be justified in a case such as this.

This is the approach I have adopted.

Exemplary Damages

APC finally pressed \$350,000 for exemplary damages, given that Mr B had stood in the role of a de facto stepfather to her, who ought to have protected her and kept her safe. But who sexually abused her for his own sexual gratification for years, disregarding her rights to bodily integrity and safety from deliberate harm.

Account also having to be taken of how he resumed his abuse of her, despite her reports to her mother and the insincerity of admissions and apologies which he had made to her in the past. That having also been demonstrated by the way in which he had conducted his case.

In the December judgment I concluded that although exemplary damages were rarely awarded, they had to be awarded in APC's case, for reasons explained at [357]-[364]. The applicable principles were discussed at [300], they including:

- (5) Exemplary damages are awarded in cases of 'conscious wrongdoing in contumelious disregard of another's rights': *Gray v Motor Accident Commission* (1998) 196 CLR 1; [1998] HCA 70 at [14]-[15].
- (6) Thus in considering whether to award such damages, the first or principal focus of the Court's inquiry is upon the wrongdoer, not upon the party who was wronged, who is entitled to the compensatory damages the law allows. Exemplary damages are thus paid to that person "in addition to compensatory damages and, in that sense, will be a windfall in their hands, they being "awarded to punish the wrongdoer and deter others from like conduct", even though not exacted by the State nor paid to it: *Gray* at [15].

Given the nature and seriousness of all that arises to be considered and Mr B never having been criminally dealt with for his abuse of APC, I have concluded that his wrongdoing should result in an award of \$300,000 exemplary damages.

That properly reflecting the ongoing, conscious wrongdoing which Mr B pursued for years in contumelious disregard of APC's rights, even though she was then a child under his care and despite her reports of his abuse to her mother, which the December judgment explains.

That sum is awarded to punish Mr B and also to deter others from such persistent and reprehensible wrongdoing, which seriously injured and damaged APC, then a vulnerable child in his care. Light is shed on what he is being punished for by the evidence which established that long afterwards in adulthood, she continues to suffer the serious consequences of his abuse, consequences which will also continue into her future.

Mr B's articulated beliefs to the contrary, which he persisted in advancing at the February hearing, can lead to no different conclusion.

Past expenses

APC pressed the buffer of \$10,000 for her past expenses which had been dealt with in the December judgment, given her age, the longevity of her mental health problems since she was a child and their consequences: at [322].

I concluded in the December judgment that awarding such a buffer was available to the Court as a matter of discretion, in the circumstances which arose to be considered: at [323].

Given all that the evidence established about APC's ongoing mental health problems and that Mr B did not oppose an award of such a buffer for her past medical expenses, I am well satisfied that the damages so pressed should be ordered.

Future expenses

An order for future expenses of \$73,505.25 was pressed. That reflecting the calculations in Associate Professor Robertson's unchallenged report, in which he explained his conclusions about the cost of the future expenses for APC given his conclusions about Mr B's contribution to APC's ongoing mental health problems and the expenses she will incur as a result.

This was discussed in the December judgment at [231]-[255].

Associate Professor Robertson's conclusions about Mr B's contribution to APC's ongoing problems and the expenses she was likely to incur as a result, were reflected by a 35% discount which APC accepted and adopted in the calculation of this and other heads of damage. As well as a 15% reduction for vicissitudes, also discussed in the December judgment.

These expenses include the costs of APC's ongoing GP and psychiatric reviews each year, as well as a psychological counselling program and medication which the Associate Professor allowed for, in an amount of \$10,000.

Despite Mr B's expressed view at the February hearing that APC does not suffer from any condition which will result in her incurring such future expenses, I am satisfied on the evidence that the future expenses finally pressed should be awarded. Entirely unchallenged as the Associate Professor's opinions and calculations were and a deduction for vicissitudes having been made in the final calculation.

Mr B had the opportunity to advance his case in his cross examination of Associate Professor Robertson, when he asked about the basis of his report. What he asked and the Associate Professor answered provides no just basis for these expenses to be refused. That the Associate Professor formed his opinions in light of the history which APC gave him is no basis for rejecting his opinions, her evidence having been accepted for the reasons given in the December judgment.

Economic loss

This claim was discussed in the December judgment at [326]-[327]. At the February hearing Mr B's submissions should be understood as opposing any award for such a loss. He having emphasised that APC had never worked and implicitly, that he was not responsible for that outcome.

Given what I concluded in the December judgment, this approach cannot justly be accepted.

Past loss

In the December judgment I concluded that APC had suffered past economic loss because of the adverse effect which Mr B's abuse had on her earning capacity, it having to be accepted that:

But for Mr B's abuse, APC's schooling would not have been disrupted as it was;

But for that abuse she would have pursued paid employment which she would have had the capacity to perform; and

It is likely that in such employment she would have achieved average weekly earnings.

APC pressed damages of \$1,049,160 for past economic loss and \$110,784 for past superannuation, based on the unchallenged approach of the accountant Mr Lee, to their calculation. His assumptions being supported even by the case which Mr B had advanced about APC's capacity, which he raised again in his submissions at the February hearing.

But APC accepted that they should be reduced by 35% to reflect Associate Professor Robertson's also unchallenged opinion, as well as 15% for vicissitudes.

I accept that this approach should be adopted, the Court being required to make an evaluation of possibilities, not establishing a fact as a matter of history. As well as an estimate about the chances that a particular thing would or could have happened: *Malec v J. C. Hutton Pty Ltd* (1990) 169 CLR 638 at 639; [1990] HCA 20. In this case, about what APC might have earned, if Mr B had not injured her as he did.

I have concluded that Mr Lee's opinions have to be accepted, the evidence establishing that APC's earning capacity was diminished as the result of Mr B's sexual abuse and a fair assessment of what would have happened to her, but for that abuse, having to be made. This must result in the conclusion that APC had the real possibility of having had a working life of the kind which Mr Lee concluded would have been open to her. That being supported by other evidence which I discussed in the December judgment and even by the case which Mr B advanced, about APC's real capacity.

The required approach to the calculation of these damages, APC having been a child when she was abused and injured by Mr B, is that a fair award be arrived at, "not the finding of historical facts on a balance of probabilities, but the assessment of the value of a chance". That taking into account "possible outcomes even though the likelihood of any particular outcome being achieved may be no more than a real possibility": *State of NSW v Moss* (2000) 54 NSWLR 536; [2000] NSWCA 133 at [87]. This typically, being done by having regard to an average wage.

That was the approach Mr Lee adopted. He also explained the assumptions which he had made and the account which he had taken of times when APC would not have worked, given the course which her life took, including when she bore her children. None of them were challenged at the hearing and they were supported by other evidence led. They cannot now be rejected as a proper basis on which to calculate her damages.

Mr B finally did not seek to oppose the calculation of these damages on the basis APC pressed. He having had the benefit of the December judgment and still not opposing the adoption of Mr Lee's approach to the calculation of this loss, or suggesting that any other approach should be preferred.

I am thus satisfied that the orders APC pressed should be made, given all that the evidence established, as I explained in the December judgment.

Future loss

APC pressed damages of \$1,085,475 for future economic loss and \$136,985 for future superannuation, as Mr Lee had also calculated. Again reduced by 35% to reflect Associate Professor Robertson's opinions and accepting that this head of damage must also be reduced by 15%, to take into account vicissitudes: December judgment at [355].

For the same reasons as those given in relation to past loss, I have also concluded that the orders pressed should be made. They reflecting a proper application of the approaches discussed in *Malec* and *Moss* to APC's future losses and Mr B not having challenged the adoption of the approach or assumptions of Mr Lee or the opinions of Associate Professor Robertson, by leading evidence from any other expert, or having successfully challenged the assumptions on which their opinions were based. They being supported by the lay evidence discussed in the December judgment.

The assumptions include APC's life expectancy and average earnings, relied on in arriving at conclusions about her diminished earning capacity as the result of Mr B's abuse.

Given all that the evidence established, I am satisfied that the experts' conclusions, supported as they were by the lay evidence, can justly be accepted and the orders pressed, which rely on them, must be made.

That resulting in total damages of \$1,429,373 for past and future economic loss, including superannuation.

Past care

APC's claims for past care were dealt with in the December judgment at [336]-[348]. She not having received paid care in the past and her claims being advanced on the basis of the opinions of the occupational therapist Ms Williams, which were also not challenged and were supported in various respects by what lay evidence established.

I observed that a plaintiff like APC was entitled to recover an amount equivalent to the commercial cost of nursing and domestic services which have been provided in the past and that would be provided in the future by family or friends, as the result of Mr B's assaults: *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 173-4; 192-3; *Van Gervan v Fenton* (1992) 175 CLR 327 at 338-340; [1992] HCA 54; *Kars v Kars* (1996) 187 CLR 354; [1996] HCA 37. This extended to the care she would otherwise have provided to other members of her family: *Sullivan v Gordon* (1999) 47 NSWLR 319; [1999] NSWCA 338."": December judgment at [337].

I also concluded that given the length and severity of the mental health problems which APC continues to suffer and their consequences, to which Mr B's abuse has contributed, her care needs, both past and future, were much greater than parents typically require, even of large families and so are compensable: at [338].

But I also concluded that there was some difficulty with their calculation, given lay evidence received, which did not accord with all of Ms Williams' assumptions: at [339].

In final submissions APC accepted that where Ms Williams' evidence varied from the lay evidence, her damages had to be adjusted downwards. She finally pressed only gratuitous attendant care services calculated in accordance with a table which made reduced assumptions about care APC had received when she was aged 15-18, 18-25, 25-30, 30-40 and 40-47. She also did not press what had previously been calculated in accordance with the approach in s15B of the Civil Liability Act, for loss of capacity to provide domestic service.

That resulting in a calculation of \$716,430 for past care, after the 35% reduction.

Damages such as this depend on the conclusion that the non-commercial care APC received in the past is compensable. That depending on it being accepted that if she had not been injured as she was, she would not have required such care: December judgment at [342].

Given all the lay evidence about the care APC has required and received in the past, the concessions she made as the result of the conclusions arrived at in the December judgment and that Mr B did not oppose calculation of this head of damages on the basis pressed, I am satisfied that its assessment on the revised approach which she urged, should be accepted.

Mr B's expressed negative views about the character of those who gave evidence about these matters can lead to no other conclusion.

I am thus satisfied that damages for past care in the amount finally pressed should now be awarded.

Future care

This head of damage was dealt with in the December judgment at [349]-[356].

The calculation pressed, of damages for future care of some \$3,041,414.25, the largest component of APC's damages claim, had regard to her statistical life expectancy of a further 38.4 years, as well as unchallenged opinions Ms Williams had arrived at about her future care needs, over the next 12 years and then the following 26, as well as the cost of commercial care which she had also assessed and explained.

The resulting calculations were reduced by 35%, again to reflect Associate Professor Robertson's conclusions, as well as a 15% deduction for vicissitudes. This had the result that the total damages claimed for past and future care is \$3,757,844.25.

APC contending that this calculation was also supported by the lay evidence dealt with in the December judgment about the ongoing adverse consequences of Mr B's abuse; the support which APC has required and received in the past as a result; the reducing availability of such support from members of her family in future, while that will also decrease some of her care needs, as her children grow and mature. It was also submitted that the evidence established the real likelihood that APC will require ongoing commercial care as she ages, given the nature and extent of her severe psychological injuries and their consequences.

In final written submissions APC explained that the calculation of future commercial care had now been undertaken with more certainty than at the earlier hearing, her life now being more stable and she not having young children with specific care needs which had to be considered. While the claim finally pressed for past care was potentially too low, "the claim for future care is now expressed precisely as the unchallenged witness' evidence calculated it" and so it and the total damages pressed should be awarded.

Mr B disputed this, contending that APC had no need for any such care. But that cannot be accepted, given what was decided in the December judgment, not having challenged the expert opinions or calculations, by cross examination or evidence, other than that which he himself gave, which I concluded could not be preferred over that of other witnesses.

What was finally pressed must, nevertheless, be considered in light of the calculation of this head of damages at the time of the earlier hearing, when a significantly lesser amount was indicated in written submissions, of \$2million.

The significant increase was explained in final written submissions to reflect that what had been advanced in the October submissions had been an estimate “based on the potential for the Court to reject various pieces of evidence, or indeed to apply a different approach on the question of calculating damages”. No different approach having, however, been suggested by Mr B, who also did not challenge the opinions of Ms Williams or what they were based on, APC contended that the entirety of her calculations should now be accepted

I am unable to accept this submission.

In the December judgment I explained Ms Williams’ calculations. Ms Williams assessed APC’s current needs to be 14 hours per week for her assistance and emotional support, promoting and supervision, 4 hours per week travel and community access and 3 hours per week for indoor domestic work, as well as 4 weeks per year for 24-hour care.

Her calculations were based on the cost of future care by commercial providers, including for services which will require claimed home modifications when APC requires 24-hour in-home care. This was explained in a table which indicated that such care was claimed as from the conclusion of these proceedings: at: [349]-[356].

I am not satisfied that such future care can justly be awarded. I am not persuaded that APC presently requires such care. She is a single mother now living with only some of her children in Housing Commission accommodation in which she has resided for over 20 years. She has no capacity for paid employment and has required and received a great deal of care from family members in the past, given the impact of her significant, ongoing mental health problems on many aspects of her life. They including her ability to care for herself, her children and her home.

But some of her needs have decreased as her children have left home and some help previously available to her from family members, no longer is. On the evidence, given the past care APC required and received, which is increasingly less available to her, I am satisfied that it is reasonable to assume that if she had funds to pay for commercial assistance of the kind Ms Williams concluded she required, that she would seek such assistance.

I am not satisfied that an evidentiary basis has been established for what APC pressed in relation to 24 hour care, despite the way Mr B conducted his case, which did not challenge Ms Williams’ assumptions or opinions.

This was not accepted in the final damages APC pressed. But nor was the evidentiary basis of the claim addressed in the written or oral submissions, other than by reference to Ms Williams’ report, despite what was said in the December judgment, about this claim.

I am still not persuaded that damages for the claimed future 24 hour care can justly be awarded. But I am otherwise satisfied that these damages should be awarded on the basis finally pressed, unchallenged as they were by Mr B.

This means that the annual total of \$88,649.44 claimed for stage 1, from now to age 60, must be reduced in respect of claimed 24-hour care to \$63,9742.24, what is claimed for such care being:

Monday - Friday - \$18,592

Saturday - \$5,206.40

Sunday - \$696.80

Totalling - \$24,495.20

For stage 2, from age 60 for the rest of APC's life, 24-hour care for 8 weeks per year is claimed. I can also see no fair basis for such an award. This means that her annual damages of \$167,611.20 must be reduced to \$106,629.60, what is claimed being:

Monday - Friday - \$37,184

Saturday - \$10,412.00

Sunday - \$13.385.60

Totalling - \$60,981.60

The annual total of \$888.89 for staff requirements as the result of the provision of 24 hour care, also cannot be ordered.

These conclusions require the recalculation of this head of damage, which must again reflect a 35% deduction, as well as 15% for vicissitudes.

The total amount of damages

The total damages APC finally pressed were \$6,070,722.25.

That is undoubtedly a significant sum, which must be approached in the context that the damages awarded have to be fair to both parties and that the Court cannot give a plaintiff perfect compensation for all their suffering: *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1 at 13–14.

Even when evidence is less than satisfactory, the Court has to do its best to put a value on loss suffered. In this case it was Mr B's failure to give the Court any real assistance in arriving at conclusions about damages, which gave rise to challenges in arriving at a fair outcome. But he cannot profit from his pursuit of that course.

What APC pursued reflected not only that it was when she was a child that Mr B seriously injured her by his persistent sexual assaults, but that she has had and will continue to have life long, adverse consequences for which she must be justly compensated.

In *Diamond* reference was made to the approach adopted by Gibbs and Stephen JJ in *Sharman v Evans* (1977) 138 CLR 563 at 58 to a consideration, on appeal, of both each head of damages as well as the total amount awarded. It was there observed that this was “a last reality check” when assessing whether error has occurred: at [23].

But a particularly high total award alone would not warrant appellate interference, given that “Where the damages award is particularly high, and is made up of several components - the majority of which are based on discretionary considerations - there is considerable room for individual choice in regard to a multitude of factors”: at [24].

What is required at first instance is an award of total damages which is ultimately fair and reasonable compensation in all the circumstances, the appropriate legal principles having been applied to the Court’s assessment of the various heads of damage.

The challenge presented by this case is that Mr B did not assist the Court to meet this obligation, earlier not having challenged the opinions of the experts who APC called to advance her damages claims at the hearing. He also decided not to take advantage of the opportunity provided by the December judgment to address the proper calculation of damages, despite the parties having agreed that they would need to address the Court further, if damages were to be awarded to APC.

The result is that he did not challenge the actual calculation of damages which APC finally pressed, despite my having raised problems with those calculations both in the December judgment and before the final hearing, which she responded to and accepted in the final orders pressed.

Having considered the problem I identified with Ms Williams’ approach to damages for future care, which was not accepted by APC and which I have resolved in this judgment, I am satisfied that the total damages which will result from their recalculation, will provide her with fair and reasonable compensation for all that arises to be considered in the calculation of her damages.

Even if it is possible that had Mr B properly participated in the proceedings, to advance a case about the calculation of APC’s damages, which might have been available on the evidence, with the result that some lesser award of damages might then have been arrived at, the total damages I propose to award reflects a fair award, given the evidence and the cases which the parties respectively pursued.

Costs

APC sought a departure from the usual costs order discussed in the December judgment at [365]-[366].

Namely, that Mr B pay her costs on an indemnity basis on and from 19 July 2024, he not having accepted her earlier reasonable *Calderbank* offers of settlement. She relying on the affidavit of her solicitor Mr Ingleton, to which the relevant correspondence was annexed, about which Mr B said at the February hearing he could say nothing.

That the Court may make such an order under s 98(1) of the Civil Procedure Act 2005 (NSW) and r 42.1 of the Uniform Civil Procedure Rules is well settled. The exercise of that discretion depends on the making of a genuine offer of compromise, which it was unreasonable for the other party not to accept: *Leichhardt Municipal Council v Green* [2004] NSWCA 341 and *Herning v GWS Machinery Pty Ltd* [No. 2] [2005] NSWCA 375 at [4].

The relevant considerations, explained in *Wilcox v Chapple* (No 2) [2024] NSWSC 1655 at [57], include “the stage of the proceeding at which the offer was received; the time allowed to the offeree to consider the offer; the extent of the compromise offered; the offeree’s prospects of success assessed as at the date of the offer; the clarity with which the terms of the offer were expressed; and whether the offer foreshadowed an application for indemnity costs in the event of the offeree’s rejecting it”.

In this case particulars of APC’s claims had been sought and provided to Mr B, presumably when he was still legally represented. Nearly a year later, after service of Associate Professor Robertson’s December 2021 report, in June 2024 APC offered to settle for \$1million plus costs as agreed or assessed and disbursements, with the proceedings otherwise being dismissed.

The matter was listed for a three-day hearing in October 2024. The offer was open for 28 days, but an extension to 2 August 2024 was also offered, if Mr B required it. By letter of 1 July Mr B “strongly” rejected the offer on the basis that “I am innocent of all the fabricated allegations made against me by your client for her own personal financial gain therefore matter will be heard in the Supreme Court NSW.”

A further offer for the same amount was made to Mr B by letter of 2 October 2024. It also explained that considerable costs were likely to be incurred in preparation for and at the hearing and that “If the Court accepts our client’s evidence as truthful and honest, considerable damages will be essentially inevitable given you have not obtained expert liability evidence of any kind, and the only expert psychiatric opinion upon which the Court can base its assessment of damages is that of Associate Professor Robertson.”

By email sent by Mr B’s ex-wife on 3 October 2024, Mr B advised that he also strongly rejected that offer.

In those circumstances I am satisfied that justice requires that the indemnity costs order sought be made. Given what was decided in the December judgment it must be accepted that when he received APC’s first offer, Mr B was aware that he was at risk of APC proving her case, that he had sexually abused her as she claimed, with the result that she had suffered considerable, ongoing injury and damage and that he was at risk of the Court ordering him to pay her very substantial damages.

Mr B was given sufficient time to consider that offer, yet he rejected it quickly. It must also be accepted that he then knew that APC had real prospects of succeeding at trial, given what he had done to her and the admissions which he had made about that, prior to his earlier family law proceedings with her mother, about which evidence was given by a solicitor at the hearing.

What APC offered thus involved a significant compromise, given the damages he must have known he was at risk of being ordered to pay. That risk has now materialised. Mr B was put on notice that if he rejected the offer and it was bettered at trial, it would be relied on to advance a claim for an indemnity costs order. APC was thus entitled to pursue that order, as she has.

Had her offer been accepted, the considerable costs involved in the further preparation for, and hearing of APC's claim would have been avoided and Mr B would not now be obliged to pay her considerably more damages than she was prepared to accept. It was open for a reasonable time and yet was rejected out of hand. It follows that APC's offer involved a genuine compromise, which Mr B ought to have accepted.

In all of those circumstances, I am satisfied that justice requires that the Court's discretion to make the indemnity costs order APC seeks be exercised.

Orders

At the February hearing Mr B sought an order for return of exhibits, which was not opposed and which I would make, but for the ongoing contempt motion. The usual order is that "All exhibits and subpoenaed material may be returned forthwith; any exhibits returned must be retained intact by the party or person that produced the material until the expiry of the time to file an appeal, or until any appeal has been determined".

The making of such an order can be dealt with when the contempt motion has been determined.

For these reasons I now order that:

APC recalculate her damages for future care in accordance with the conclusions which I have reached.

APC file and serve her proposed final orders within 7 days, together with a short explanation of the final calculation of her damages.

If Mr B disagrees with that calculation or those orders, that he file and serve the orders he proposes with a short explanation of his calculation, within a further 7 days.

Mr B pay APC's costs, as agreed or assessed to 19 July 2024 and thereafter, on an indemnity basis.

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