

AUSTRALIA / JUDGMENT

Major v Sutherland Shire Council

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District Court

New South Wales

Medium Neutral Citation:

Major v Sutherland Shire Council

[2014] NSWDC 129

Decision date:

09 July 2014

Before:

Cogswell SC DCJ

Decision:

- (1) Verdict and judgment for plaintiff against the defendant in the sum of \$278,392.
- (2) Defendant to pay the plaintiff's costs.

Catchwords:

TORTS - Negligence - council fence railing gave way, plaintiff fell down embankment - liability admitted - damages - non-economic loss - 30% of a most extreme case - factors relevant to award of damages for future loss in earning capacity - self employed plumber - "most likely future circumstances but for the injury" - award of buffer.

Legislation Cited:

Civil Liability Act 2002 (NSW) ss 3, 13, 16.

Cases Cited:

Cockburn v The Trust Company Ltd (No 2) [2014] NSWDC 119.

Penrith City Council v Parks [2004] NSWCA 201.

Category:

Principal judgment

Parties:

Bradley Major (plaintiff)

Sutherland Shire Council (defendant)

Representation:

Counsel:

PN Khandhar (plaintiff)

NW Hogan (defendant)

File Number(s):

DC 2013/00110928

Judgment

1Bradley Major is a successful plumber. He was walking his dog on a summer's evening on 18 January 2012 when he sat on a railing near the beach at Cronulla. The railing gave way and he landed heavily on his buttocks and then rolled down an embankment. He injured himself.

2Bradley Major sued Sutherland Shire Council, claiming that the Council had care and control over the fence and owed him a duty of care. He claimed it had breached its duty of care to him by negligently not maintaining the railing. At the hearing of the case - which came on before me two days ago on 7 July 2014 - the Council conceded liability. It was, therefore, for me to assess the damages to be awarded to Mr Major.

3Both Mr Major and the Council were represented by very competent junior counsel, Mr PN Khandhar for Mr Major and Mr NW Hogan for the Council. They have been of assistance to me in determining the case. I do not propose to recite the evidence. I have re read my notes of the evidence of the only witness, Mr Major himself, and re examined the exhibits.

4It is important to record that I accepted Mr Major's evidence as both credible and reliable. Mr Hogan made it clear that he made no challenge to Mr Major's evidence on either basis. To my mind, that concession was entirely appropriate. Mr Major is now 41 and, as I said, is a successful plumber, conducting his own business.

5Mr Khandhar made available to me a document in the form of a submission which was a schedule of damages (MFI 3). Mr Hogan made available to me a written outline of submissions (MFI 4). By reference to the schedule of damages, I will set out the damages which I propose to award, making findings on controversial issues where appropriate.

6Mr Khandhar argued that I should make an award for non-economic loss. He argued that an appropriate figure would be that corresponding to 30% of a most extreme case in accordance with s 16 of the Civil Liability Act 2002 (NSW). Mr Hogan, on the other hand, argued that the interference in Mr Major's life was minimal and that the non-economic loss would be no more than 10% of a most extreme case.

7Non-economic loss relevantly means, according to s 3 of the Civil Liability Act, pain and suffering and loss of amenities of life. Following are the factors which I regard as relevant in assessing an amount for non-economic loss for Mr Major. He is still waking from sleep with pain and discomfort. He is regularly taking medication. He does not like taking medication, and he described himself as feeling "like a cripple". His back is always "mildly sore". On good days, his back would rate 2 to 3 on a scale of 10 and on a bad day, he would rate it at 6 to 8. Mr Major, I might add, is a witness who, in my view, did not attempt to exaggerate his evidence in order to increase any damages he might obtain.

8Significantly, his favourite sport has been offshore fishing. He used to do it once a week, and engaged in competition. The pain he experiences in his back means that he has reduced that activity significantly, going out only about once every three months. The wave motion against the boat aggravates the pain in his back. As he said in evidence, he "really misses fishing."

9He also enjoys surfing. The accident has not stopped him surfing, but it has affected how he surfs. He used to "really enjoy" surfing on a short board, but now surfs almost invariably on a longer Malibu board. That is not his preference, and obviously affects his enjoyment of the sport.

10He has physiotherapy treatment reasonably regularly and a report from his treating physiotherapist describes the object of the treatment to be to reduce his symptoms to a "manageable level." His prognosis, according to an orthopaedic surgeon qualified for an opinion, Dr Peter Conrad, is described as "guarded." Relevantly to his employment, Dr Conrad places restrictions on the kind of work he could do and weights he could lift. I refer to that opinion in this context because it demonstrates an independent opinion about the restrictions which will affect Mr Major's enjoyment of life and clearly points to, or supports, his account of the pain. Significantly, he also enjoys skiing and when I asked him why he had not skied since 2012 after the accident, he did not suggest that it was because of the pain, but that he had simply not got around to it.

11Recently, when I delivered a judgment on 2 June 2014 in *Cockburn v The Trust Company Ltd* (No 2) [2014] NSWDC 119 I regarded 30% of a most extreme case as an appropriate figure in assessing Mr Cockburn's non-economic loss. The interference with Mr Cockburn's lifestyle was perhaps marginally greater. But Mr Cockburn was older than Mr Major and the interference with Mr Major's enjoyment of his life and the pain and suffering he will experience will be for a longer period.

12I regard the submission that 30% of a most extreme case is the appropriate measure of the severity of non-economic loss as being acceptable. For that reason, in my opinion, I should award Mr Major non-economic loss for the equivalent figure, which is \$127,000.

13Mr Major's past out-of-pocket expenses have been assessed at \$4,337. That figure is not controversial; it is mostly, if not all, for physiotherapy and I will allow that in his award of damages.

14The proposal put forward by Mr Khandhar for his client's future out-of-pocket expenses comprises two figures which are contained in MFI 3. The figure for medication into the future of \$4,720 is not controversial and I will allow that.

15The figure of \$30 a week for physiotherapy attracted some attention from Mr Hogan. He suggested that \$30 a week was a little excessive, based as it was on the figure of \$4,337 for past physiotherapy over the period of 128 weeks. Mr Hogan argued that the physiotherapy was just required by Mr Major once every three or four weeks as he needed it. It was agreed between Mr Khandhar and Mr Hogan that the cost of a physiotherapy session was \$75. Mr Hogan argued that if Mr Major had physiotherapy once a month, then an appropriate allowance would be a weekly amount of \$18.75, rounding it up to \$20 a week. However, in re examining the exhibits, I noted the report from Mr Major's physiotherapist, Matthew Forrest, which is part of exhibit E. Mr Forrest recorded that he was "continuing to treat Mr Major for similar symptoms, every 4 to 6 weeks. Symptoms can be reduced to a manageable level usually within 1 to 3 treatments." To my mind, if Mr Forrest is treating Mr Major every 4 to 6 weeks for 1 to 3 sessions and each session is \$75, then I would calculate a reasonable estimate as follows. If Mr Major had, say, 2 sessions every 5 weeks so that I should allow 1 session every 2½ half weeks, then it seems to me that the figure of \$30 a week, which Mr Khandhar suggested in MFI 3, is a reasonable estimate.

16I would therefore accept both of the figures which Mr Khandhar proposed for future out-of-pocket expenses which, when added, total \$33,055.

17The figure proposed by Mr Khandhar in MFI 3 for past wage loss was \$5,000. Mr Hogan argued that Mr Major has increased the income from his business. That was a sound argument, because the financial documents contained in exhibit 1 bear that out. Mr Hogan also pointed out that Mr Major said in evidence in chief that his hours of work remain the same overall. But I also note that in cross-examination he said that each month he probably lost about one day a month off. He also said that if he loses time off work, either because of his condition or because he needs treatment, then he usually makes it up the following day.

18Based on his 2012 tax return, which was part of exhibit 1, it seems to me that he may have been making around \$120 a day. Over the 2½ half years since the accident, he may have lost 30 days. A calculation such as this cannot be done with much accuracy. When I say that he may have lost \$120 a day for 30 days, that is probably based upon his taxable income, which is a gross amount. But in addition, I need to take into account his evidence that there were missed opportunities. Sometimes, he cannot do a particular job which might involve manoeuvring a particularly heavy hot water system. He has to give that work away. As Mr Khandhar says, he cannot service his

clients for that sort of work. In addition, he may have to pay a labourer to dig a trench where it is not a simple or easy trench to dig. I acknowledge that Mr Major could not locate in the financial documents any figure corresponding to payments he may have made to a labourer, but I do not think that he was misleading me in saying that he occasionally has to do that. As he said himself, he is not a bookkeeper.

19 Taking into account these various matters, I think an appropriate figure for past loss in earning capacity would be closer to \$4,000 for the period to date, and I would allow that amount.

20 The figure proposed by Mr Khandhar for Mr Major's future loss in earning capacity is \$100,000. Mr Khandhar's figure was in the nature of a buffer, which he argued was appropriate in this case. On the other hand, Mr Hogan argued that Mr Major's "most likely future circumstances would be to keep working at the same rate and into the future with the assistance of occasional medication and physiotherapy." He referred to Matthew Forrest's report which indicated that Mr Major is capable of returning to work with recurring intermittent flare ups of symptoms. Mr Hogan argued that any award for future economic loss was not appropriate.

21 I regard the following factors as relevant in making an assessment for an award of damages for future loss in earning capacity. Mr Major is engaged in a physically demanding job. He described the kinds of things which he has to do. There are occasions when he simply cannot do that job. On those occasions, he may engage someone else to undertake a physical task or he may give the job away. In order to keep going, he needs regular physiotherapy and medication. Mr Major originally planned that he may retire at 65 but now doubted that he would make it to 65. He may have to retire earlier than that. I accept that that is a layman's view, so to speak, but I bear in mind that his symptoms have persevered for some years now and Dr Conrad regards his prognosis as guarded. I also bear in mind that an orthopaedic surgeon qualified on behalf of the Council to provide an opinion, Dr Anthony LG Smith, expressed the opinion that the accident "could have aggravated lumbar degenerative disease."

22 I might add that Dr Smith was also of the view that none of the symptoms which Mr Major presently has would be any longer the result of the accident on 18 January 2012. I do not accept that opinion. Mr Major was symptom free beforehand. Dr Smith acknowledged that there may have been an aggravation of a back condition. Whether or not Mr Major had a back condition beforehand was something which was more a matter of speculation. Dr Smith's prognosis was that Mr Major would "have back pain with or without leg symptoms from time to time with a variety of activities on his part". He added that such symptoms would be "consequent to the arthritic process" and his back condition. He regarded him as "fit to continue work as a self-employed plumber."

23 Dr Conrad, on the other hand, expressed the view so far as Mr Major's employment is concerned that "he will be limited in doing heavy lifting, and going up and down ladders and working at heights or in restricted places, such as under houses. His lifting limit should be about five kilograms in weight. He should avoid repetitive lifting or bending. This should all be part of a structured rehabilitation program." I might add that I also prefer Dr Conrad's opinion, expressed

in a report dated 5 December 2013 having been shown Dr Smith's report, that "Mr Major's ongoing back problems relate to the accident". That opinion is also consistent with Mr Major's own evidence, as are the restrictions which Dr Conrad would place on Mr Major in his employment.

24The Court of Appeal in *Penrith City Council v Parks* [2004] NSWCA 201 agreed that an award of future economic loss in the form of a buffer was still appropriate. McClellan AJA described such an award as being a "modest award". Giles JA expressed the view that "it is still open to assess damages by way of a so-called 'buffer'." (Giles JA expressed that view at [5] and McClellan AJA expressed his view at [51].)

25To my mind, Mr Major's most likely circumstances but for the injury (by reference to s 13(1) of the Civil Liability Act), would be that he would continue with his successful plumbing business. The business has a good client base. Mr Major had a capacity to do the physically demanding work for the next 24 years or so until the age of 65. However, those most likely future circumstances, but for the injury, have been affected, in my opinion, by the accident in the ways which I have described.

26I repeat that Mr Hogan is right in pointing to the increase in Mr Major's gross earnings. But of course, I need to make an assessment of his loss in earning capacity provided it is productive of loss in income. To my mind, there is clearly a loss in Mr Major's earning capacity. The evidence suggests that it will be indefinite, given the time it has lasted so far and Dr Conrad's prognosis. I accept Mr Major's own reservations about being able to continue to work until 65. It is possible that he will be forced to retire earlier than he would prefer.

27Taking all those matters into account, I regard this as an appropriate case to make an award of damages for future economic loss in the form of a buffer and I also regard Mr Khandhar's proposed figure of \$100,000 as appropriate.

28Finally, Mr Khandhar has made a claim on behalf of his client for attendant care services. He makes no claim for any provided in the past but claims \$25,000 for the future. Mr Hogan points to Mr Major's evidence that there was only a slight increase in pain caused by mowing the lawns and that Mr Major's wife does most of the domestic chores. He pointed out, correctly in my opinion, that there was no evidence from Mr Major's wife to say, for example, that "she could not in future be able to perform any of the domestic tasks with respect to which Mr Major could not perform." Mr Khandhar, on the other hand, says that it would be a struggle for Mr Major to undertake domestic work after a day's work in his employment.

29The only domestic activity which Mr Major is engaged in regularly is lawn mowing. That, for him, is manageable - like his work in his employment. He occasionally assists with the cleaning of the bathroom. He and his wife are planning to have children. That may, of course, reduce his wife's ability to contribute to domestic chores inside.

30It is impossible to make any exact calculation of an appropriate amount for future paid care, but I do regard the proposed figure of \$25,000 as excessive given the evidence of the limited tasks which Mr Major does and that the mowing remains quite manageable. But I think an allowance of \$10,000 is appropriate because he may need assistance with lawn mowing in the future and may need to assist domestically with some of the heavier tasks, particularly if they have children. For that reason, I would regard an appropriate amount to award for attendant care services in the future as \$10,000.

31The total of the amounts I have allowed in damages is \$278,392.

32I enter a verdict and judgment for the plaintiff against the defendant in these proceedings for \$278,392.

33I order the defendant to pay the plaintiff's costs.

34I direct that the orders which I have made not be entered until further order or until 4pm on Friday 11 July 2014, whichever is the earlier. The parties have liberty to apply in respect of the costs order up until Friday 11 July 2014 at 4pm.

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18 August 2014

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