
AUSTRALIA / JUDGMENT

Pallier v Solomons (No 1) [2014] NSWSC 1214

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Supreme Court

New South Wales

Medium Neutral Citation: Pallier v Solomons (No 1) [2014] NSWSC 1214

Hearing dates: 25-27 August 2014

Decision date: 27 August 2014

Jurisdiction: Common Law

Before: Hamill J

Decision: Settlement or compromise approved under s 76 of the Civil Procedure Act 2005 (NSW)

Catchwords: CIVIL LAW - approval of agreed damages - s 76 Civil Procedure Act - car accident - future earnings of young person - quantum of possible damages - legal incapacity - settlement - beneficial to plaintiffs interests

Legislation Cited: Civil Procedure Act 2005 (NSW)

Cases Cited: Fairhurst v Fairhurst [2012] NSWSC 388

Rhodes v Swithenbank [1889] 22 QB 577

Category: Interlocutory applications

Parties: Charles Kavanagh Pallier (Plaintiff)

Trent Leigh Solomons (Defendant)

Representation: Counsel:

P W Taylor SC (Plaintiff)

S Hickey (Plaintiff)

K P Rewell SC (Defendant)

Solicitors:

Lyons Barnett Kennedy (Plaintiff)

J M Crestani & Associates (Defendant)

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EX TEMPORE Judgment

1HIS HONOUR: I am currently hearing proceedings between the plaintiff, Charles Pallier, and the defendant, Trent Solomons. The proceedings arise from serious injuries occasioned to the plaintiff in a car accident which occurred near the city of Tamworth on the evening of 4 October 2009.

2The defendant was the driver of a motor vehicle which left the roadway and overturned whilst it was carrying four passengers. The defendant admits that his driving at the relevant time was negligent. There is some issue between the parties as to the nature and extent of that negligence but that is not a question which is relevant for present purposes. There is also an issue between the parties as to whether the plaintiff contributed to his own harm. In other words, there is an issue as to contributory negligence.

3When the case commenced on Monday, Mr Taylor of Senior Counsel who appears for the plaintiff with Mr Hickey, provided me with a helpful opening in which he articulated the major areas which were then in dispute between the parties. In doing so he provided me with a spreadsheet in which the respective positions of the plaintiff and the defendant were set out insofar as they concerned the question of the quantum of possible damages. The spreadsheet showed that there were disputes between the parties as to the amount of general damages as well as the appropriate basis upon which both past and future earnings - and consequently the plaintiff's economic loss - should be calculated.

4Prior to the first witness being called and after an adjournment of an hour or so the parties indicated that they had reached agreement on all but two issues. Those two issues are, first, the question of contributory negligence and the related question concerning the nature and extent of the defendant's negligence and secondly, the appropriate amount of damages for fund management assuming the plaintiff receives an award of damages.

5At that stage the plaintiff tendered without objection a schedule of damages which became exhibit A. The amounts indicated in exhibit A are the amounts upon which the parties have agreed to compromise or settle following their negotiations and are as follows:

- (1) Non-economic loss: \$420,000
- (2) Out-of-pocket expenses: \$3,363

- (3) Past economic loss: \$92,464
- (4) Past superannuation: \$10,171
- (5) Future economic loss: \$666,548
- (6) Future superannuation: \$75,974

That leads to a total of \$1,268,520.

6A perusal of the document shows that the amount agreed upon represents a compromise on both sides. Certainly the numbers agreed upon are less than those the plaintiff suggested initially were appropriate, as evidenced by the spreadsheet handed to me during the course of Mr Taylor's opening. In total, the amount of the plaintiff's compromise is in the vicinity of \$300,000. That results from a reduction in his general damages of \$57,000 and a reduction of what I might call his notional earnings of between \$200 and \$300 per week.

7Pursuant to the provisions of s 76 of the Civil Procedure Act 2005 (NSW), I am asked to approve that settlement or compromise. As I have said, the plaintiff suffered a significant brain injury in the course of the accident. I have received and perused, largely on an informal basis, a number of relevant medical reports. The sad fact is that the plaintiff is under a "legal incapacity" for the purposes of s 76. Accordingly, any agreement or settlement of "any matter in dispute" between the parties which is reached on his behalf may be approved or may be disapproved by the Court: see s 76(4). This includes an agreement or settlement as to part of the matter in dispute.

8While the proceedings remain part-heard on the issue of contributory negligence and while the parties have come very close to reaching an agreement as to the appropriate calculation of any damages for fund management (an issue which cannot finally be resolved until the question of contributory negligence is determined) the parties ask me to consider approval of the agreed damages set out in exhibit A at this stage.

9The question that I have to determine is whether the compromise is beneficial to the interests of the plaintiff. Unless I am affirmatively satisfied that the settlement or compromise is for the plaintiff's benefit I should withhold such approval. See, for example, *Fairhurst v Fairhurst* [2012] NSWSC 388 and *Rhodes v Swithenbank* [1889] 22 QB 577. This in turn involves a consideration of the prospects of the plaintiff receiving a greater award of damages at the conclusion of a full hearing.

10In determining the question of whether the settlement proposed in exhibit A is beneficial to the plaintiff, I have considered a number of documents provided to me by the plaintiff's counsel and with the consent of the defendant. Those documents include the statement of a witness, Meghanne Clarke, who was a school teacher and Deputy Principal of a high school that the plaintiff attended somewhat intermittently in the years prior to the car accident. I have also been provided with a statement of Jamie Pallier, who is the father of the plaintiff, and who is in a position to (and does) provide significant insight into the somewhat tumultuous early life of the plaintiff. I note that the plaintiff was just over the age of 16 at the time of the subject car accident.

11Determining the appropriate amount of damages for a person of such a young age is notoriously difficult. It involves making evaluative predictions as to the likely employment and income of the person when very little is known as to how the person will progress as they achieve adulthood. The performance of a child at school is not necessarily indicative of where they will end up in terms of their employment and income. Many bright school students have been failures and many average students have been, at least in the financial sense, successes. Nevertheless, such evaluative exercises are undertaken by judges in cases such as the present every day.

12The material before me shows that, whilst the plaintiff was a person of some potential and who occasionally performed quite well at school, he was also a person with some significant behavioural difficulties. I do not need to, and think it inappropriate to, articulate those behavioural difficulties here. The reason for those difficulties is not particularly, if at all, relevant, but the material shows a degree of instability in his home and family life and it shows that he moved both homes and schools on more than one occasion.

13Not long before the accident the plaintiff had indicated a desire to enter the armed forces. In particular, he was interested in the Army and the Air Force. He had also shown an interest in mechanics and had spoken to his father about the possibility of working as a diesel mechanic on an oil rig. His father was a shearer and the plaintiff had worked from time to time as a farmhand or roustabout. However, the plaintiff had not finished school and the prospects of his obtaining employment in his preferred areas, and in particular given his behavioural difficulties to which I have opaquely referred, is questionable.

14Shortly before the collision he had commenced a TAFE course to achieve his School Certificate and he seemed to be performing quite well at TAFE. He may have in due course achieved an income greater than the average weekly wage and it was upon that basis that the plaintiff's lawyers indicated an amount for past economic loss and future economic loss which is much greater than the proposed compromise agreement. On the other hand, the defendant's initial position was predicated upon the fact that the various behavioural difficulties and his intermittent school attendance and occasionally mediocre performance at school would not have led a judge to be particularly sanguine as to his prospects. No doubt, the defendant would have submitted that those problems would have supported a conclusion that the plaintiff may have struggled to achieve the average weekly wage. He certainly would not have achieved the average weekly earnings in the short-term given that he was still studying at TAFE to achieve his School Certificate.

15In determining whether or not the settlement is in the plaintiff's interests and beneficial to him, it is necessary to consider, not just the best case scenario, but also the possibility of a worse outcome. In view of the difficulties associated with proving his likely income and some of the evidence which would have supported the defendant's contention that the Court would have been, as I have said, less than sanguine as to his ultimate employment prospects, I have reached the conclusion that there was a significant possibility that the plaintiff's damages would have been somewhat less than that upon which the parties have agreed.

16I give great weight to and it is of significant comfort to me that the plaintiff is represented here by both senior and junior counsel who are experienced in this area of the law and in the proper assessment of damages. He is also represented by a highly regarded, capable and experienced solicitor from Tamworth with significant knowledge and experience in the question of the proper assessment of damages. His legal team advises him to settle on the terms outlined in exhibit A.

17In any event, the compromise figures as articulated in exhibit A represent a sensible and sound resolution of a case which had some significant difficulties. I am affirmatively satisfied that the compromise or settlement proposed is beneficial to the interests of the plaintiff.

18Accordingly, under s 76 of the Civil Procedure Act 2005 (NSW), I approve the settlement or compromise.

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