

AUSTRALIA / JUDGMENT

Peric-Davies v Mazdo [2004] NSWCA 20

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New South Wales

Court of Appeal

CITATION : Peric-Davies v Mazdo [2004] NSWCA 20

HEARING DATE(S) : 16 February 2004

JUDGMENT DATE :

16 February 2004

JUDGMENT OF : Giles JA at 1; Hodgson JA at 22; Bell J at 29

DECISION : Appeal allowed. Verdict and judgment for the defendant and order for costs made below set aside. Remit the proceedings to the District Court for a new trial on the assessment of damages. The respondent pay the appellant's costs of the appeal. The costs of the first trial abide the result of the new trial.

CATCHWORDS : Personal injuries - finding thresholds under Motor Accidents Act not reached - no finding as to any lesser extent of injury entitling recovery of past economic loss and out-of-pocket expenditure - if a finding, no reasons for it - appealable error - appeal court unable to assess the damages - new trial as to damages generally.

CASES CITED : Arian v Nguyen (2001) 33 MVA 37.

PARTIES : Iva Peric-Davies - Appellant

Sankhairi Mazdo - Respondent

FILE NUMBER(S) : CA 40748/02

COUNSEL : P Webb QC & D A Allen - Appellant

P Deakin QC & J Sewell - Respondent

SOLICITORS : Colin Daley Quinn, Kogarah - Appellant

Vandervords - Respondent

LOWER COURT District Court

JURISDICTION :

LOWER COURT DC 8942/00

FILE NUMBER(S) :

LOWER COURT Rein DCJ

JUDICIAL OFFICER :

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

CA 40748/02

DC 8942/00

GILES JA

HODGSON JA

BELL J

16 February 2004

PERIC-DAVIES v MAZDO

Judgment

1 GILES JA: This is an appeal from a verdict and judgment for the defendant in proceedings in the District Court arising out of a motor vehicle accident on 26 July 1998. The defendant admitted liability, and the judge was concerned only with the assessment of damages.

2 The plaintiff was a passenger in the front seat of a car hit from behind by a car driven by the defendant. She claimed fairly extensive injuries and sequelae, summarised by the judge:

"3. The Plaintiff claims that she suffered a 'flexion/extension injury to the cervical spine', soft tissue injury to the cervical spine, injury to the lower zygapophyseal joints, muscular ligamentous injury to the left shoulder, inter-scapular area and thoracic spine, as well as shock and sequelae. The sequelae included, it was claimed, psychological disorder, suicidal ideation and an attempt at suicide."

3 The judge was favoured with a bundle of medical reports tendered on behalf of the plaintiff and a bundle of medical reports tendered on behalf of the defendant, all admitted without objection and without any of the authors of the reports required for cross-examination. The reports provided a spectrum of opinions, some supportive of the extensive injuries and sequelae alleged by the plaintiff and others completely to the contrary. It was of course particularly difficult, in the absence of cross-examination, for the judge to obtain the assistance which might have been

hoped for from the medical reports in determining the effects of the accident upon the plaintiff.

4 As the judge said, the medical reports which favoured the plaintiff's case provided evidence supporting her suffering pain and then depression or post-traumatic stress disorder as a result of the accident; but as his Honour also said, the opinions to that effect were in large measure a result of acceptance of the plaintiff's description of her pain and feelings, and with one possible exception itself rather qualified, there was no objective support for her complaints. This made the judge's view of the plaintiff's evidence describing her pain and feelings of particular importance in his findings on the nature and extent of her injuries.

5 The judge's reasons broadly took the following form.

6 He first set out the conclusions and some passages from the medical reports favouring the plaintiff's case, and then did likewise with respect to the medical reports adverse to the plaintiff's case. He particularly dealt with a video taken of the plaintiff, and the opinion of one of the doctors whose reports were tendered by the defendant on being shown the video. He referred to a number of matters in the plaintiff's evidence particularly pertinent to the basis underlying some of the medical opinions.

7 The judge said that there was "nothing in the plaintiff's manner of giving evidence per se that led me to think that she was obviously dishonest or unreliable in her testimony". But he then observed that there were "some aspects of her oral evidence which were not conducive to treating her as a reliable witness." He went through a number of such matters, as to one saying specifically that he did not find the plaintiff's manner of responding to questions about her activities in the video convincing.

8 The judge said that he was faced with the inconsistent views of medical experts, and came to his conclusion as follows:

35. On balance, I am not persuaded that any long-term physical or psychological effect was suffered by the Plaintiff as a result of the accident. In coming to that view I will indicate the key elements which, although not individually decisive, have prevented me from being satisfied as to the claims made by the Plaintiff:
- (1) The views of Dr Sekel and Dr Sinclair particularly in relation to the lack of relationship between what she was asserting as her symptoms and what they observed or were doing at the time, and their opinions as to the effect of the accident described by the Plaintiff which opinions are not widely divergent from the views of Dr Garvan and Dr Cordato, retained on behalf of the Plaintiff.
 - (2) The absence of any x-ray, CT scan or other objective evidence to support her assertions.

- (3) The fact that she described herself to Associate Professor Robert Bryant as having had 'a happy childhood that involved no major accident or stresses' and made no mention of the matters to which Ms Roberts refers, and her reticence to speak of matters with Dr Eikens, which he noted, leads me to conclude that the Plaintiff has not been frank with those experts retained on her behalf. This lack of candour was noted by Ms Roberts and was exhibited with Dr Dyball (see report of 13 September 1999).
 - (4) The psychological matters referred to by Ms Roberts as existing prior to the accident including, importantly, the episode of anorexia nervosa suffered six years before the accident and the fact that there was a significant relationship issue which was impacting upon the Plaintiff at least after the accident and possibly before.
 - (5) The video evidence which would seem to indicate that in July 1999 she had no obvious difficulty in lifting a pram and using her left arm.
 - (6) The aspects of her oral evidence to which I have referred.
 - (7) The comments of Dr Cordato, Dr Garvan, Dr Barnsley and Dr Eikens the Plaintiff's experts, I think, themselves raise doubts as to whether there is any physical long term basis for the complaints.
36. To these matters, although less significant, I would add that the accident did not appear to be a particularly severe one according to the details obtained from the Plaintiff by Dr Sekel, the fact that the Plaintiff and her fiancé went shopping (as she informed Dr Sekel), or to pay bills, immediately after the accident (see also Exhibit B in which the nature of the damage is depicted). I say less significant because I accept the full impact of the accident may not have been felt immediately and that the nature of the damage to the vehicle does not necessarily preclude an injury of the type claimed having been experienced.
37. Accordingly, I am not persuaded on the balance of probabilities that she has suffered a condition as a result of the accident that has left her with an impairment equivalent to at least 15% of an extreme case (not the most extreme case : see *Southgate v Waterford* (1990) 21 NSWLR 427, *Dell v Dalton* (1991) 23 NSWLR 528) as required by s 79A of the Motor Accidents Act 1998. Nor am I satisfied that the Plaintiff has sustained any economic loss or that there is at least a 25 per cent likelihood that she will in the future sustain a future economic loss or diminution of earning capacity or that she had required any assistance for a period of at least six hours per week or for at least six months (s 72) as a result of the accident.
38. It follows that there should be verdict and judgment for the Defendant, and that the Plaintiff should pay the Defendant's costs."

9 In the appeal the plaintiff identified four areas of error.

10 The third and fourth areas were directed to what the judge said about the plaintiff's testimony, the plaintiff submitting that there were errors in the judge's analysis underlying his view that the plaintiff was not a reliable witness and in the analysis underlying the conclusion, in para [35] earlier set out, that the plaintiff had not established any long-term physical or psychological effects suffered as a result of the accident. In particular, it was said that there was divergence of opinions contrary to what the judge said in his para [35(1)], and that there was a failure to differentiate between the physical and psychological effects on which the plaintiff relied.

11 The first two areas of error were that the judge had failed to make any finding, or if he did make a finding had failed to give reasons for the finding, as to any effects of the accident short of the long-term effects with which his reasons had dealt, and thus had failed to address the plaintiff's claims for past economic loss and an award for out-of-pocket expenses. It was submitted that both of these needed to be addressed even if the judge was not satisfied that the various thresholds mentioned by him in para [37] of his reasons had been reached.

12 In the course the appeal took the plaintiff's submissions in these four areas were not developed, as we called upon the defendant in relation to the first two areas of error. For the reasons which follow, I am of the opinion that appealable error in those two areas has been made out, necessitating a new trial generally on the assessment of damages.

13 The judge said nothing about out-of-pocket expenses. In the course of the trial his Honour was provided with a "schedule", which was not before us, and was told that the out-of-pockets had been agreed at \$6,220 unless he was told otherwise. So far as appears he was not told otherwise. What the out-of-pocket expenses were for is not known to us, save that a letter from the defendant's solicitors to the plaintiff's solicitors dated 13 August 2001 with which we were provided indicates that \$3,448.54 of that sum was payments made by the defendant's insurer pursuant to s 45 of the Motor Accidents Act. The evidence was that the plaintiff consulted a doctor on the day of the accident and consulted doctors fairly regularly thereafter. Assuming that she suffered some injury in the accident, an amount would have been recoverable by way of out-of-pocket expenses, although how much would depend on the findings made as to the nature and extent of the injuries suffered.

14 That then takes me to the question of past economic loss, as to which a similar position obtains. The judge did say in his para [37] that he was not satisfied that the plaintiff had sustained "any economic loss". The defendant submitted that this was a finding inherent in which was that the plaintiff had not suffered any injury in the accident, whereby she was not entitled to any past economic loss or out-of-pocket expenses.

15 The judge's words, however, were in the context of his Honour not being persuaded that the various thresholds had been reached. It is far from clear that his Honour intended a finding that the plaintiff had not established the suffering of any past economic loss at all. The issue was present because, on the evidence, the plaintiff had been working at the time of the accident and had not returned to work, she said because of the pain following the accident. The evidence most favourable to the defendant's position was that of Dr Sekel, whose report was tendered on behalf

of the defendant, and was that the plaintiff "would have sustained a minor soft tissue injury of the neck and surrounding tissues which would have completely resolved within a maximum of six weeks without long-term complications". Dr Sekel was of the opinion that the plaintiff "has been fit for all normal work, including that of a beauty therapist, since approximately 23/8/98." Thus one would have expected a finding that there was at least some past economic loss, being the period of four weeks or so following the accident.

16 The doubt whether the judge meant to find that there was no past economic loss at all is increased by the wider context in which his words are found. In his para [35] the judge was addressing "long-term physical or psychological effect" suffered as a result of the accident. Those words appear at the commencement of para [35] and their import is taken up in the words "physical long-term basis" at its conclusion. While in para [36] the judge referred to the nature of the accident and the fact that the plaintiff and her fiancé went shopping following the accident, the evidence was that the plaintiff and her fiancé had been on their way to a particular store at the time of the accident, that they went to the store after the accident, and that immediately thereafter the plaintiff went to a medical practitioner. The judge said that he accepted that the full impact of the accident may not have been felt immediately and that the nature of the damage to the vehicle did not necessarily preclude an injury of the type claimed to have been experienced. Thus to this point his Honour was not expressing any view as to the short-term effect of the accident, but was dealing with the long term. Paragraph [37], in which the reference to past economic loss appears, commences with the word "Accordingly". This suggests that it was regarded by his Honour as following from his previous discussion, a discussion directed only to the long-term effect of the accident.

17 All this, it seems to me, means that the judge was not finding that the plaintiff had failed to establish that she had sustained any past economic loss at all, even as to the minimum period of four weeks or thereabouts to which I have referred. And if the judge did mean so to find, it is evident from what I have said that his reasons for so finding are not apparent.

18 Thus it seems to me that, either for want of a finding or because the finding was not explained in the reasons, appealable error has been shown both as to past economic loss and as to out-of-pocket expenses. Those two matters needed to be dealt with and they were not, or were not dealt with by adequate reasons.

19 The amounts involved may not be large, but in the case of past economic loss that cannot be assumed in the absence of reasons. As I have said, the medical reports ranged across a spectrum. Whilst the judge did make findings as to the long-term effects of the accident on the plaintiff, that did not preclude short-term effects of some consequence although not reaching the thresholds to which his Honour referred. We can not be satisfied that the judge meant to find or would have found short-term effects of the accident on the plaintiff measured by the four weeks or so but no more. There was evidence on which his Honour could have found effects of greater consequence, albeit not reaching the thresholds, and the possibility of an intermediate finding is highlighted by the plaintiff's own evidence that she felt an improvement after the birth of her child and felt a further improvement shortly before the trial.

20 We were invited by the defendant ourselves to find that the plaintiff's past economic loss was of the order of four weeks' loss of wages, or to award a cushion somewhere in the same monetary area, and perforce to award against the defendant at least a large part of the agreed out-of-pockets figure. In the circumstances I have outlined, I do not think that we can properly do so. Where in the available range the plaintiff's loss in those respects should fall requires consideration of the medical opinions in the light of the plaintiff's presentation and we do not have the benefit of the latter. We do not have a forthright finding of the kind in *Arian v Nguyen* (2001) 33 MVR 37, that no reliance whatever can be placed on the plaintiff's honesty and credibility whereby it can be said that only the bare minimum can be found in her favour. It is open on a re-assessment to find effects of the accident justifying an award for past economic loss greater than the amount suggested, plus out-of-pockets of some unknown part of the \$6,220, and I do not think that we are in a position to undertake the reassessment.

21 It follows in my view that, regrettable though it is, the only solution is to order that there be a new trial. I propose the following orders. Appeal allowed. Verdict and judgment for the defendant and order for costs made below set aside. Remit the proceedings to the District Court for a new trial on the assessment of damages. The respondent pay the appellant's costs of the appeal. The costs of the first trial abide the result of the new trial.

22 HODGSON JA: I agree.

23 Mr Deakin QC accepted that there was appealable error to the extent that, by reason of the way the case was conducted below, the judgment should have taken account of out-of-pocket expenses, at least in the amount of \$3,448.54 paid by the respondent's insurer, and perhaps to the extent of \$6,220, apparently conceded by the respondent below at Black 34. However, Mr Deakin submitted that the respondent had to be given credit for the \$3,448.54; and he submitted that in relation to this matter, this Court could determine the appropriate amount to be awarded, being somewhere between nil and about \$2,800.

24 In relation to past economic loss, Mr Deakin submitted that no error was demonstrated, and he relied on the statement in para [37] of the primary judge's judgment where the primary judge said that he was not satisfied that the appellant had suffered any economic loss. However, as pointed out by Giles JA, the findings in para [37] were based on reasons given in para [36] where the primary judge gave reasons why he was not satisfied that the appellant had suffered any long-term physical or psychological effect from the accident. The primary judge did not give reasons for not being satisfied that the appellant suffered short-term physical or psychological effects, preventing her from earning income for at least a short period after the accident. It was clear that the appellant was working at the time of the accident, and that she did not work after the accident. Having regard to that circumstance, and having regard to the medical evidence, there was a very strong case that the appellant suffered a loss of income for at least a short period after the accident.

25 The Motor Accidents Act 1988 provides no threshold for past economic loss. Section 70A applies only to future economic loss or diminution of future earning capacity.

26 Mr Deakin submitted that the trial judge had found the appellant unreliable, and could be taken to have rejected her evidence that she could not work immediately after the accident; and he relied on the decision of *Arian v Nguyen* (2001) 33 MVR 37. However, as pointed out by Giles JA, the primary judge's adverse comments on the appellant in this case were far less severe than the comments made in that case; and in my opinion, if the appellant is to be deprived of compensation for loss of earnings for at least a short period in this case, that would require far more justification than given by the primary judge.

27 Mr Deakin submitted that, if this Court considered there was appealable error, this Court should assess the amount of compensation for past economic loss. I do not think it appropriate for this Court to do so. Such an assessment would depend on conclusions about the effect of the accident on the appellant in respects not articulated by the primary judge, and in relation to which a judge who has observed the appellant would be far better placed to make than this Court.

28 There were two other grounds of error raised in this appeal. This Court has not heard argument on them, because of the views taken on the two grounds that have been dealt with. Those other grounds concerned the primary judge's assessment of the appellant's credibility and also the assessment of the medical evidence. This Court has not heard argument on those matters because of the view it reached on the two matters discussed, and all aspects concerning those matters will be open for reconsideration at the new hearing.

29 BELL J: I agree with the orders proposed by the presiding Judge for the reasons that his Honour gives. I also record my agreement with the additional reasons of Hodgson J.

30 GILES JA: The orders will be as proposed. On the new trial all questions of the plaintiff's entitlement to damages will be open.

31 HODGSON JA: For my part I certainly have not intended to suggest that the plaintiff will necessarily be entitled to damages on those first two points.

Last Modified: 02/18/2004

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Prepared on 29 October 2026 · Esheria