

One million reasons for good judgment

Poole v Evans, Unreported, Melbourne County Court, 30 May 2000

Background

On 30 May, 1995 Graeme Poole sustained severe injuries whilst riding his motorcycle on the roadway adjacent to the Royal Botanical Gardens in Melbourne. On 30 May, 2000 Mr. Poole received judgment for damages in the sum of \$1,032,500.00 plus retention of benefits already paid under the Transport Accident Act ("TAA") from the County Court in Melbourne.

It is believed to be the largest settlement or judgment in a Common Law claim under s.93 of the TAA since its inception on 1 January, 1987. The amount of judgment is remarkable in view of the caps set out in s.93(10) of the TAA. Damages were capped at a maximum of \$332,810.00 (now \$340,250.00) for pain and suffering and loss of enjoyment of life and up to a maximum of \$748,830.00 (now \$765,570.00) for pecuniary loss. Further, s.93(13) of the TAA prescribes a hefty discount rate of 6% for capitalisation of present value of future losses under the actuarial tables.

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The Jury verdict in fact allowed the plaintiff an amount of \$300,000.00 for pain and suffering and loss of enjoyment of life and \$1.2 million for pecuniary loss. Judicial surgery required reduction of the latter figure to the statutory maximum of \$748,830.00, reduction by the deductible portion of the No Fault benefits in an amount of \$45,609.00 and adding back interest on past loss of earnings in the sum of \$29,279.00. The plaintiff obtained an Order for solicitor/client costs as he surpassed his Offer of Compromise. This included certification for both Counsel on daily fees.

Equally remarkable is the fact that they offered at the commencement of trial to settle the claim for an amount of \$875,000.00 plus retention of benefits plus costs, but the TAC was not prepared to increase its offer from \$850,000.00 on the same terms. In the event, TAC's insistence on not increasing its offer by a further \$25,000.00 cost it not only the further \$157,500.00 in damages but also the cost of running the trial for eight days with two Counsel on either side, estimated to be at least as much as the additional damages.

Negligence

The plaintiff was a motorcyclist who was upended by a car attempting

to execute a U turn at a bend in an inner suburban roadway. The TAC argued negligence to the end. It relied upon its assertion that the defendant was able to come to a halt and leave the plaintiff approximately three metres between the front of the defendant's vehicle and the kerb, notwithstanding the evidence that there was hardly any time for the plaintiff to avoid the defendant's vehicle. No doubt, a significant factor influencing the TAC in not unequivocally admitting liability was the fact that the plaintiff had no memory of the collision and also the perceived prejudice of juries against motorcyclists. Ultimately, the writer believes that this failure to admit liability will only have served to have swayed the jury further in favour of the plaintiff.

Injuries

The plaintiff sustained a severe closed-head injury which included consequences such as left-sided weakness, severe post traumatic headaches, dizziness, blurred vision, vomiting and nausea, memory difficulties, word finding difficulty, variable speed of information processing, distractibility and irritability. There was also a risk that he would suffer from hydro-

cephalus in the future. He further sustained soft tissue injury to his neck and back, several fractures in the left hand and a fracture to the right clavicle. Not surprisingly, he also had a psychiatric injury including adjustment disorder and depression.

A difficulty facing the plaintiff's claim was the fact that his injuries were not clearly visible and he appeared as more or less "normal". We were at pains to ensure that the jury understood the nature of the plaintiff's injuries notwithstanding appearances.

The plaintiff was a vibrant 28-year-old engineer. Evidence was given by several friends and business associates to the effect that he loved the challenges of life, thrived on his work and was very ambitious. The plaintiff himself gave excellent evidence including the details of his loss of self-esteem and his consequent inability to hold onto the stable relationship he had been in or indeed other relationships. Importantly, the plaintiff's credibility was unimpeachable.

Pecuniary loss evidence

The plaintiff had commenced his own engineering business, but was essentially performing sub-contract work for BHP. He entered negotiations with a 1995 Tax Return indicating earnings up to 30 May, 1995 of approximately \$27,000.00 net of tax. How then was he to claim pecuniary loss at substantial rates? Evidence was given of a contract entered into in January, 1995 between the plaintiff's company and BHP, including details of daily rates of pay for variable tasks including lucrative off-shore work. Very significant evidence was led by at least four other engineers who knew the plaintiff indicating the typical career path of an engineer. Some of these witnesses were the plaintiff's peers who were shown to be earning in the region of \$1300.00 net per week. One senior engineer gave evidence of earnings in the region of \$1800.00 net per week.

Evidence was given as to the plaintiff's desperate attempt to return to work only several months after the accident, when he developed severe

headache and was quite obviously unable to continue. This evidence was given by his former employer with whom he had attempted to resume employment on a limited basis. He was unable to return to work thereafter. The plaintiff himself gave evidence of his attempts to perform voluntary work for St. Vincent's DePaul once a week, and it was clear he had difficulty even with that task. Whilst his other problems were not insignificant, he tended to develop severe headache from the exhaustion of having to apply himself to any particular task.

In a compelling closing address, Mr. Richard Stanley QC for the plaintiff suggested adopting a conservative figure of \$1400.00 per week which would result in a total pecuniary loss claim of 1.2 million dollars. The choice of conservative figure to put to the jury was of course a considered one, in the full knowledge that the plaintiff's submissions in any event gave him an outcome well in excess of the statutory maximum. Clearly, the jury was persuaded by Mr. Stanley as this was precisely the figure it allowed for pecuniary loss.

Conclusion

Graeme Poole's life was shattered when he sustained injuries through no fault of his own in 1995. On the fifth anniversary of his accident, Graeme was able to rejoice at the excellent outcome of his litigation. No appeal has been lodged, indeed the decision always appeared unappealable in view of the evidence.

Graeme maintains contact with me. He is happy with the outcome of the litigation. He nevertheless continues to be practically unemployable and forced to endure the consequences flowing from the transport accident he suffered almost six years ago.

The major lesson from this case is in the preparation of evidence regarding lost earnings and in not leaving any apparently obvious matters to the sphere of speculation. There is also a lesson in being prepared to run cases where the plaintiff's credibility appears beyond reproach. **PL**

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