

**RECENT DECISIONS**

## Telling porky pies won't bring home the bacon...

*Palma v Nominal Defendant* [2016] NSWCA 12 (12 February 2016)

[Link to decision](#)

### Summary

A trial judge is entitled to use adverse credit findings against the plaintiff in assessing damages and use a 'buffer' as an appropriate means of determining future economic loss.

### Background

The plaintiff suffered injuries in a motor accident and brought a claim under the *Motor Accidents Compensation Act 1999* in which he claimed substantial economic loss and damages for domestic care, both past and future.

The plaintiff had returned to what he said was part time work, but the evidence demonstrated that both the plaintiff and his new employer had engaged in secretive transactions to benefit the plaintiff, enabling him to obtain Centrelink benefits by falsifying his timesheets. In one document, the plaintiff asked his new employer to destroy financial records. The trial judge took this as a basis to make adverse findings regarding the plaintiff's credit.

Although there was an abundance of medical evidence supporting the plaintiff's claim for continuing physical disability, the trial judge was of the view that the doctors who expressed these views had not been armed with the information regarding the extent of work which the plaintiff was undertaking with the new employer, and accordingly their assessments of his inability to work were not reliable. On this basis, the trial judge preferred the opinions of the defendant's doctors who said that he had a capacity for work.

The trial judge further expressed doubt as to the credit of the plaintiff's partner in respect of the domestic assistance which she had allegedly provided.

Because of these credit issues, the trial judge made no allowance for past or future domestic assistance and, accepting that the medical evidence indicated that the plaintiff did have the prospect of some future problems, allowed \$100,000 as a buffer for future economic loss.

The plaintiff lodged an appeal against the judgment alleging that the judge had erred in using an adverse credit finding in the assessment of damages.

### Judgment

The Court of Appeal showed reluctance, as it usually does, to intervene with findings as to the credit-worthiness of witnesses, saying that the trial judge has the benefit of observing the demeanour of the witnesses when giving evidence. The Court held that the trial judge was not in error in making adverse findings of credit.

As to the evidence in respect of domestic assistance, the trial judge was not in error in finding that the assistance provided was nothing more than the usual give and take in a family relationship, especially in the context of doubt as to the veracity of the witness.

The Court of Appeal found that the judge did not err in finding that the plaintiff had demonstrated an ability to work full time without difficulty and, quite correctly, accepted that this did not mean that he will be able to work without difficulty on a full time basis for the rest of his life. Accordingly, the award of a buffer for future economic loss was appropriate.

The court went on to find that the plaintiff had failed to discharge his onus of proving the need for future domestic assistance to a level sufficient to entitle him to damages under the *Motor Accidents Compensation Act 1999*.

## Comment

The judgment demonstrates the value in undertaking a thorough investigation of a plaintiff's post injury circumstances. If it can be established that the plaintiff has been dishonest to the extent that the plaintiff's credibility as a witness is called into doubt, the trial judge is fully entitled to use an adverse finding on credit in the assessment of damages.

The Court of Appeal has confirmed that it is not inappropriate for a trial judge to approach the question of future economic loss by allowing a buffer; and the onus of proving the elements of damages lies with the plaintiff, particularly in respect of satisfying statutory thresholds.

## For more information, please contact:



**Doug Vorbach**

Special Counsel

T: 02 8257 5722

M: 0419 013 617

[doug.vorbach@turkslegal.com.au](mailto:doug.vorbach@turkslegal.com.au)