An example of a 15% assessment of non-economic loss

Bowden v Dr Georghy[1]

By Anna Walsh

This medical negligence case involved allegations against a general practitioner for negligently removing black tattoos using 'Photoderm', a device delivering intense pulsed light, leading to permanent scarring and hypopigmentation to the plaintiff's left and right deltoid areas and upper right back. The case ran for two weeks between 6 and 17 September 2004, with oral judgment given by Judge Coorey on 23 August 2006 in the District Court, Sydney.

At the time of the incident, Ms Bowden was a 24-year-old beautician. She had black tattoos applied professionally after she was the victim of a home invasion at age 16 and raped. She gave evidence that she considered the tattoos to be a work of art, but they were a reminder to her of a time in her life that she no longer wished to dwell upon.

The defendant, Dr Georghy, recommended Photoderm and Ms Bowden had seven treatments between 15 November 1999 and 16 October 2000. Following the treatments, the plaintiff said she experienced pain, redness and raised blisters on her skin. At one point, she was diagnosed by another doctor with infected blisters and prescribed antibiotics. Ms Bowden said Dr Georghy told her to stop taking the antibiotics and continue treatment. She followed this advice until 16 October 2000, when another doctor diagnosed her with third-degree burns.

Ms Bowden then consulted a cosmetic surgeon who diagnosed hypopigmentation, chronically inflamed and indurated areas, nodular thickening, hypertrophic scarring and fine scarring. She underwent laser therapy to try and remove residual ink embedded in the scar tissue and had injections to try to reduce hypertrophic scarring but was left with hypopigmentation and a degree of raised scarring along the outline of the tattoo.

The plaintiff's liability evidence was strong. Three experts gave evidence that the wavelengths required to penetrate the skin and target black tattoo ink necessitated a laser that could deliver pulses in nanoseconds, a much shorter time frame than the Photoderm, so as to ensure thermal relaxation time for the pigment. They were critical of the defendant's decision to continue treatment of the plaintiff in the presence of blistering, and were of the view that blistering was evidence that the device was held too close to the skin. The defendant had one expert who disagreed.

The court found for the plaintiff on liability. In relation to damages, the defendant submitted that the plaintiff was between 2 and 5% of a most extreme case while the plaintiff submitted a range between 30 and 35%. In support of that assessment, the plaintiff argued that she was an attractive young woman working as a beautician with permanent scarring that would affect her for another 60 or so years. While had never been embarrassed by the tattoos, the scarring was much worse. As a consequence, she suffered from a loss of self-esteem and avoided exposing the areas to sun or wearing any clothing that showed her upper arms.

The court was not convinced that her scarring was as bad as she claimed, and she was assessed as being 15% of a most extreme case. With the addition of out-of-pocket expenses, the court awarded her $7,899 plus costs. As proceedings were commenced in May 2002, the case was caught by the restrictions on recovery of party:party costs imposed by the *Legal Profession Act* 2002 (NSW) for cases under $100,000. The cost to the plaintiff of running this two-week trial was significant, and with party:party costs restricted to $10,000, the legal costs will go largely unrecovered. Added to this is the fact that the defendant was uninsured.

This case is an example of what constitutes a 15% injury in the medical negligence context and highlights the difficulty of running a medical negligence claim where non-economic loss is the largest component and where comparative verdicts for assessments of a most extreme case are only just being made. It is also a classic example of a plaintiff with a meritorious complaint and a permanent injury who has been disadvantaged by tort reform. Soft tissue injury without functional loss is not viewed by the court as overly significant, lying somewhere between 15 and 32%. Given the trend to defend cases, and the costs of running medical negligence trials, plaintiff practitioners should protect their clients with very early and reasonable offers of compromise. They should also keep abreast of relevant decisions so as to be able to confidently advise their clients whether litigation is an appropriate option. ■

Note: 1 Unreported decision, Coorey J, NSWDC, 23 August 2006.

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