

## SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

**Case Title:** Perry v Pese

**Citation:** [2018] ACTSC 205

**Hearing Dates:** 31 July 2018 – 1 August 2018

**Decision Date:** 1 August 2018

**Before:** Elkaim J

**Decision:** (i) Judgment for the plaintiff in the sum of \$157,884.  
(ii) The defendants are to pay the plaintiff's costs of the proceedings.

**Catchwords:** **TORTS – NEGLIGENCE** – Motor vehicle collision – personal injury – nature and extent of injury – calculation of damages

**Legislation Cited:** *Civil Law (Wrongs) Act 2002* (ACT)

**Parties:** Matthew Perry (Plaintiff)  
Pupi Pese (First Defendant)  
Insurance Australia Limited trading as NRMA Insurance (ABN 11 000 016 722) (Second Defendant)

**Representation:** **Counsel**  
Mr A Muller (Plaintiff)  
Mr D Crowe (First and Second Defendant)

**Solicitors**  
United Legal (Plaintiff)  
Hall & Wilcox (First and Second Defendant)

**File Number:** SC 67 of 2018

### ELKAIM J:

1. The plaintiff was born in 1972. He was injured in a motor vehicle accident on 31 March 2017. He blames the first defendant for the accident. The second defendant, the first defendant's insurer, agrees and has admitted breach of duty of care.
2. The plaintiff, by this action, has sought damages from the defendants arising from his injuries. He has claimed damages under the following heads: general damages, past and future medical expenses and past and future domestic assistance. Interest is claimed where applicable.
3. The defendants accept that the plaintiff was injured but have challenged the extent of the injuries and in particular their translation into compensatory loss.

4. The *Civil Law (Wrongs) Act 2002* (ACT) is relevant to the assessment of damages.
5. In brief compass, the accident occurred when the first defendant failed to give way to the plaintiff at a roundabout. There was a collision between their respective vehicles.
6. The plaintiff is now almost 46 years of age. He was 44 when the accident occurred. The plaintiff has a significant history of medical illness. He has endured three bouts of cancer. In 2009, he was treated for prostate cancer. In 2014, he was diagnosed with cancer in his left shoulder and later in the same year a rectal tumour was identified. He has had surgery and radiation therapy to address the cancers. He is now in remission.
7. The plaintiff was not working when the accident occurred. He was receiving a Disability Support Pension. The pension was based on his incapacity flowing from the cancer in his left shoulder. The plaintiff has had two previous motor car accidents. He suffered whiplash injuries in each accident but they appear to have been of minor severity and were not the subject of any claim.
8. The plaintiff has a good work history, primarily involving fairly heavy labouring work or forklift driving. The details of his various employments can be found in the chronology (Exhibit F).
9. There is no claim for economic loss. The plaintiff intended to return to work after his cancer treatment. However, he commenced proceedings against his general practitioner and Canberra Hospital arising from this treatment. This claim, which resolved earlier this week in favour of the plaintiff, included a claim for economic loss. Accordingly, any claim for economic loss in this matter would amount to 'double dipping'.
10. The plaintiff's alleged injuries are to his neck and then down along his spine to his lower back. There is also an injury to his left shoulder. The injuries are soft tissue in nature. The plaintiff had previous problems with his middle and lower back but he says these areas have been exacerbated or aggravated by the accident.
11. The plaintiff said that prior to the accident, and following physiotherapy, he was feeling a good deal more confident and flexible, particularly in the area of his left shoulder and he was looking forward to a more productive life. He was also bringing his Chrysler back to life and had been driving it for only about a week before the accident. His only passions were his motor car and music. The plaintiff, while in a band some years earlier, had contemplated stopping work to concentrate on his music. Unfortunately the drummer of the band ('Mortified Flesh') fell off his motorbike and injured his hand. This curtailed his drumming and with it the chances of Mortified Flesh rising to fame, or at least to an economically productive standard.
12. The plaintiff said that he has always been houseproud and cared for his townhouse both inside and in the garden. He now has difficulties with many domestic chores. His mother helps him from time to time as does his friend, Mr Jason Warne.
13. The plaintiff said that he does not have much treatment. Fortunately, he has been able to attend physiotherapy through his cancer treatment regime. This has given him more movement in his neck and shoulder area but has not alleviated the pain.
14. He has not had the funds to pursue all of the treatment and medication he would have liked, but he anticipates that with the proceeds from the medical negligence litigation

and this litigation that he will be able to take advantage of more intensive treatment regimes.

15. The plaintiff was a very impressive witness who did not embellish his symptoms. If anything he underplayed them and made concessions about improvement over time. He also conceded that he was in “a bad way” before the accident as a result of his encounters with cancer and the radical surgery the treatment had entailed. He even volunteered that in addition to all of his other health problems, he also suffered from emphysema which at times left him short of breath. Remarkably, he said that he continues to smoke cigarettes.
16. The plaintiff said that he had been emotionally affected by the accident because he had felt that he was doing well following all of his earlier treatment. He said that immediately following the collision he was angry and wanted to remonstrate with the other driver. His anger dissipated, however, when he saw that the driver was a learner and only had one leg.
17. My impressions of the plaintiff were confirmed by the evidence of his mother, Ms Diane Holmes, and his friend, Mr Jason Warne. They both referred to the plaintiff’s stoic nature and his reluctance to accept assistance notwithstanding his need.
18. Ms Holmes said that following the accident she initially stayed with the plaintiff for about two weeks, then had a week’s break and returned for a further week. Since then she has visited the plaintiff every two or three weeks, usually staying for the weekend. In the initial period of assistance, she rendered significant help to the plaintiff for his personal needs and also about the house. She thought she may have assisted for 10 hours a day during the first three weeks. However, in a mark of her honesty she accepted that her estimate of hours might have been excessive. She said that over the subsequent visits she would normally spend about seven hours a day providing assistance.
19. Ms Holmes’ assistance encompassed housecleaning, washing and cooking.
20. Mr Warne has also provided some assistance. He has helped mow the law on about five or six occasions and he does jobs when he notices that they are required during his visits to the plaintiff. He has specifically observed that the plaintiff socialises a good deal less since the accident and he seems depressed.
21. He described the plaintiff as having a very deep attachment to his motor cars. He said the plaintiff’s motor car was “his life”.
22. The plaintiff emphasised that notwithstanding all of his previous problems, the motor vehicle accident caused him more pain in his left shoulder and new pain in his neck and back. He has not returned to his condition prior to the accident. I accept him entirely. This acceptance, of its own, is enough to dispense with the medical expert relied upon by the defendant, Dr Mourad. This doctor’s views have such an overwhelming air of advocacy about them that they must be rejected almost out of hand.
23. In this regard, I note the appropriate comments made about Dr Mourad’s views by Dr Conrad in his report, dated 25 July 2018. I also agree with Dr Patrick’s observations about Dr Mourad.

24. Dr Mourad's two reports are in Exhibit 1. The doctor took a history which is consistent with the plaintiff's evidence. He does not at any stage suggest that the history is unreliable or exaggerated. To the contrary, he says that he detected no "psychogenic or non-organic factors". Nevertheless, he states that the plaintiff "may have sustained a soft tissue whiplash type injury to his thoracic spine" (emphasis added). Although he thinks that the plaintiff's neck pain will continue he makes no comment about the source of this pain.
25. Dr Mourad states that he agrees with the views of Dr Conrad but not those of Dr Patrick. I can understand that he might disagree with Dr Patrick but I cannot understand how he can agree with Dr Conrad. For example, he says that the plaintiff requires no domestic assistance whereas Dr Conrad says he needs six hours per week. Dr Conrad says the motor vehicle accident is responsible for causing injuries to the plaintiff's neck, mid back and left shoulder. Dr Mourad only thinks the back injury may be attributable to the accident.
26. Dr Mourad's second report is perhaps more difficult to understand than even the first. In this report he finds that the plaintiff's injuries should have resolved seven months after the accident. He has somehow chosen this period of time to speculate that degenerative change took over as the cause of the plaintiff's pain. This is despite the fact that he apparently accepts the plaintiff's complaints and their consistency since the accident. I reject the views of Dr Mourad.
27. I should add that it is a measure of the realistic and responsible attitude taken by counsel for the defendants that he did not attempt to defend Dr Mourad's opinion.
28. Turning to the views of the plaintiff's doctors, I think there is a general similarity between the views of Dr Patrick and Dr Conrad. This is to the effect that the plaintiff suffered soft tissue injuries to his neck and mid back which are likely to affect him for some years into the future. In addition, both doctors attributed a degree of the plaintiff's problems with his left shoulder to the motor vehicle accident. My conclusion about the plaintiff's medical condition includes an acceptance that his soft tissue injuries are, to some extent, an exacerbation of pre-existing degenerative changes.
29. It is also necessary to take into account that the effect of the degenerative changes will at some time in the future be the dominant cause of any discomfort felt by the plaintiff.
30. Nevertheless, although he did mention that he had occasional pains in his neck and back after a long day's work, I am satisfied that his present and continuing problems in his neck and back, and to some degree his left shoulder, are attributable to the accident and will be for some years into the future.
31. I am also satisfied that the plaintiff has suffered emotionally from the accident, although this distress cannot be elevated to any identifiable psychological or psychiatric condition. The distress does, however, include the disappointment of losing the gains that had been made following the various treatments for the cancers.
32. I do not entirely agree with Dr Nair whose predictions for future surgery seem out of step with the other experts. I do not agree with his opinion that the plaintiff does not require any domestic assistance.
33. Turning now to damages: immediately before the accident the plaintiff was making a steady recovery from the radical treatment he had received for his different cancers. Mr Warne thought that the plaintiff was "70 to 90%" back to his old self and his mother also

noticed the improvement. The accident was a major emotional stumbling block, not only because of his injuries and the loss of his cherished Chrysler, but also because of the return to physical restrictions and significant pain.

34. The pain and restrictions of movement, as well as the general upset, are likely to remain for some years into the future. However, because of the nature of the injuries I think there is likely to be a gradual improvement over time. This is consistent with the plaintiff's own evidence about his progress since the accident.
35. The plaintiff relied on median life tables to provide a life expectancy of 37 years. The plaintiff has a history of significant episodes of cancer. He has emphysema and yet he still smokes. Any initial impression would unquestionably suggest a reduction in his life expectancy.
36. Although there are comments by some of the medical experts, I do not intend to reach any conclusion about life expectancy. This is because I do not think any special damages should be extended beyond 10 years. This is also consistent with my view that the plaintiff's soft tissue injuries are improving and not likely to continue for more than another 10 years.
37. The plaintiff suggested general damages be assessed at \$90,000. The defendant submitted \$40,000 was more appropriate. In my view, the plaintiff's figure is much closer to reflecting the pain and suffering the plaintiff has suffered and will suffer in the future. Although the plaintiff's figure perhaps suggests general damages continuing for the rest of his life, but my prognosis is about 10 years, I nevertheless think the degree of pain and suffering he has suffered so far has been so significant that general damages should be \$80,000.
38. Interest on half the general damages at 2% is \$1,064.
39. Past medical expenses were agreed at \$540.
40. For the future the plaintiff has claimed \$46,725. This is made up of the amounts set out in the Statement of Particulars but reduced by the sum attributable to surgery. The defendant has allowed \$2,000. I think there are two problems with the plaintiff's figures: firstly, they extend for the balance of his life and secondly, some of the claims are unreasonable. The request for 10 visits to a general practitioner per annum is an example.
41. I agree that there should be an allowance, for 10 years, for medical visits, physiotherapy and medication. Using the 3% tables, I allow medical visits at \$16.35 per week ( $\$16.35 \times \$451.8 = \$7,386.93$ ), physiotherapy at \$11.53 per week ( $\$11.53 \times \$451.8 = \$5,209.25$ ) and medication at \$5 per week ( $\$5 \times \$451.8 = \$2,259$ ). I also allow an extra \$2,500 for occasional specialist and radiological expenses. The total is \$17,355.
42. The rate for past domestic assistance was agreed at \$35 per hour. Estimates of times spent on assistance are notoriously unreliable. The plaintiff has asked for an average of three hours per week since the accident, but with added recognition of the longer hours performed by Ms Holmes for three weeks following the accident.
43. The defendant submitted that I should allow \$3,000, effectively on a cushion basis. It was a central part of the defendant's submission that the plaintiff has not established a need for domestic assistance beyond that suggested by the defendant. I disagree. The

fact that the plaintiff said he would struggle and persevere to do the work does not mean there is no reasonable need for assistance.

44. The plaintiff is obliged to establish a reasonable need for the domestic services. A reasonable need does not encompass working beyond the limits of a physical condition notwithstanding a driving, perhaps pride based, force to do so. I am satisfied that the assistance provided by the plaintiff's mother is assistance that meets a reasonable need on the part of the plaintiff.
45. I think the plaintiff's approach is very fair and, to some degree, is an understatement of the amount of assistance that has been provided, in particular by his mother. I do not, however, believe that in an adversarial contest it is appropriate to allow damages in excess of an amount claimed by a plaintiff. Correspondingly, I would not award damages below any figure submitted by a defendant.
46. I also note the recognition in the figures of part of the need for domestic assistance being referable to the effects of the plaintiff's cancer treatment, as shown in Exhibit 2.
47. I allow the claim as made by the plaintiff. This is \$11,151. Interest on this amount is \$335.
48. I would only add that but for my acceptance of the plaintiff's submission, I would not have included any allowance for Mr Warne working on the plaintiff's motor vehicle. Firstly, I do not regard this as falling within the ambit of domestic assistance. Secondly, I am not satisfied on the evidence that I can make any particular assessment of the amount of time that this endeavour has occupied.
49. For the future, the plaintiff has claimed three hours per week for the balance of his life expectancy of 37 years. The defendant suggested a global amount of \$5,000. Once again, I think the three hours per week submitted by the plaintiff is very reasonable. I do not, however, agree with the allowance being for the balance of the plaintiff's life expectancy. As mentioned above, I do not think damages should extend beyond 10 years into the future. On the 3% tables the calculation is  $3 \times \$35 \times \$451.8 = \$47,439$ .
50. A summary of the damages I have allowed is in the following table:

General Damages	\$80,000
Interest on General Damages	\$1,064
Past medical expenses	\$540
Future medical expenses	\$17,355
Past domestic assistance	\$11,151
Interest on past domestic assistance	\$335
Future domestic assistance	\$47,439
<b>Total</b>	<b>\$157,884</b>

51. I make the following orders:

- (i) Judgment for the plaintiff in the sum of \$157,884.
- (ii) The defendants are to pay the plaintiff's costs of the proceedings.

52. I will hear the parties if any alternative costs order is sought within 14 days.

I certify that the preceding fifty-two [52] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Elkaim.

Associate:

Date: