COMMENT

PERSONAL INJURIES AWARDS IN SOUTH AUSTRALIA 1982

The last survey of decisions involving claims for damages for personal injuries, which appeared in (1980) 7 Adel LR 298, covered a period of fifteen months ending 30 September 1979. The present survey contains summaries of decisions made during the first nine months of 1982; and they are all reported in the Law Society Judgment Scheme, vols 98-102. The decisions made during the two years or so that intervened were not surveyed mainly because several major alterations in the principles governing the assessment of damages, that were made meanwhile, have deprived the awards of much of their relevance for purposes of comparison.

As in previous surveys, cases are classified according to the injury suffered, and in the event of multiple injuries, according to the major injury. The damages are stated on the basis of full liability, with no reduction for any contributory negligence. The total amount awarded in each case, excluding special damages and interest, is indicated initially at the margin, rounded off to the nearest $500.00.

The most significant change in assessment principles relates to the calculation of damages awarded for future loss arising from destruction or diminution of earning capacity. Following *Atlas Tiles Ltd* v *Briers* (1978) 21 ALR 129, such loss was assessed on the basis of gross pre-accident earnings. Income tax which the injured person would have been liable to pay had he not been injured was not specifically taken into account. This decision was reversed by a majority decision of the High Court in *Cullen* v *Trappell* (1979) 29 ALR 1. In assessing future loss of earning capacity, the court is now required to have regard to the income tax which the plaintiff would have had to pay on his earnings had he not been injured.

The practice of discounting awards for future loss on account of the monetary benefit of advanced payment has been of long standing. That practice was challenged with particular reference to the effects of inflation on lump sum awards of damages and to the incidence of income tax on the earnings from investment of the moneys. During 1980-1981 some awards were made without discounting. Others were made on discount rates of between 2% and 5%. There was great uncertainty as to the practice of discounting and as to the relevance of inflation and the incidence of income tax upon investment earnings. The matter was eventually settled in December 1981 by a majority of the High Court in *Todorovic and another* v *Waller* (1981) 37 ALR 481. A statement was made by the Chief Justice when judgment was handed down in that case. It read:

> "Because of the practical importance of the decision in these cases, the Court now publishes this statement as to its effect.
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> In an action for damages for personal injuries, evidence as to the likely course of inflation, or possible future changes in rates of wages or prices, is inadmissible. Where there has been a loss of earning capacity which is likely to lead to financial loss in the future, or where the plaintiff's injuries will make it necessary to expend in the future money to provide medical or other services, or goods necessary for the plaintiff's health of comfort, the present value of future loss ought to be

quantified by adopting a discount rate of 3% in all cases, subject, of course, to any relevant statutory provisions. This rate is intended to make the appropriate allowance for inflation, for future changes in wages generally or of prices, and for tax (either actual or notional) upon income from investment of the sum awarded. No further allowance should be made for these matters."

Change has also taken place with respect to the principles upon which interest on damages is awarded pursuant to s 30c Supreme Court Act 1935-1980. The effect has been to reduce awards of interest. In motor vehicle accident cases it frequently happens that an injured person is entitled to damages against the negligent road user and, arising out of the same accident, to benefits from his employer pursuant to the provisions of the Workers Compensation Act. Weekly payments of compensation are made immediately by the employer in most cases. In practice therefore the worker is not deprived of wages pending finalisation of the action against the negligent third party. When assessing interest pursuant to s 30c the payment by the employer was regarded as *res inter alios acta* as regards the defendant. In *Batchelor* v *Burke* (1981) 35 ALR 15, the High Court held that this was wrong and that interest should not be awarded on that portion of a judgment which represents loss of earnings before trial in the case where the plaintiff has received equivalent worker's compensation during that period.

HEAD INJURIES

$201,500.00 The plaintiff was a 20 year old male postal officer. He suffered brain damage, a broken arm, several broken ribs, two collapsed lungs, and scarring to his arm, leg and back. Initially he was hospitalised for a period of about 2½ months. He recovered well from all injuries with the exception of brain damage. The only lasting consequences of his accident were brain damage and the bodily scarring. He returned to his former occupation after an initial lengthy absence. There were several further absences from work while the plaintiff underwent treatment. The plaintiff suffered drastic personality change. Prior to the accident he had been a well-adjusted youth. As a consequence of his injury he became aggressive and violent. He was frequently irrational and quarrelsome. His behaviour was generally anti-social. There was a need for him to take anti-convulsant and anti-psychotic drugs. He had an inability to get on with his family and his workmates. He lacked the desire for promotion. His employer took a benevolent attitude towards him. Should be lose his present employment he would require an especially tolerant employer. He was at a substantial disadvantage on the general labour market. His prospects of a satisfactory marriage were significantly reduced. The assessment of the trial judge, upheld on appeal, was: pain and suffering at $65,000.00, past loss of earning capacity at $21,400.00, future loss of earning capacity at $100,000.00, and future medical care and treatment at $15,000.00. *McNeill* v *Cavallaro* 102 LSJS 222 (King CJ, Jacobs and Wells JJ).

$230,000.00 The male plaintiff was 2½ years of age when he was injured in January 1969. His damages were finally assessed in July 1982 when he was 16¼ years of age. He suffered brain damage resulting in an intellectual deficit, impaired

motor co-ordination, and behavioural/personality problems. But for the injury the plaintiff would have been a person of normal/average intelligence. As a result of brain injury his intellectual capacity was assessed as being dull and he was capable only of unskilled work. Other members of the family had been successful in sporting activities. The reduced motor co-ordination rendered the plaintiff incapable of satisfactory participation even in backyard sports. In addition, the motor co-ordination rendered him clumsy about the house and in riding a bicycle. The personality problems of the plaintiff included a lack of tolerance, easy frustration and impulsive behaviour. These factors had led to social isolation, a general apathy and lack of motivation. There was little prospect of his obtaining or keeping regular employment even of an unskilled kind. The plaintiff's mother had provided voluntary services over and above what would normally be provided by a mother for a child, particularly in respect of the plaintiff's hygiene, training and general maintenance. The award was a sum of $55,000.00 for general damages for pain and suffering, inconvenience and loss of amenities. No award was made for past earning capacity loss as the plaintiff would but for the injury have been at school until the time of assessment. Future loss of earning capacity was assessed at $160,000.00. Damages for the voluntary sevices of the mother were assessed at $15,000.00. Interest was allowed at $9,000.00 and special damages approximately $2,000.00. *Pacini* v *Cooper* 101 LSJS 166 (King CJ).

NECK INJURIES

$82,500.00 A market gardener, 61 years of age at the date of judgment, sustained neck injury as a consequence of two road accidents. The trial judge first assessed damages as a total and then apportioned damages to each defendant. The plaintiff was born in Italy. He left school at an early age after only an elementary education. He came to Australia at 29 years of age. Five years later he purchased a block of scrub land, cleared and developed it as an orchard. Eight years later he purchased a second property and established a market garden on it. The properties were run as a family concern with various members of the family being in partnership. The plaintiff was an extremely hard worker. His work was successful and profitable. He had few interests other than his work. In the first accident he suffered ligamentous injury to the neck which restricted neck and shoulder movements and caused pain. There was also a minor lower back strain. Treatment was limited to the taking of analgesics and to physiotherapy. The second accident aggravated both injuries. The plaintiff then developed very substantial restriction in movement limiting him to only the very lightest work. This reduced his physical contribution to the partnership to almost nothing. He continued to have physiotherapy and derived short term benefit from it. His leisure time was spent pottering about the properties, but he was largely dissatisfied by his

enforced inactivity and became depressed. The award by way of general damages for pain, suffering, inconvenience and loss of amenities was $25,000.00. Earning capacity loss, both past and future, was assessed at a total of $50,000.00. An allowance of $7,500.00 was made for the cost of future physiotherapy treatment including the cost of travel for the purpose of having it. Interest was allowed at $3,550.00 and special damages at $3,490.00. *Ceravolo* v *Honow; Ceravolo* v *Caruso and Adelaide and Wallaroo Fertilizers Ltd* 99 LSJS 343 (Cox J).

$22,000.00 The plaintiff was 35 years of age at trial. He had left school in Italy at 14, and then pursued an apprenticeship as a bricklayer and tiler, which he did not complete. At the age of 17 he came to Australia. For the next six years he worked mainly as a tiler, plasterer and terrazzo worker. Then, in partnership with his wife, he began a very successful business in purchasing, renovating and selling houses. They acquired five house properties which they let, receiving rental income in excess of $23,000.00 per annum. In addition they had acquired a home (unencumbered) valued in excess of $110,000.00. The plaintiff was a hard worker. He suffered neck and low back injury. He was treated with anti-inflammatory drugs and physiotherapy. Restriction in movement of the neck and more particularly the low back disabled him for some time in the work of a tiler. The low back pain was due to exacerbation of degenerative changes existing in his back at the time of the accident and which would at some later stage have caused pain even if the accident had not occurred. It was inevitable, if he continued to pursue the occupation of a tiler, that back pain would have occurred at some stage. All medical practitioners who gave evidence thought that there were major non-organic elements in the plaintiff's complaints. The trial judge accepted this evidence relying upon his own observations of the plaintiff as a witness. The award of damages was $10,000.00 for pain and suffering. Past economic loss was assessed at $2,200.00 and future economic loss at $10,000.00. Interest was allowed at $860.00 and special damages agreed at $390.00. *Macri* v *Eggleston* 101 LSJS 280 (Walters J).

BACK INJURIES

$102,500.000 The plaintiff was a 49 year old boilermaker/welder. Prior to his accident he was not in good health. He suffered from heart disease, bronchitis, and hypertension. He was at risk in the event that operative treatment was carried out on him. He had previously been injured in a variety of ways but none of these injuries had prevented him, on a long term basis, from carrying out the occupation of boilermaker/welder. The accident which was the subject of the cause of action caused a prolapse of a disc in the low back resulting in sciatica. It was initially treated with rest and physiotherapy. But for the plaintiff's systemic diseases operative treatment would have been carried out, but it was

not a reasonable option available to him in view of his underlying ill health. A lumbar brace was prescribed and the plaintiff wore this almost continuously. The back injury would prevent him from doing any heavy work. The plaintiff had severe pain on a daily basis, even when he was not engaged in any particular activity; it was sufficient to awaken him from sleep. All sporting activities had been reduced or terminated by reason of exacerbation of pain. The plaintiff preferred not to drive a motor vehicle long distances because of the discomfort associated with back injury. He filled in his time doing leather work. He took pethidine tablets for the relief of pain. The plaintiff's pre-trial earning capacity was unaffected by the systemic diseases from which he suffered, but eventually the heart disease was likely to cause a change in the type of work which he was doing and occasional absences from work. Damages for pain, suffering and inconvenience and the loss of the amenities of life were assessed at $18,500.00. Loss of wages to date of trial (over and above weekly payments of compensation paid for a period of about 20 months) were assessed at $16,350.00, and future loss of earning capacity was assessed at $65,000.00. The sum of $2,500.00 was allowed for future medication. *Turner* v *State of South Australia* 98 LSJS 98 (Williams J).

$130,500.00 The plaintiff was a 52 year old labourer, born in Greece. He was raised on a farm there and had only a meagre formal education. He migrated to Australia in 1955, promptly obtained work, and continued in regular employment thereafter with the Engineering and Water Supply Department of the State Government. Prior to his accident he was contented and happy. His recreations included dancing, going to the cinema and various social outings. He lived with his wife and teenage children. Had he not been injured and had he continued to be employed in the work he was doing at the time of the accident, at trial he would have received a weekly wage of $170.00 net. Before the accident he did most of the maintenance on his own home. In October 1976 he suffered a lumbar disc prolapse as a consequence of lifting a large hammer. Surgical treatment was undertaken promptly but did not result in any marked improvement in the plaintiff's condition. Thereafter he suffered constant pain and discomfort. His movements became severely restricted and he could get about only with the aid of a walking stick. He could not sit for any length of time. Pain disturbed his sleep at night. His social, recreational and family activities were completely disrupted, and he could no longer do maintenance work around his home. He suffered from chronic neurotic depression and periods of anxiety. The trial judge found that he would not return to work and that he would never improve to any marked extent. Damages for pain, suffering and loss of amenities of life were assessed at $30,000.00. Past and future loss of earning capacity was assessed at $85,000.00. Economic loss associated with the

incapacity to provide his own fruit and vegetables and to do maintenance work around his own home, and the value of the voluntary services of the plaintiff's wife were assessed at $15,550.00. Special damages were agreed at $4,470.00, and a lump sum award of $4,000.00 interest was made. (Judgment was then recorded for a reduced amount on account of the plaintiff's contributory negligence). *Anagnostopoulos* v *State of South Australia* 99 LSJS 25 (Cox J).

$114,000.00 The plaintiff was a 44 year old maintenance fitter. He received his secondary and trade education in England. Having completed an apprenticeship as a plumber and gas fitter he undertook various short term technical courses of a specialised nature. He migrated to Australia in 1972. He was in excellent health prior to his accident in 1978, and had had a history of stable employment. His recreational pursuits prior to the accident included playing golf and lawn bowls. He maintained a vegetable garden of his own and also attended to most of his own house maintenance. At the time of the accident he was employed as a maintenance fitter with the Public Buildings Department of the State Government. He suffered lumbo-sacral disc injury. His initial treatment consisted of rest and was followed by a course of physiotherapy. After several weeks he returned to work and persisted there despite substantial pain and discomfort. A lumbar corset was then prescribed and the plaintiff took "back education classes". He continued at work for almost a year but then was obliged to have several lengthy absences; and eventually ceased work about 3 years after the accident. He was then 47 years of age. The plaintiff's condition involved taking pain-killing drugs. His pre-accident sporting activities and social pursuits were severely limited by his injury. He felt substantial loss at not being able to carry out his chosen occupation, and was disappointed by his inability to keep his vegetable garden and maintain his home. The trial judge found that he would never be able to resume the occupation of a maintenance fitter but that he retained the capacity to do light work not involving repetitive lifting, bending or work in confined spaces. The award of damages for pain, suffering and loss of amenities was $30,000.00. Past economic loss was agreed at $19,000.00 and future economic loss assessed at $65,000.00. Special damages were agreed at $3,000.00 and a lump sum of $2,000.00 allowed for interest. *Betts* v *The State of South Australia* 101 LSJS 214 (Walters J).

LEG INJURIES

$270,000.00 The plaintiff was 22 years of age when he was injured in a motor vehicle accident which occurred in November 1979. Having completed his Leaving Certificate he became a qualified plumber by apprenticeship. He was a capable and willing worker in that occupation. Prior to his accident the plaintiff had demonstrated outstanding ability in a variety

of sports, particularly in hockey in which he represented South Australia and had prospects of playing for Australia. The trial judge described him as a handsome man, of pleasant disposition and possessing qualities of courage and determination. He suffered severe injuries to both legs together with relatively minor ones to the chest and right hand. He underwent a series of operations in which the right leg was amputated at mid-thigh level. A prosthesis was fitted followed by an extensive course of physiotherapy and rehabilitation. The left leg was injured at knee level and below. On completion of treatment the assessment of the plaintiff's leg function was that he had lost 80% of the function of the right leg distal to the thigh and in the case of the left leg the loss was assessed at 60% distal to the thigh. His prosthesis would need to be replaced regularly at considerable expense. His injuries caused pain daily. Had he been employed as a plumber at the time of trial he would have received a gross weekly wage of about $290.00. He had not returned to his occupation and would never be able to do so. His sporting career was at an end. He could swim, play 8 ball and he did some hockey coaching. On appeal, damages were assessed as follows. For pain, suffering and inconvenience and the loss of amenities of life the sum awarded was $70,000.00. Past and future loss of earning capacity was assessed respectively at $15,000.00 and $160,000.00. The sum of $20,000.00 was allowed with respect to the ongoing cost of replacement of the prosthesis on a regular basis. The sum of $5,000.00 was awarded for voluntary services provided for the plaintiff. In respect of future medical care (other than the replacement of prosthesis) a sum of $250.00 was allowed. Special damages were agreed at $18,416.00 and a lump sum of $3,500.00 was awarded for interest. *Nominal Defendant* v *Hayes* 99 LSJS 336 (King CJ, Wells and Matheson JJ).

$114,000.00 The plaintiff was a 45 year old bias cutter. He left school at 14 years of age and followed a variety of occupations before migrating from England to Australia in 1964. He was thereafter in regular employment, and for about 9 years before the accident in 1978 he had worked continuously for the defendant. Prior to his accident he had led an active social and sporting life. He engaged in cycling, swimming and dancing, played table tennis, and coached netball. He suffered a torn lateral meniscus of the left knee with gross disruption of the lateral femoral condyle. This was repaired surgically. Thereafter a course of physiotherapy was carried out. Because of the persistence of pain a patellectomy was performed. Eventually the plaintiff regained full movement of the knee but it was tender and painful. He needed a walking stick to get about. He worked infrequently over the period of about 2½ years immediately after his accident. Eventually he was dismissed from his employment by the defendant and he had not up to the time of trial obtained other employment. At the date of trial, if still employed in his former occupation he would have received $226.00 net

per week. As a consequence of his injuries the plaintiff was unable to play table tennis and to enjoy dancing. The trial judge found that he was capable of returning to his former occupation but was permanently disabled for work which involved prolonged standing or walking. Damages for pain, suffering, inconvenience and loss of amenities of life were assessed at $40,000.00. Past loss of wages was assessed at $12,000.00 (in addition to some $17,700.00 paid by way of weekly payments of compensation under the Workers Compensation Act) and future loss of earning capacity was assessed at $60,000.00. An award of $1,500.00 was made in relation to future medical treatment and chemist expenses. $500.00 was awarded for the vountary services provided by the plaintiff's wife in nursing him between operations. Rehabilitation costs were awarded at $1,416.00 and a lump sum of $1,850.00 was awarded as interest. *Mullen* v *Uniroyal Pty Ltd* 100 LSJS 110 (Matheson J).

$60,500.00 The plaintiff was accidentally injured in September 1978. At that time he was about 30 years of age, and worked in partnership with his brother as an installer of insulation. Prior to his accident he was in good health. He enjoyed long distance running as a form of recreation. His injuries included concussion, an injury to the right shoulder, and a fracture to the middle third of the right femur. He was hospitalised for two weeks during which the fracture was reduced under general anaesthetic and stabilised with the aid of an internal nail. The plaintiff was discharged on crutches and about a month later commenced a course of physiotherapy for the injured leg. Initially no specific treatment was carried out for the injured shoulder but as the pain persisted a course of physiotherapy was prescribed. The plaintiff returned to work about 5 months after the accident, but experienced difficulty with his injured leg and shoulder. Whilst the fracture of the leg healed well the plaintiff was left with substantial disability to the knee. The trial judge found that further operative treatment would be required, but not for at least 10 years more. He also found that the plaintiff would probably change occupation but that he would not take employment which was less remunerative than his pre-accident occupation. Nevertheless the plaintiff was found to be at a disadvantage on the general labour market in getting and keeping work in the future. The assessment proceeded on the basis that the plaintiff's shoulder would remain troublesome, and that he would have considerable, and probably worsening, pain in the knee at least till further operative treatment was carried out. The trial judge found that the plaintiff's pain was severe and that he was frustrated and irritated by it. He was unable to resume long distance running. The award of damages for pain, suffering and loss of amenities was $40,000.00. Past loss of earnings was agreed at $2,000.00 Fot the voluntary services of the plaintiff's wife in caring for him, the sum of $500.00 was awarded. The sum of $2,000.00 was awarded for the cost of future medical

treatment. $15,000.00 was awarded in relation to future earning capacity loss. Special damages were agreed at $2,800.00 and a lump sum of $3,800.00 was awarded as interest. (Damages were then reduced on account of the plaintiff's contributory negligence). *Ellingford* v *Skinner* 100 LSJS 214 (Bollen J).

HAND INJURIES

$80,000.00 The plaintiff was a 40 year old die setter/operator who suffered injury in October 1977. He had left school at 15, and worked in a variety of manual occupations in England before migrating to Australia about 1970. He had been in constant employment as a die setter/operator with the defendant for about 6 years prior to his accident. He was right-handed. One of his recreations before the accident had been playing the guitar. The plaintiff also had the opportunity to do part time work to supplement his income, painting houses and doing general house maintenance. He suffered partial amputation of the right thumb and the index finger. The amputations were repaired by skin graft. There was considerable initial pain and discomfort. Altogether some six operations were carried out by both general and plastic surgeons. The plaintiff was left without the distal joint of the thumb and the whole of his index finger. The appearance of the hand was unsightly, and the usefulness of the hand was assessed as being reduced by 60%. The plaintiff continued to suffer from phantom pains of crushing of the hand. He was absent from work for 1½ years immediately following the accident, and then resumed his former occupation but with difficulty and fear. Eventually he was transferred to other duties at a rate of pay about $12.00 per week less than in his pre-accident employment. He was permanently handicapped in carrying out a number of daily tasks. He could no longer play the guitar. He had psychiatric treatment in relation to his fear of machines, but this did not help him. Damages for pain, suffering and inconvenience and the loss of amenities was assessed at $25,000.00. Economic loss for the past was assessed at $22,750.00 and for the future at $32,250.00. Special damages were agreed at approximately $5,000.00. The sum thus ascertained was then reduced on account of the plaintiff's contributory negligence and the statutory repayment of worker's compensation deducted. *Latimer* v *Texas Instruments Pty Ltd* 99 LSJS 17 (Cox J).

EYE INJURY

$62,000.00 The plaintiff was about 48 years of age, and was at the time of his accident employed as a maintenance man by the Engineering and Water Supply Department of the State Government. He had previously obtained qualifications as a die setter. He sustained an eye injury. He was hospitalised for 33 days during which he underwent two operations, the second of which was for removal of the injured eye. A third operation was later carried out for repair to the implant. He suffered a psychological reaction to the

removal of his eye and became very depressed. Psychiatric treatment was of some benefit in reducing the depression. At trial it was found that he enjoyed the full range of his pre-accident recreational activities but not as efficiently as he had done prior to the accident. He had trouble judging distance. In his employment he was reduced in status to a job which he found to be tedious, and as a result of that reduction in status lost $3.50 net per week. The psychological illness would continue and there was a possibility that it would become more serious. The plaintiff was vulnerable in his present employment; and if he lost it he would have difficulty in obtaining suitable alternative employment. He would not be able to resume work as a die setter. $35,000.00 was awarded for pain, suffering and loss of amenities. Past loss of earnings was assessed at $5,200.00 and future loss arising from reduced earning capacity assessed at $20,000.00. An allowance of $2,000.00 was made for future prostheses, medical and chemist expenses. Past special damages were agreed at approximately $6,500.00. Interest was allowed at approximately $1,850.00. *Morton* v *State of South Australia* 99 LSJS 160 (Matheson J).

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