ACCIDENT COMPENSATION

*Michael Chesterman**

CAN EARNINGS-RELATED COMPENSATION BE JUSTIFIED?

My contribution will focus on the priority that one should give to the earnings-related element in compensation. I want to ask the question: "Are we giving too much priority to the issue of supposedly compensating lost earnings when we are dealing with an accident?" The source of what I am saying today is a research paper entitled "Proposals for Modification of the Common Law" which I wrote for the New South Wales reference on accident compensation.[1] People may think that that was really a case of tissue transplant for a dead horse, but unfortunately the horse hasn't died yet. The common law is very much alive and kicking and in fact the common law in this country at the moment is one of the few areas where statutory tinkering is going on with matters such as the assessment of damages. I am referring to the legislation in N.S.W. in particular.[2] My presentation today focuses on common law and its emphasis on earnings-related compensation. But whatever sort of compensation scheme you are considering – and indeed whether you are considering restricting it to accidents or to particular classes of accidents, or extending it to accidents and illness together – you still have to face this fundamental issue: what priority should be given to earnings-related elements as against other payments? Of course, the other particular payments one has in mind are provision of income support for the victim, provision of costs of care and associated with that, provision for rehabilitation. An underlying theme of my comments is that if you take the common law as the best and the most fully worked out instance of an earnings-related – a highly earnings-related – system, any criticisms that you can direct to that ought to be equally applicable to other forms of approach to compensation, whether it is a fault or no fault system, and whether restricted to accident or extended to illness as well.

It surprises me when I look at the literature on torts in general, that with the exception of Atiyah on assessment of damages, so little attention is paid to the appropriateness of the earnings-related element at the present day and even Atiyah in *Accidents, Compensation and the Law* adds comparatively little on this issue.[3] At the compensation seminar at the A.N.U. last year[4] I was surprised that this issue scarcely arose in that context as well and yet it seems to be crying out for consideration, whatever particular scheme of compensation you are talking about.

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* N.S.W. Law Reform Commission.

1 M R Chesterman, "Proposals to Modify the Common Law", Research Paper for N.S.W. Law Reform Commission (1983).

2 Law Reform (Marital Consortium) Act 1984 (N.S.W.); Motor Vehicles (Third Party Insurance (Amendment) Act 1984 (N.S.W.)).

3 (3rd ed. 1980) 194-204. See too H Luntz, *Assessment of Damages for Personal Injury and Death* (2nd ed 1983) para 1.1.12-13.

4 *Personal Compensation for Injury* (1985), being Proceedings of Seminar at Australian National University, 17-19 August, 1984.

Well without further ado let me make what I see to be the main points of criticism that one should direct at the common law emphasis on endeavouring to ensure in theory that you provide in effect full compensation for the earnings that have been lost by the victim as a result of the accident. This principle – although one might believe otherwise, particularly with the pronouncements of the NSW Law Society[5] – is not time hallowed from the days of the Norman Conquest or anything of that sort. It is only about one hundred years ago that it was clearly laid down that fair if not full compensation was appropriate for loss of earnings.[6] Before those days the damages assessment was very much a matter for the juries, who clearly took their own tracks – rather more than they would be allowed to do nowadays – and you didn't have such a clearly schematised system of pecuniary and non-pecuniary loss and so on as one has in the common law since then. So we are not talking about basic and fundamental common law principles that simply should not ever be challenged – far from it.

Many of the points about the result of the emphasis on earnings-related compensation are pretty straightforward and yet they do need to be said more than once. The common law deals very sketchily with the person who for one reason or another is at the time of the accident a non-earner. Let me single out first the young child, who is not yet mature, – a child of say 10, 11, 14 something like that – who has not yet entered the workforce, where there is no guidance as to what sort of earnings that person will receive, or would have received but for the accident. It is astonishing that one of the cases of record compensation at its time – *Thurston* v *Todd* in 1965[7] – had a damages award of 69,000 pounds for a girl of fourteen, but only 1,000 pounds of that was for loss of earnings. The rest, it is true, was for other things that were necessary. There was also an award of some 9,000 pounds for so-called maintenance. But given a life expectancy of 30 years this did not amount to very much. What you are seeing is the court throwing up its hands and saying: "Well there is no real evidence as to whether this person would or would not have been a high salary earner so we will take the low figure". Underlying that seems to be the feeling that if this does leave her short of something to live off in the long term, there will be the social security system, or perhaps there will be the family sources of support. But these issues are not really examined. And for a child of fourteen permanently disabled, one has to assume that the sources of income support from the family may well dry up at the later stages of life – the parents die off, the family splits, and so on.

By the same token – and here I am entering upon an area that has been much more thoroughly worked over in recent times by Margaret Thornton[8] and Reg Graycar[9] – is the problem of the non-earning

5 Leaflets issued by the N.S.W. Law Society in opposition to the N.S.W. Law Reform Commission's proposals to abolish common law rights to compensation in the field of transport accidents described these rights in terms such as 'fundamental'.

6 *Phillips* v *London & South Western Railway Co* (1879) 4 QBD 406 (Div Ct); (1879) 5 QBD 78 (CA); (1879) 5 CPD 280 (CA).

7 [1965] NSWR 1158; [1966] 1 NSWR 321 (CA).

8 M Thornton, "Loss of Consortium: Inequality Before the Law" (1984) 10 *Syd LR* 259.

9 R Graycar, "Compensation for Loss of Capacity to Work in the Home" (1985) 10 *Syd LR 528*. See too A C Riseley, "Sex, Housework and the Law" (1981) 7 *Adel LR* 421.

housewife. Again the underlying assumption of the common law is: "Well, we compensate loss of earnings capacity, but how do we measure that? Prima facie it is the loss of actual earnings, but these are nil, because she is a housewife. What do we do to boost that? Well if there is a possibility of returning to the workforce at a later stage of her life – after the children have left home and so on – we will allow a contingency figure for that, but the onus is on her to establish it." It is often not very great in times of high unemployment like the present. There are very good arguments for the other side to say that this contingency will probably not materialise because she will be trying to get into the workforce too late in life. So despite some minor inroads in this, like the English case of *Daly* v *General Steam Navigation*[10] a few years ago, now one finds very little sympathy for the argument that what the disabled housewife loses, and what should be looked at in her case, is not earnings at the time of the accident but working capacity in the broader sense, and that that working capacity is an element of loss which should be given an economic measure.

Perhaps in passing I'll mention here that one of the further dimensions of that particular situation is the loss of consortium claim which has been established by the common law for giving financial compensation for that work around the house to the husband, instead of the wife applying for and obtaining damages in her own right. In this enlightened State, the loss of consortium action has been extended to wives as well by statute,[11] but it doesn't really address the problem I am talking about – that of the injured housewife. It doesn't touch that at all. Apart from that, it is of course a non-sexist measure. In other States and I am thinking now of N.S.W.,[12] the response which arises is: "Well, it is a terrible sexist thing to allow only husbands to claim loss of consortium, so we will abolish that, but we won't do anything about allowing wives to get any better recovery for their loss even though at the time of the accident they were fully or substantially engaged in housework". One can dig into that situation and produce a worse problem with the emphasis on loss of earnings. As I said in relation to children, the assumption seems to be that when the housewife is injured the existing sources of financial support, say from the husband breadwinner, will continue, but how can we assume that? Divorce for whatever reason is extremely frequent nowadays. You could possibly try to argue in a tort claim that if the divorce was caused by the accident or contributed to by the accident there ought to be a head of damages for the loss of that support, but how are you ever going to prove it? And how are you going to answer the counter-argument that if the accident had not occurred the divorce might still have occurred anyway, in which case you have lost your causal link? It does seem amazing to me that one might have to get into that rarefied sort of area in order to deal with this harsh fact that you can have in front of you. A housewife who has been injured and then loses the breadwinner through divorce some years later is left without sources of support because the compensation has failed to address that issue. She is thrown back on what we know to be the below-poverty-line level of social security, but has by hypothesis a

10 [1981] 1 WLR 120 (CA).
11 Wrongs Act 1936-1975 (SA) s 33.
12 Law Reform (Marital Consortium) Act 1984 (NSW).

disability which means that she is never likely to enter the workforce again so as to get above that poverty line.

At the other end of the scale let's see what the common law does for your high-earning plaintiffs, your people who answer what used to be the description of the traditional juror – male middle-aged and middle-class, and probably middle-minded as well – when they claim damages for loss of earnings. Let's say the injury was suffered at the height of their career. The common law explicitly recognises that in getting full loss of earnings they can acquire a very substantial surplus over what might be called their costs of maintenance, cost of care and other basic needs, and that some of this surplus may enure for the benefit of their heirs on their death. A couple of cases that have particularly dealt with the problem of compensation during the so-called 'lost years' bring that element to light. If you are injured at age 45 and your working life is thereby reduced from 20 years down to say 10 because of a shorter life expectancy, the common law still says you ought to be able to get that loss of earning capacity over the ten years that you lost. You see justifications such as the following passage which I will read briefly from the House of Lords case of *Pickett* v *British Rail Engineering* in 1979. Lord Wilberforce dealing with the very situation I just outlined, of the fairly high earning middle-life male who has had his life-expectancy shortened, said:[13]

> Future earnings are of value to [a victim] in order that he may satisfy legitimate desires, but these may not correspond with the allocation which the law makes of money recovered by dependants on account of his loss. He may wish to benefit some dependants more than, or to the exclusion, of others; this (subject to family inheritance legislation) he is entitled to do. He may not have dependants, but he may have others or causes [meaning presumably worthy causes], whom he would wish to benefit, for whom he might even regard himself as working. One cannot make a distinction, for the purposes of assessing damages, between men [notice this word "men"] in different family situations.

In almost any tort system running at the moment, as we know, a pool of insurance provides most of the compensation that is paid out, whether you are talking about road accidents or work accidents, or indeed insurance funds brought together by public liability insurance or medical insurance, and so on. And usually the debate has to be framed in terms of that pool being not infinite: there are limits to it. The point that one has to ask is: if the funds are limited, are finite, are we really getting our priorities right? Should we be worrying about the sort of thing that Lord Wilberforce described? Is it legitimate to be saying: "Yes, money can come out of that pool so that the rich high income earner who has lost life-expectancy can benefit worthy causes and look after his dependants", while at the same time the same approach leads to extreme dangers of under provision such as that one I have suggested. Young people or non-earning 'housespouses' (housewives) are quite likely to be left falling back on social security much earlier than one would conceivably hope for.

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13 [1979] 1 All ER 774, 781.

The arguments against Lord Wilberforce are strengthened when you consider the likelihood that the limited insurance fund which is putting up this money will not have been contributed to on a flat rate basis – if it is, say, the third party vehicle insurance fund – or at least on the basis that there is no relationship to the earnings of the victim being compensated. It is not a situation of high earners paying large amounts into the fund and therefore being entitled to get high amounts back again; it doesn't work like that at all in any of the insurance funds we are talking about.

So, to bring together the argument that I am putting forward – which I must say is not a new argument, but one that is still underemphasised in this sort of debate – whatever scheme one is moving towards, statutory, common law, broad-based against all range of accidents or limited to transport accidents, or whatever, we need at the same time to be going back and assessing fundamentally the importance to be given to the earnings-related element. And clearly the gist of what I am saying is that much more needs to be done to ensure that the basic needs, the income support, the costs of care, are put at the top of the list and that if after that you still have some icing left for the cake, so as to allocate the compensation for lost income, that has to be a second priority. You cannot rely on a doctrine of compensation for a notion or fiction of "what might have been", which is what we do at the moment, in order to ensure that the events that actually occur as a result of the accident are being properly looked after. This is a basic theoretical issue which the common law system has never really faced because of its essentially compensatory force.

This is not to say that the earnings element has no place at all. I fully accept the argument that in cases of shorter-term injuries, and even more so for compensation in the immediate aftermath of an accident, it would be unfair to ask relatively high earners to adjust, as it were, overnight to a sudden drop in income and to have to sell up heavily mortgaged houses or other property. The system which to some extent the N.S.W. Transport Accidents Report[14] is working towards starts with a 'floor', a minimum bottom line of compensation by way of income support, and thereafter it seems to me if there is to be a recognition of an earnings-related element that should be subject to a well-defined ceiling. The trouble with the N.S.W. report is that it had the ceiling but scarcely any floor and the overall structure suffered as a result. I know there were debates and disagreements within the Commission on this issue, but the floor that arrived at last was a fairly lowly placed one and only indeed coming into operation, as I understand it, two years after a person was injured if the injury still persisted.[15]

This is essentially, then, an argument whereby so-called compensation moves towards a welfare model. It leaves open the possibility for high income earners to take out private insurance if they so wish, for a top-up, which was something the N.S.W. Commission proposed.[16] This is much more equitable in conjunction with virtually any funding model with a flat rate contribution through an insurance premium or a levy

14 NSW Law Reform Commission, *A Transport Accidents Scheme for New South Wales*, LRC 43 (1984).
15 *Id*, paras 7.87-7.98.
16 *Id*, para 8.31.

such as the Medicare levy. It is clearly amenable to a system of periodical payments, and indeed any periodic payments that you have can have ample scope for variation according to the circumstances of the victim. My last point is that there is a major job for people debating these topics, whether in the classroom with students or in other forms of academic debate, or elsewhere, to open out this question much more than has been done. I know that there are all sorts of political constituencies against it – the trade union movement for one would be very unhappy, I think, about loss of earnings compensation going by the board – but one has to start somewhere. Academic lawyers are one of the main groups that can help in the process, and they should do all they can.