

Heads of damages

Brian Donovan QC

Introduction by Geoff Coates,
 Managing Editor

The following article comprises notes prepared by Brian Donovan QC for a lecture he gave on heads of damages. Brian has kindly made his notes available to APLA's members for this issue of *Plaintiff* focussing on the theme of damages. The article is in the form of notes from which Brian spoke rather than the usual form of a paper for publication. It has not been re-written extensively, as the content is quite clear to the experienced practitioner. Additions have only been made to clarify some points.

The theme that emerges from Brian's paper is that you must always go back to the concept of damage, as trying to put the Plaintiff back in to the same position he or she would have been in had it not been for the injury (as far as money can do that). It therefore requires, as Brian suggests, imagination. Imagination to see how the Plaintiff would have developed throughout his or her life, career, social involvements and to look at the normal ups and downs of life. It also requires imagination to be used in determining what the injured Plaintiff will now need.

Expert opinion is vital for this process. Those who make it their career to look after damaged individuals in our society can be of great assistance in advising the lawyers what is necessary and what is possible. Similarly, accountants and actuaries can assist in identifying the full extent of a person's loss of earnings and earning capacity, including direct wage loss, and accumulation of wealth

in the form of assets, superannuation and investments.

1. Non Economic Loss

In non-statutory schemes this is "general damages". Maximum general damages awarded by courts is around \$325,000 to \$350,000. In statutory schemes this is capped eg *Motor Accidents Act* and *Workers Compensation*. The cap in New South Wales is \$250,000. It is therefore important to develop other areas of damages within the classes of special damages. Interest is available on the past component of non-economic loss under general law, but none under the statutory scheme.

The line is blurry between general damages and economic loss. Loss of income clearly affects the quality of life of the individual and through a variety of other factors affects the life of the individual

2. Past and Future Economic Loss -

This is based on actual past earnings, average weekly earnings and special opportunities for increases. It may involve historical examination of the plaintiff's work history and of the work history of the plaintiff's family and surrounding circumstances. Use of statistical tables and special categories of plaintiffs (eg gender and race). Note if the plaintiff is hospitalised the defendant may try to claim a deduction on economic loss for being housed and fed in hospital.

It is nearly always a good idea to get an

accountant to assist with the compilation of economic loss figures. Richard Cumpstons' paper, at the 1997 national conference is recommended for further reading on this issue

3. The Fox v Wood component must be added to make up income tax losses.

In common law claims where statutory schemes also apply the net loss of earnings is recovered at common law yet the gross amount of compensation must be re-paid. Fox v Wood damages addresses that gap!

4. Note the social security preclusion period. The present divider is 410.

The divider is average weekly earnings and has now gone up to \$416. Half the total damages is used. For example, if you are awarded \$68,000 damages half of that is used (\$34,000) and when divided by \$416 a preclusion period of eighty-two weeks is obtained. Centrelink will provide estimates of the preclusion period within five working days if the request for a notice is used in regard to an offer made.

5. Past and future superannuation is also an important part the economic loss.

Once more it should be noted that it is essential to get the advice of a qualified accountant to ensure accurate calculations

6. What allowance for inflation? 3% tables generally Todorovic v Walter and 5% under the NSW Motor Accidents Act and Workers Compensation legislation. In Victoria the amount is 6%.

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Heads of damages

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Brian Donovan QC

7. Past Care -

- (i) Voluntary, (*Griffith v Kerkemeyer*).
- (ii) One or two carers (or more). In *Fakinos v Angelides*, Dunford J (NSW SC 1 September, 1995) allowed two voluntary carers under the *Motor Accidents Act* scheme.
- (iii) Consider early applications to the court to obtain commercial care. If there is funding then there may be use of commercial care without such application. The use of this commercial care may be proof of need for future commercial care.

8. Future Care

- i) Nursing home or carers in own home?
This is still a live issue in some cases. Sometimes it may be part in a nursing home and part at home. Generally now nursing homes are considered not adequate, but this depends on the actual evidence.
- ii) Family or commercial – or mixture of both.
- iii) Who will provide evidence, and what experts will be used – rehabilitation medical specialist, occupational therapist and carer-nursing agency?
- iv) Factors to consider:
 - a. How long is it needed – life expectancy;
 - b. Use of life tables for life expectancy (variations according to race, area, personal family history of long living parents etc (see *Corey Rotumah v GIO* unreported 30 March 1998 Supreme Court of New South Wales Donovan AJ)); What are the most recent statistical life expectancy tables? There may be Special tables for particular classes of plaintiffs (eg. gender and race).
 - c. Medical or other factors special to level of care for this plaintiff,

- eg doctor's assessment, and special social factors for this plaintiff;
- d. Consider the number of carers: single; house couple; extra night carer; weekend carer.
- e. Rates for cost of carers, holidays and sick leave for carers, superannuation for carers – which agency will provide the carers? –What effect will the particular areas have. (eg isolated country town)?
- f. Cost of “keep” ie food etc for the carer is additional to carers' rates. This is now about \$21.00 per day for each person.
- g. Level of care; family care; live in or live out; experienced or inexperienced; enrolled nurse or registered nurse; what duties are to be carried out? reason for different levels: plaintiff's mobility, plaintiff's breathing, plaintiff's swallowing, plaintiff's mood (aggression etc.) special medicines, special physio, ethical reasons (women especially);
- h. Management and supervision of carers and arrangements for replacements. This may be by agency or family; allowance should be made for a management cost of changing teams of carers. The Protective Commissioner may have an additional role here. See *Van Doure*, Dunford J NSW Supreme Court 1997
- i. Social companion of same age. Especially important for young plaintiffs like hemiplegics with evidence of brain damage and limited ability to interact socially; (Allowed in *Saddler v Bladewell* 27 March 1998 (unreported) Supreme Court of New

South Wales Donovan AJ) This item will depend on actual evidence.

- j. How to open the issue at the start of the case to make sure the judge sees level of care needed. (Perhaps sometimes hand up similar fact case and comparable care just to make a new judge aware of the size of verdicts.)
- v) **Contingencies and vicissitudes** – in some states a deduction is made on all future costs but not in New South Wales See *Sharman v Evans* (1977) 138 CLR 563 at 587:-
“Once a probable life expectancy is determined these enter not at all into these (contingencies and vicissitudes) enter not at all into the assessment of future hospital expenses or the conventional amount for shortening of life expectancy that are significant in the case of earning capacity.”
Bresatz v Przibilla (1962) 108 CLR 541 at 546:-
“The contingencies that have to be considered in assessing loss of earnings are those which it is assumed might notionally have befallen the plaintiff had she not been injured and continued to work. The contingencies that may affect future outgoings are of a different order.” Per Windeyer J.
Frankcom K v Woods (unreported) Court of Appeal 1 October 1990 per Mahoney AJ at p.2:-
“I do not think that it should be taken, generally and without exception, that an amount calculated for the future services of this kind is not to be discounted to take account of the uncertainties of life. No doubt, where the only factor in respect of which there would uncertainty was the duration of life, a calculation in

which duration had been taken from, e.g. recognised tables, would not require further discounting."

And per Glass JA at p.5:-

"The trial Judge in calculating the amount due under this head applied the proposition laid down in the joint judgment of Gibbs and Stephen JJ in *Sharman v Evans* ((1976 - 7) 138 CLR 563 at 587) that compensation for future nursing services should not be discounted for the vicissitudes of life."

vi) The choice of care agency is particularly important as rates vary. Not only do rates vary but also the quality of carers varies and it is important to obtain a reputable agency such as, in Sydney, Dial-an-Angel. The quality of the agency is important to ensure correct costings and also quality of the carers and the supervision and management of the carers and their replacement. The experience of the agency in actually placing carers for this type of injured plaintiff is important. Check the agency has this hands-on experience.

9. **Future Treatment** - GPs and specialists (neurologists, orthopaedic, ENT ophthalmologists, respiratory). How often? What costings?

10. **Future Physiotherapy** - regular or supervisory and reasons for need.

11. **Future Occupational Therapy** - occupations and equipment.

12. **Future Diversional Therapy**

13. **Future Speech Therapy** - assistance for communication and also eating and breathing. This may involve use of equipment such as computers and voice enhancement.

14. **Brain Outreach Team** - usually available from Brain Injury Unit at major hospital; includes nurse, occupational therapist, physiotherapist and others. May include doctor. May be required to visit once every three months for four hours. Sometimes more or less.

15. **Future psychology, physiotherapy and counselling.** Especially important in adolescent years.

16. **Future sexual care and therapy.** This may be quite important for sexually aggressive brain damaged people, especially males, and where they are mobile. Medical evidence is needed.

17. **Equipment and Supplies**

a. mobility - wheelchairs, walking frames, power chair, folding chair.

b. exercise and physical equipment - special room for gymnasium and storage -(bike, tilt table, exercise mats chairs);

c. intellectual equipment (computers and the like see below) for communication, for improved education, for business, for recreation - quality of life;

d. other - special bed, pillows, cushions, Roho mattress, blenders, heavy duty washing machines, special sitting chair.

e. hoists inside house, also for car, and for pool.

f. nappies; ointments; medications;

g. maintenance of equipment must be included as well as complete periodic replacement.

h. replacement of equipment must be allowed for recurring and replacement costs - what these are and how they are costed - financial rates are calculated on 5% (and 3%) plus the full initial cost for the first item.

18. **Computer**

Computer experts have developed a big role for computers for the disabled. They can help to allow the plaintiff to do more things, to use a computer for communication, for education, for work or simply as an intellectual stimulus and entertainment. There will be a capital cost, replacement cost and running cost. This is a rapidly developing area.

19. **Educational Matters:** special education courses, special teachers - at home or at institutions.

20. **House Modifications** - Note: the plaintiff

does not receive the full house cost but only the difference between the cost of the house he/she will need and the equivalent unmodified house. Similarly the plaintiff only receives the cost of any additional land needed over the size the equivalent house would require. However the plaintiff is presently allowed any capital gain from the modifications as this (in 10, 20, 30 years) is usually modest and is set off by overall depreciation of much of the modifications.

a. Full brick or brick veneer and overall quality.

b. Quality of fittings - carpet and the like. If original house would have been of high quality the extra parts of the new house would have to be costed at that quality - there can be complications - where the plaintiff lives in a caravan for example.

c. What is the nature of the original house the plaintiff would have had (depends on socio-economic group and family background eg size and quality);

d. Costing will depend on area; outlook and level (flat or sloped) - usual need for flat land; (cheap country area or Double Bay - where did the plaintiff live before?);

e. How much extra land?

f. How many extra rooms and space (for carers and equipment): Width of doorways and halls to allow for wheelchair.

g. Additional accommodation and storage room for additional equipment (chairs mattresses extra bedding, sheets and the like because the plaintiff wets them);

h. Further separate room for gymnasium;

i. Accommodation for existing carers and for additional carers both permanent and casual, and replacements for weekends and holidays.

j. Type and standard of carer accommodation - one double bedroom plus living room - or only one room or self contained unit;

- k. Size of carer's accommodation, fittings, kitchen and bathroom, equipment (stoves refrigerator, washing machine etc). What facilities can the carer use in the main house?
- l. Air conditioning – all rooms or only part of the house. What is the outside climate? (eg Cooma or Tweed Heads) Does the plaintiff need the air conditioning because immobilised (and cannot use heaters) or because of spinal injury unable to regulate own body thermostat? What other reasons are there for air conditioning?
- m. There will also be additional replacement costs (eg carpets wear quickly because of wheelchairs) and additional running cost (eg extra electricity for air conditioning etc)
- n. Where the plaintiff can do some things then special kitchen and bathroom layout etc may be claimed.
- o. An architect's report is usually needed to set out the design and cost. This report will be based on what the medical rehabilitation specialist other specialists specify expressly are needed by the plaintiff.

Note: Where there are infant plaintiffs the family will often care for the plaintiff. There may be an agreement that a house now and a house later when the plaintiff becomes an adult may be justified.

- 21. **Swimming pool** – size of pool, small spa, small domestic pool or true exercise pool (15 to 20 m) – level of heating – type of enclosure (fully enclosed or with a sheltered area) – air conditioning (may be very expensive because of heated pool humidity); additional costs because of the land where the pool will be put; (rock, cliffs, slopes);
- 22. **Holidays** – based on level of plaintiff's socio-economic position – what sort of holidays did the plaintiff and the plaintiff's family take prior to the accident? What sort of holidays

could the plaintiff have looked forward to?

- a. cost of transport – car, train, air flight;
- b. local town, capital city, interstate, overseas;
- c. cost of accommodation, level of accommodation, (eg local motel or five star international);
- d. one carer or two to travel with the plaintiff;
- e. only the cost of the carers' fares and accommodation are claimable. The plaintiff's costs are paid by the plaintiff as he/she would have had to pay for their own holiday even if uninjured – unless the plaintiff now needs an upgraded aeroplane seat and the upgrade is then claimable.
- f. duration of holiday – one week or more.

23. Transport

- a. cost of car if plaintiff uninjured – type of car, standard of car (what would plaintiff have used if no accident?)
- b. cost of the different car now needed for the plaintiff eg van needed for wheelchair.
- c. cost of modifications – equipment – hoist.
- d. total cost of plaintiff's post accident car with equipment;
- e. cost of additional running and periodic replacement costs. The car may be used more than if the plaintiff were uninjured.
- f. mobile phone is usually included under this item. This allows the care to call for help.
- g. NRMA, RACV etc. usually will provide costing.

24. Special matters for particular plaintiffs

For example the farmer who can do some work but needs an offsider present with him:

- because of dangers if he has an accident on his own;
- because he forgets what he should do next; or is someone who needs special tractor – harvesters etc modified to allow him to drive them. This would have to be weighted against the

income he would earn from the work.

25. Guide dog for companionship

26. Protective Commissioner:

- a. Funds management. Rozniak formula in New South Wales.
- b. Costs of application to Supreme Court Protective Division (about \$3,000).
- c. Costs of Court Visitor under Protected Estates Act. This varies depending on life expectancy and number of visits needed per year. The Protective Commissioner will advise of costings.

27. Use of Tables

In various texts the 3% and 5% discount tables are set out. These are used for the calculation of future loss and costs. They are most simply used for the calculation of future economic loss, but all future costs including nursing care, home care and the like have to be calculated on the basis of these tables by taking the weekly amount and multiplying it by the relevant multiplier for the number of years. This must be done for every item of future expense including care, equipment and its replacement, medicines, special food and the like. In general no amount should be deducted for contingencies and vicissitudes as are deducted in future loss of earnings and loss of earning capacity. See paragraph 4(1) above.

28. Compensation to relatives claims and death claims. The first issue is dependency. This usually means economic dependency such as that of a spouse or children. In such circumstances it is necessary to determine the amount of dependency. This can be done by specific evidence or by reliance upon the general statistical tables which for example suggest that where there are a wife and three children they receive between approximately 70% to 85% of the deceased's earnings. Where there is only a wife and a husband, then the husband may keep perhaps 40% for himself. These statistics are based on what are probably outmoded role models, but they

illustrate the procedure needed to determine the dependency.

The dependency is usually taken to continue for the wife, but to end for the children when they reach 18, but this may not be so if there are plans for them to go to University, something which is becoming more common in our society. See *Rouse v Shepherd* (1994) 35 NSWLR p.250 Badgery-Parker J.

29. I do not know of any case involving the expectation by older children to receive future assets when the deceased would have accumulated those assets had he or she lived for the normal life span, however I can see no reason why this should not be claimable. It may be particularly important where there is a high level of income of the deceased and the deceased had a pattern of large savings, investments and/or superannuation. The children could well expect to receive that at the end of his full life expectancy and they are deprived of that by the early death even if they do not suffer that loss immediately because they are no longer directly financially dependent. One must look at the deceased's pattern of savings to develop this claim further.

30. To date loss of children has led to very small awards of damages under death claims. The parents are not dependent on the children and therefore there is said to be no dependency loss. The question arises whether parents may have a claim for death of their children where there was a likelihood that the children would have looked after their parents in their old age. This seems to me to be a reasonable claim provided that there is evidence that this would be so. Such evidence may be difficult to find. The likely source of the evidence would be the parents, and it may be argued that no doubt they hoped their children would provide them with such support in their old age and even home care, but this does not mean it is likely it would happen. The changing patterns of society may be relied upon by the defendant to defeat the claim. On the other hand if the children who died come from a family where there is a history of such care being provided by the children then that may be powerful evidence to allow

such a claim. I can find no authority on this point. In principle such a claim should be permitted.

31. The question arises whether as part of a disabled person's claim there may be a claim by the parents of a disabled person for loss of the disabled person's assistance, care and support when the parents are aged. This is kind of an inverted *Griffith v Kerkemeyer*. This is a duty which the injured plaintiff had to the parents and the injured plaintiff can no longer fulfil that duty. I know of no case where this has been claimed. However in a case a few years ago (*Kamboroglou*) there was a claim by a father (the mother had died before the hearing) for a child who had been born in error. The child was disabled. The claim included costs of care by the parent for the child. The claim was on the basis that the parent had a moral duty to care and provide support for the child (now and continuing after the child turned 18 years) and therefore the parent could claim for that cost. The matter was settled before final verdict, but Sharpe J gave an interlocutory ruling which permitted the claim to go to the jury. By analogy it would seem to me that a claim by an injured plaintiff for inability to provide services to elderly parents, in circumstances where the plaintiff had a moral duty to the parents, might well be allowed. It is a claim similar to that made by parents when their child is killed.

32. The question of damages for catastrophic injuries involves rapid developments and lateral thinking. There will no doubt be many more developments of heads of damage claimable in such cases. Realistic imagination is needed.

33. Persuasiveness in the courtroom is important. Persuasiveness, however, will not arise simply from arguments by counsel, but by the quality of the expert opinion. The experts who are normally needed include all of the above. For brain and spinal injuries rehabilitation specialists, spinal specialists, neurologists, neurosurgeons are all required. Frequently there are additional injuries such as injuries to eyes and eye specialists and the like are required for each area of

injury. The rehabilitation specialist should, wherever possible, set out all the things that the plaintiff needs including general principles for equipment, the house and the car. These matters should be taken up by other specialists. Occupational therapists, architects and the like fill in the detail. The costings are then required from the Pharmacy Guild (for medication), the carer agency (for carers), Paraquad or AP Care or occupational therapist (for the equipment).

34. Major cases apart from those referred to above are:- *Nicholson v Nicholson* (1994) NSWLR 308, *Marsland v Andjelic* (1993) 31 NSWLR 162 and 32 NSWLR 649 ; (1996) 135 ALR 543 *Rosniak v GIO*. (1992) 2 NSWLR 665

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APLA Membership at 31 May 1999

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|--------------------|--------------|
| NSW | 553 |
| Queensland | 353 |
| Victoria | 256 |
| South Australia | 79 |
| Western Australia | 44 |
| ACT | 29 |
| Northern Territory | 14 |
| Tasmania | 16 |
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