

Assessing damages at common law

Recent comparative verdicts from the ACT

By Emma Reilly

Plaintiffs in personal injury cases should be awarded damages that would best restore them to the positions they would have been in had there been no negligence.

This principle is subject to some qualifications, including remoteness in law, and the plaintiff's obligation to mitigate the damage suffered. When assessing damages, a judge should indicate how much of the total award has been allocated to those heads of damages that apply to the case.

Comparing the reasons for awarding damages and the amounts awarded in past cases is important information for lawyers when advising clients, and measuring risk for settlement purposes. However, comparative verdicts must be considered in the context that the majority of personal injury claims settle, and those that run to verdict more often than not have an unusual quality about them, such as issues regarding liability, credibility and fraud.

In the ACT, damages in personal injury matters remain assessable at common law, with no legislative caps or thresholds. This article examines such damages using comparative verdicts from the ACT Supreme Court, with particular reference to general damages (or non-economic loss) and economic loss (in the context of earning capacity).

GENERAL DAMAGES

General damages is a non-pecuniary head of damage, and includes damages for pain and suffering and loss of enjoyment of life. General damages provides for consolation, rather than compensation. It is extremely difficult to give pain and suffering a monetary value, or to calculate what represents reasonable compensation for undergoing the pain and suffering involved in a personal injury. Regardless of the value of the claim, plaintiffs would rather have their health than their damages.

When assessing general damages, a lot may turn on the presentation of the plaintiff as a witness and, equally, the forensic diligence of the defendant. Matters taken into account include pain and suffering; trauma; discomfort; inconvenience; loss of pleasure derived from work, hobbies and sport; difficulties with marriage and childbearing; loss of

independence; loss of taste and smell; loss of sexual pleasure; curtailment of life; and scarring and disfigurement.

Awards for general damages are generally split between past and future, for the purpose of allocating interest to the past component. Interest is then calculated at a reduced rate, because of the cumulative nature of the damage.

A permanently unconscious plaintiff, who cannot feel pain and discomfort, will not receive damages for pain and suffering, whereas damages may still be awarded to an infant who cannot remember the pain: *Pavic v ACT* [2007] ACTSC 97.

What of an injured elderly person? It could be argued that a person of advanced age should receive a reduced amount of general damages, given their relatively brief remaining life expectancy, and the fact that the length of time for which they will suffer into the future is expected to be shorter than for a younger person. However, as stated by Master Harper of the ACT Supreme Court in the matter of *Cirina v Wong* [2005] ACTSC 45:

'The impact of an accident of this kind must be regarded as very much greater for someone of the plaintiff's age [67] than it might be for a younger person, who might be expected to be both physically and mentally more resilient.' In *Sarri v The Owners – Strata Plan 1260* [2006] ACTSC 83, the plaintiff was aged 77 and in poor health. Master Harper noted that she had suffered a nasty experience in the context of a fall, and a serious injury to the shoulder. Her pre-existing lower back condition was aggravated, causing continuing lower back pain. Master Harper decided that had she succeeded in establishing liability, she would have been awarded general damages in the sum of \$30,000, apportioned \$20,000 to the past and \$10,000 to the future, with interest of \$2,000 on the past component.

In some jurisdictions, legislative thresholds prevent claims for less significant injuries. However, in such cases where a cause of action is viable, it is often more difficult to predict an assessment than in a case involving serious injuries. An

example of a case at the lower end of the scale is *Annette Helen Dryden v Katrina Bowditch* [2008] ACTSC 131, which involved a plaintiff who was bitten by the defendant's dog. Liability was admitted. The plaintiff suffered from a laceration to her right eyelid, an injury to her tear duct and a laceration to her right forearm, causing scarring. Master Harper of the ACT Supreme Court awarded damages in the total sum of \$60,238.83, including \$45,000 for general damages and \$2,500 for interest thereon.

A further example of an assessment of general damages can be taken from *Molyneux v Guy* [2007] ACTSC 99, involving a CTP claim by a 29-year-old plaintiff arising from a motorcycle accident in September 2004, where liability was admitted. The hearing proceeded before Chief Justice Higgins to assess damages only.

The plaintiff was hit on her motorcycle by the defendant motor vehicle driver, who made an unsafe right-hand turn. The plaintiff suffered from a compound fracture to the tibia and fibula of her right leg; an injury to her neck, resulting in the loss of cervical lordosis; an injury to her upper back; and an injury to the right shoulder scapula region, along with shock and psychological sequelae.

The plaintiff had two young sons. By the time of the accident she had gained qualifications as an enrolled nurse, and was working in a nursing home.

The plaintiff had previously suffered episodes of depression. Her relationship broke down after the accident and, in early 2005, she was living in a refuge. In mid-2005, her depression worsened, and she attempted suicide. She was then admitted to a psychiatric unit. By December 2005, she had secured a government home, her children had been returned to her and she had made physical improvement. In December 2006, she applied for a job in a nursing home, but was rejected due to her history of injury.

At the time of judgment, the plaintiff remained unemployed, with scarring on her leg, and pain in the affected areas. She agreed in evidence that she would be fit for part-time sedentary work.

Chief Justice Higgins was satisfied that, despite the other contributing factors in her life, her injuries had, and continued to have, significant effects, both physical and psychological, upon her enjoyment of life and her working capacity. He awarded general damages of \$110,000.

In *Robinson v Australian Capital Territory* [2008] ACTSC 80, the plaintiff, a school teacher, was awarded general damages in the sum of \$90,000 plus interest of \$7,000 on the past component (half) in respect of injuries to her hip, sustained in an incident at work on 10 February 2000. The plaintiff was 59 years of age when injured, and 67 at the time of judgment.

The injury occurred when the plaintiff was standing in the doorway of a school bus and the door closed on her. Liability, including the identity of the owner of the bus, was in issue at hearing. The defendant also alleged that a subsequent incident on 22 February 2000, for which the defendant could not be held responsible, caused her ongoing problems. These arguments on behalf of the defendant were not accepted by the court, and the plaintiff succeeded

in establishing negligence in respect of her injury and its consequences.

The plaintiff was initially diagnosed with chronic traumatic left trochanteric bursitis, with elements of a left sacro-iliac joint contusion. Cortisone injections did not assist. Although she initially struggled to continue working, she was certified unfit for work from Easter 2001. With rest, her symptoms eased, but did not disappear.

The plaintiff was eventually diagnosed with a gluteal tear, which was surgically repaired in 2004. She was in hospital for one week, came out in a wheelchair and progressed to crutches, which she needed for six to eight weeks. Her husband took leave from his employment as a government veterinary surgeon to look after her. The plaintiff did not think that she ultimately gained any benefit from the surgery. She was unable to subsequently achieve a return to full teaching duties, and her employment was terminated in November 2004.

In awarding general damages, Master Harper noted that the plaintiff had been through more than eight years of hip pain. Before her injury, she was a fit and healthy woman who enjoyed her work as a schoolteacher and her various leisure activities, including tennis, walking and gardening. The defendant had adduced evidence that the plaintiff had continued in activities such as walking on overseas holidays and helping on the family farms. Master Harper stated that it was to the plaintiff's credit that she maintained a positive >>



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approach to life and continued to engage in physical activities to the extent that she could. In submissions, Counsel for the plaintiff suggested a range of \$80,000 to \$90,000 for general damages and, as noted above, Master Harper made an award at the high end of that range.

LOSS OF EARNING CAPACITY

Damages for economic loss, including out-of-pocket expenses and past wage loss, are sometimes relatively mathematical, and therefore easy to predict and/or assess. However, in other cases, especially with regard to earning capacity, the award may be made by way of 'buffer', depending upon a balancing of evidence of competing factors adduced by the plaintiff and the defendant as to the plaintiff's likely scenario, had s/he not been injured.

In the matter of *Molyneux v Guy*, discussed above in respect to general damages, Chief Justice Higgins discounted past economic loss because of the plaintiff's decision to leave the first nursing home she worked at, prior to the injury, as the result of a dispute involving her actions in moving a patient. She was between jobs when the accident occurred, and finding it difficult to obtain work that accommodated her available hours, given her childcare responsibilities.

Past economic loss was awarded at \$40,000 plus \$4,000 for superannuation loss, plus interest at 9 per cent (a further sum of \$6,395). For future economic loss, his Honour worked on the basis that the plaintiff, but for the accident, would be fully employed as an enrolled nurse. It was accepted that if she were totally disabled, her loss would be \$549,900 – reducible for normal vicissitudes to \$467,415 – plus superannuation loss of 10 per cent. However, his Honour considered that the plaintiff would, after about 12 months, return to work, earning approximately 50 per cent of her past capacity. As she would have more difficulty working full-time on a continuing basis because of her disabilities, she was awarded \$230,000 for future economic loss, plus \$23,000 for lost superannuation.

The matter of *Michael Sheane Hall v Jeffrey John Stove & Llewellyn Robb* [2007] ACTSC 75 involved a plaintiff who was 47 years old at the time of judgment. His neck,

back, right hip and right knee were injured in two motor vehicle accidents in 2000 and 2001, and he suffered from psychological sequelae. He was ultimately successful in establishing negligence, without any reduction of damages for contributory negligence.

The plaintiff had a sporadic employment history with a series of jobs, including as a general hand, trainee machine operator, leading hand, a trainee crane operator, steel fixer and bar tender. At the time of the first accident, he was working as a 'roadie' in the music industry, and planning to record his own album. His group certificates for the years ended 30 June 1999 and 30 June 2000 disclosed gross earnings of only \$2,274 and \$604 respectively. However, evidence was adduced on his behalf that his earnings had been more than this, but were either not paid or not disclosed. Before the second accident, the plaintiff had the opportunity to join his brother in a concreting business. His evidence was that he was unable to pursue this occupation, due to his injuries.

On the issue of assessing damages, Justice Crispin of the ACT Supreme Court stated:

'I am conscious of the fact that the first and second defendants are sequential rather than joint tortfeasors, and that the proper approach is to assess the damages appropriate for the injuries suffered in the first accident and then the damages appropriate for the exacerbation of those injuries and any further injuries suffered as a consequence of the second accident. Such an exercise is inevitably problematic.'

Justice Crispin also acknowledged that any assessment of the plaintiff's loss of earnings was fraught with difficulty. Counsel for the plaintiff submitted that he was entitled to damages to compensate him for his loss of earning capacity, even if he had not been fully utilising that capacity at the time of the relevant injuries. Justice Crispin was satisfied on the evidence that the plaintiff lost a capacity to earn at least an average income of \$500 net per week from the first accident, and awarded damages for past economic loss accordingly, discounted by 25 per cent owing to his sporadic work history.

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The award for future economic loss was predicated on an assumption that the plaintiff would have been able to derive at least 80 per cent of net average weekly earnings (\$638.40) to age 60. Application of a discount rate of 3 per cent per annum led to a theoretical net loss of \$365,049. Having regard to the plaintiff's history, Justice Crispin applied a larger discount to this figure (35 per cent) to allow for the potential contingencies of life. That resulted in an award for future economic loss of \$237,282, attributed \$190,000 to the first accident and \$47,282 to the second.

The defendants appealed the decision, including in respect of economic loss, asserting that the award was manifestly excessive in the context of the plaintiff's work history: *Jeffrey John Stove & Anor v Michael Sheane Hall* [2008] ACTCA 21.

The appellants did not challenge the trial judge's approach of selecting a figure for net average income per week and then discounting it for periods of unemployment, and the Court of Appeal acknowledged this as an appropriate method. However, it was determined that the discount rate used for past economic loss was manifestly excessive, given the respondent's work history and meagre earnings during the period of five years or so prior to the first accident. Damages for past economic loss were reassessed. The Court of Appeal maintained the notional figure of \$500 net per week, but reduced it by 50 per cent instead of 25 per cent. The trial judge's original award for future economic loss was considered appropriate.

Scott Anthony Walters v Canberra Girls' Grammar School [2007] ACTSC 52 involved a plaintiff who broke his right wrist, in an incident moving a cupboard at work as a school maintenance man, resulting in continued intermittent pain. He could no longer ride his motorcycle, play the drums or go bushwalking. After an initial recovery period, the plaintiff continued to work and suffered no ongoing actual loss of income. However, his employment history included work as a plumber, drainer and gasfitter, and it was accepted that he would never be able to engage in this work again, as a result of his injury.

In the circumstances, rather than make an award for future economic loss, Master Harper made an allowance in that regard as a component of general damages. General damages of \$75,000 were awarded, of which \$40,000 was apportioned to the past, with interest of \$3,500.

CONCLUSION

Although it provides a useful analysis as to awards of damages for economic loss at common law, *Hall v Llewellyn*, discussed above, illustrates how important it is to examine verdicts closely, when assessing the reason for the matter proceeding to hearing. The plaintiff was involved in a subsequent motor vehicle accident, on 7 January 2005, which aggravated his injuries; however, this incident was not subject to a claim. He was also charged with assaulting one of his solicitors in respect of the proceedings, in October 2005. Psycho-social issues probably affected the ultimate decision of the court.

Although general damages for all injuries remain assessed at common law in the ACT, most other jurisdictions in

Australia have legislative restrictions in relation to awards for general damages or non-economic loss. In NSW, for example, damages for non-economic loss are not available at all from an employer in relation to a negligent work injury. The *Civil Liability Act 2002* (NSW) has a threshold as to the severity of non-economic loss, of 15 per cent of a most extreme case, before damages are available. The *Motor Accidents Compensation Act 1999* (NSW) stipulates at s131 that non-economic loss is not available unless a plaintiff has a degree of permanent impairment greater than 10 per cent. If the plaintiff exceeds the threshold, damages for non-economic loss are assessed in accordance with the common law (with a maximum amount of \$381,000).

Interestingly, a comparison between ACT and NSW awards for damages reveals that although the legislative restrictions may affect access to awards, once a plaintiff is entitled to an award, the amount is largely comparable to what would have been assessed at common law, if not more in the case of severe injuries.

In any event, keeping up to date with the judgments of the court is an effective way to ensure accurate assessments of damages for clients. ■

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