The SERIOUSLY INJURED CHILD PLAINTIFF

How to assess loss of earning capacity

By Jeremy Wiltshire

Future economic loss is generally the big ticket item in personal injury claims (along with future care in catastrophic claims) and allows the most scope for disagreement. The future is uncertain. No one has a crystal ball. No one knows exactly what will happen in the future. No one knows exactly what would have happened had the claimant never been injured. Usually there is a range of possibilities, involving varying degrees of economic loss.

These factors are most pronounced in the case of the seriously injured child claimant. Where a child is injured, there is usually no past earnings history. All earnings projections are necessarily speculative and, to some degree, guesswork. So how do courts address that difficult task?

APPROACHES

The simplest approach would be to take the national average weekly wage over a working lifetime, less any residual earning capacity, and apply the usual discounts.

There are arguments in favour of that methodology. While some claimants will inevitably be undercompensated and >>

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some overcompensated, it should, on average, even out. It saves courts from having to decide which children should have more and which children should have less, when in reality there is no way of being certain which children will lose more than others. Some children will out-perform expectations based on their socio-economic background, while others will not maximise the advantages they are given in life.

Attempting to distinguish one child from another inevitably requires a court to make generalisations and value judgments about each child's potential earning capacity based on their circumstances and environment.

In *Ren v Mukerjee*,[1] Miles CJ of the ACT Supreme Court observed that a particular child plaintiff should have an award based on average weekly earnings plus 20 per cent:

> 'It implies a finding of fact that as a child of obviously intelligent and industrious parents, Samuel was likely to have been a more than average income earner. Although the implication suggests, in my view, **a somewhat distasteful assumption** rather than a finding, that the lives of children of the clever and affluent are worth more than those of the poor and less distinguished, it is in accordance with case law....' [Emphasis added]

Calculating loss of earning capacity by reference to a notional income but for the injury (whether or not adjusted for the individual characteristics of the child) less any residual earning capacity and an allowance for 'the vicissitudes of life' is referred to in some of the cases as 'the conventional approach' or 'the traditional approach'.

The main alternative to the conventional approach is to apply a global award. That approach found favour in a series of cases which, in particular, followed *Settree v Roberts*[2] in the New South Wales Court of Appeal in 1981.

Mahoney JA considered that there were limitations to statistics and averages in the case of an injured child with no past earnings history. There were overwhelming difficulties in weighing the possibilities of *inter alia* whether the child would otherwise have entered the workforce; if so, at what age, in what occupation, at what wage, with what risks of unemployment, and with what risks of injury or illness. For those reasons, he did not consider it was appropriate to adopt the conventional approach for child plaintiffs. He said:

> 'It should, in other words, be accepted that what is done is guesswork and guesswork of such a nature as is not appropriate to the judicial process. I think it should be recognised that, in assessing compensation in such a case as this, the court is involved directly in the valuation of the capacity or chance. If this be so, then, consequently, it should, I think, be recognised that when the court places money value upon such a capacity or chance, it is, in whole or in part, involved not in a process of calculation, but in the making of a social or value judgment. It is, in other words, determining what, at any given time, society, ie the jury or judge, sees as the value of the loss of capacity or chance to earn money in the future. In such a case, what it does is analogous to what is done when, in accordance with "current ideas of fairness and moderation" it quantifies general damages: cf *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118 at 125; *Pannucio v Pannucio* (1976) 8 ALR 329; 50 ALJR 429c at 431.'

That is, he considered that the court should abandon the pretence of being able to calculate with any precision what an individual child plaintiff might lose and instead approach the task in the same way that it approaches an award of general damages for pain and suffering.[3]

That approach has received some support: for example, *D'Ambrosio v De Souza Lima*[4] from 1985, in which the ACT Supreme Court made a global award of $100,000 for loss of earning capacity to a boy severely injured at age six who had no prospect of paid employment.

More recently, Cullinane J in the Supreme Court of Queensland adopted that approach in *Fitzgerald v Hill & Suncorp*.[5] The plaintiff was 8 when injured, but almost 26 at trial. He suffered cognitive deficits and personality changes. His likely income but for the injury was a matter of speculation but, by the time of trial, he had a history of both work and study; each with limited success. Notwithstanding that history and the various conventional calculations presented by the parties, Cullinane J concluded that because of the plaintiff's age when injured, the length of time since the injury and the fact that he was still relatively young, it was appropriate to fix a global sum in the manner proposed in *Settree v Roberts*. He stated: '*A mathematical approach is impossible in such a case*.' He awarded $800,000.

While Cullinane J listed various factors and '*imponderables*' to be allowed for in arriving at the global award, the judgment does not give details of the weight he gave those factors or how they led him to that precise figure. Those factors included those described in *Settree v Roberts*, as well as the uncertainty as to the plaintiff's future occupation, the possibility of above-average performance and the likelihood of periods of unemployment in the future due to his personality issues. He did not refer to comparable judgments. It appears the award was probably a figure falling somewhere between the conclusions of the opposing accountants using average weekly earnings as a base.

Adopting a protocol of future economic loss awards for child plaintiffs based on a general damages type model using '*current ideas of fairness and moderation*' might be useful if, like general damages awards in the past, there were regular and consistent judgments with a small number of relevant *indicia*, such as whole-person impairment. Unfortunately,

that is not the case with loss of earning capacity awards for child plaintiffs.

This difficulty was highlighted by Miles CJ in *Ren v Mukerjee*, when he noted that:

> 'The circumstances as to the future earning capacity of the hypothetical Australian child totally and permanently disabled from birth are not likely to vary greatly from case to case and other awards should provide more than usual guidance to a proper figure. The actual awards, however, do vary.'

He went on to highlight awards ranging from $250,000 to $560,000 (in the context of 1996). Earlier in the judgment he noted:

> 'The matter is largely one of informed guesswork or discretion. Blackburn CJ called it a "social or value judgment" when awarding $100,000: *D'Ambrosio v De Souza Lima*, although the preferred approach nowadays appears to be to use figures like average weekly earnings at least as a guide.'

On that basis, Miles CJ adopted almost a hybrid approach. Using average weekly earnings adjusted for the child's circumstances and for competing possibilities that the child might have started earning at age 18 or might have delayed earning until age 24 after a period of study, and taken to age 60 less 25 per cent deduction for contingencies (including possible return to China), he arrived at a rounded-off figure of $400,000. He then compared that figure to comparable global awards to confirm his provisional assessment that $400,000 was appropriate.

Notwithstanding some recent cases like *Fitzgerald v Hill*,[6] it does appear to be correct to say that *'the preferred approach nowadays is to use figures like average weekly earnings at least as a guide'*. The court can then take account of the child's circumstances as may be relevant to the assessment of notional earning capacity. Without being comprehensive, those factors can include:

- parents' education, occupations and earnings;
- the education planned by the parents;
- achievements of siblings;
- pre-injury school results or IQ assessments;
- pre-injury aptitudes or interests;
- any existing learning deficits, disabilities or personality or behavioural issues; and/or
- any particular advantages or opportunities available to the child (for example, the ability to work in a parent's business; ability to use parent's contacts, etc).

Those factors may, of course, affect an assessment of loss of earning capacity either positively or negatively, or both.

For example, in *Ren v Mukarjee* and in *Fitzgerald v Hill* it assisted plaintiffs that they came from families with a history of and emphasis on tertiary education, with the corresponding income advantages. By contrast, in *Settree v Roberts*, Mahoney J noted that a consideration of the plaintiff's family work history would not be likely to assist him, as his father's work was 'at best spasmodic' and at trial he had been out of work for 15 months; two sisters were unemployed, and only a brother had regular employment.

Consequently, the circumstances of a case may dictate the parties' proposed methods of calculation. A global award based on similar judgments may be favourable to a child from a low socio-economic background, whereas a child from a higher-achieving background may benefit more from an individualised assessment.

The most common method of assessment appears to be, after consideration of any factors giving insight into the occupational direction a child might have taken, to pick a particular award (or similar evidence of income) relating to an occupation that best reflects the range of potential occupations for that child.

For example, in *Goode v Thompson*,[7] the child had shown interest in science and mathematics before being injured at 12; the court considered an 'average weekly earnings catalogue' in the accountant's report was not particularly helpful and instead adopted the Public Service Award – State (Pay levels) for 'administrative stream' as the best guide to the type of income that the plaintiff might have earned.

In *Hills v State of Queensland*,[8] involving a child with cerebral palsy from birth, a forensic accountant prepared three scenarios: earnings of a practising solicitor, a human resources manager and average weekly earnings. There was evidence that the child's IQ was about average, but McMurdo J accepted that the family history and priority placed on education meant it was likely that the plaintiff would have done some tertiary study. Beyond that conclusion, the court considered that there was no way of knowing what field he >>

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would have entered and no particular basis to believe he would have been a solicitor or an HR manager. Nonetheless, the losses under the HR model were considered a reasonable measure as being moderately above average after a period of study.

In *Waller v McGrath*,[9] involving a child who was 12 when injured and 20 at trial, the court chose 'forestry worker' from an occupational therapist's evidence as to the group of occupations likely to have suited the plaintiff, having regard for his pre-morbid diagnoses of Attention Deficit Disorder and dyslexia and the OT's evidence that he would function best where he did not have to work in groups and could be physically active. Martin J then applied the appropriate award indexed over his working life.

EARLY JOBS AND STUDY

In addition to the plaintiff's likely principal occupation, consideration should be given to the likelihood that the child would have engaged in casual evening, weekend or holiday work while still at school or university. That likelihood, and the likely hours worked, will depend on the circumstances, including the availability of such work in the local area, transport, the child's abilities and the likelihood of engaging in other activities like sports to exclusion of casual work.[10] Evidence of whether siblings or peers participated in such work may assist.

Whether the child would have undertaken tertiary study affects damages in several ways. Depending on the study, qualifications are likely to increase the notional income. However, time studying may delay the start of the period of work in the plaintiff's principal occupation, potentially from 17 or 18 to, say, 22 to 24.[11] The difference can be significant. For example, in *Hills v State of Queensland*, once a delayed start was factored in, the lifetime earnings of an HR manager were not much higher than the average weekly wage starting from school-leaving age.

INDEXATION

Income for most workers will vary and, usually, increases over the course of a working life. It will generally be a distortion to apply a single income rate across the working life. Some means of indexing the rate is required. There are numerous ways of achieving this to get a fair result.

In *Goode v Thompson*, where the court adopted a public service award, Ambrose J assumed that the plaintiff would attend TAFE part-time while working between the ages of 18 and 20. He chose an appropriate pay level on the award for that age bracket, then a different pay point for the years 21 to 28, then a higher level for 29 to 65.

In *Waller v McGrath*,[12] Martin J took a forensic accountant's calculations of indexation of the award rates for forestry workers calculated for each five-year period from the time the plaintiff would turn 25 until the age of 45. He then took the indexed figure at 45 as, effectively, a median wage and applied that rate of loss over the whole working life.

In other cases, and in particular occupations without awards, it may be necessary to obtain evidence of the likely progression and pay of an individual throughout a typical career.

Naturally, awards based on weekly incomes calculated on the conventional basis require discounting in accordance with the applicable discount tables. Where different rates are used representing different stages of the plaintiff's life, apply the deferred discount tables for the numbers of years until the start of each relevant period.

DISCOUNT FOR CONTINGENCIES

The discount rate for 'contingencies' or 'vicissitudes of life' has always been a matter for judicial discretion, attracting 15 per cent as a standard in several jurisdictions. Recently, there has been some particular judicial consideration of the issue in Queensland.

The discount for contingencies is, of course, intended to allow for the various events in the course of a life which may affect the ability to earn income. The phrase was coined in *Phillips v London & SW Railway Co*,[13] where Brett LJ noted that the plaintiff's income was '*subject to the ordinary accidents and vicissitudes of life*' that were too numerous to estimate exactly.

In his authoritative text, *Assessment of Damages for Personal Injuries and Death*, Professor Harold Luntz argues that the 15 per cent standard rate is too high and does not adequately take account of decreased mortality rates, improvements in healthcare and the like.[14] He suggests that the only statistically significant contingencies are death, sickness, accident, unemployment and industrial disputes. He concludes:[15]

> 'To sum up, a reasonable allowance in the average case of a person in regular employment for contingencies other than death causing loss of income, after taking into account sick leave, social security and other benefits, appears to be less than 5.5%, being at most 0.4% for sickness, injury and unpaid holidays; at most 0.1% for industrial disputes; and at most 5% for reduction of income consequent on unemployment. A larger contingency allowance would be appropriate for children and others who are not in regular employment at the time of injury. … If death is also to be allowed for … depending on age and the rate of interest, less than 2% to 4% should be added for men and less than 1% to 3% for women. The maximum discount for all contingencies should thus be under 10% in the average case. This is obviously much less than the standard 15% employed in New South Wales and some other jurisdictions.'

The increased discount for children takes account of the longer period over which the contingencies can occur and uncertainty as to whether the child would have worked at all. Professor Luntz notes that individual circumstances may result in a different discount where there are clear factors that increase or decrease the risks, but that those will be the exceptional cases.

In *Waller v McGrath*,[16] Martin J considered Professor Luntz's arguments compelling. He noted that the Australian economy in 2054, when the plaintiff's working life would end, will be unrecognisable to us and so there can be no scientific way of estimating contingencies. Nonetheless, he considered the Luntz approach to be a more thorough and justifiable examination than the intuitive approach normally adopted. He accepted that, in the average case, the discount should be less than 10 per cent but, in view of the plaintiff's age, the discount should be 12 per cent. The defendant had pressed for a discount of 20 per cent. The Queensland Court of Appeal considered the 12 per cent discount to be within the judge's discretion and was '*a debate on which it is impossible for an appeal court to enter*'.[17]

This approach has been considered in a string of subsequent recent cases, none involving child plaintiffs, but the consideration is relevant to all loss of earning capacity claims:

- McMeekin J considered the arguments in *Craddock v Anglo Coal*,[18] as well as the particular risks in that case and concluded that if there was to be a change to the practice of using 15 per cent, then it should come from a decision of the Court of Appeal.
- Douglas J accepted the Luntz approach in *Cameron v Foster*,[19] but in view of the particular circumstances of the case (including other health issues) it was appropriate to increase the discount to 15 per cent.
- Douglas J followed *Waller v McGrath* and used a discount rate of 10 per cent in *Strachan v McPhee*.[20]
- Ann Lyons J in *Marshall v Girard*[21] acknowledged the arguments for a '*standard 10 per cent*' discount, but also noted that Luntz referred to the discount being increased where the court considered the vicissitudes to be greater than normal and, in the circumstances of that case, she applied a 40 per cent discount.
- Similarly, in *McClintock v Trojan Workforce*,[22] Applegarth J acknowledged the result in *Waller v McGrath* but, in the particular circumstances of that case, applied a discount of 30 per cent.

The issue is not yet determined but, while McMeekin J wants guidance from the Court of Appeal, other judges appear prepared to accept a movement in the standard discount from 15 per cent towards 10 per cent, subject to the circumstances of the case. It seems likely that for most seriously injured child plaintiffs there will not yet have been time for circumstances to have arisen that would require a significantly higher discount, so 12 per cent may become the standard for children.

It is not uncommon for courts to make additional discounts by, for example, calculating the loss to age 60, rather than 65 or 67. Care should be taken to ensure that the plaintiff is not unfairly disadvantaged by such double discounting, unless there are particular grounds for doing so. ■

Notes: **1** (ACT SC, unreported, 8 October 1996). **2** [1982] 1 NSWLR 649. However, the report omits the passages of the judgments dealing with loss of earning capacity. The relevant unreported parts of the judgment are reproduced in *D'Ambrosio v De Souza Lima* (1985) 60 ACTR 18 at 21. **3** Obviously in pre-CLA times. **4** (1985) 60 ACTR 18. **5** [2007] QSC 228. **6** *Ibid.* **7** (2001) Aust Torts Reports 81-617; [2001] QSC 287; upheld on appeal: *Goode v Thompson* [2002] 2 Qd R 572; [2002] QCA 138. **8** *Hills v State of Queensland* [2006] QSC 244. **9** *Waller v McGrath & Suncorp Metway Insurance Limited* [2009] QSC 158. **10** See, for example, *Waller v McGrath* at [33]; *Hills v State of Queensland* at [110]. **11** See, for example, *Hills v State of Queensland* at [104]-[105]. **12** See note 9 above. **13** (1879) 5 CPD 280 (CA). **14** Professor Luntz, *Assessment of Damages for Personal Injuries and Death* (4th edn), 2002, Chapter 6, Section 4. **15** At [6.4.14]. **16** See note 5 above. **17** *Waller v Suncorp Metway Insurance Limited* [2010] 2 Qd R 560; (2010) 55 MVR 95. Special leave was refused by the High Court but principally on the issue of rates for care. **18** *Craddock v Anglo Coal (Moranbah North Management) Pty Ltd* [2010] QSC 133. **19** *Cameron v Foster & Anor* [2010] QSC 372. **20** *Strachan v McPhee & Ors* [2010] QSC 439. **21** *Marshall v Girard* [2010] QSC 454. **22** *McClintock v Trojan Workforce No. 4 Pty Ltd & Anor* [2011] QSC 216.

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