

Future Economic Loss

Notes from lunch-time presentation: 21 May 2013

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I. Introduction

1. The general principle, of course, is that where there is personal injury arising from negligence damages are compensatory. Damages are intended to compensate the plaintiff for the loss incurred, and any loss having a monetary value should be compensated with money (eg, *Skelton v Collins* (1966) 115 CLR 94 at 128-129). But, subject to the statutory cap: *Civil Liability Act 2003*, s 54.
2. Future economic loss is essentially shorthand for the damages payable to compensate for the financial impact of an impaired capacity to earn income. Damages are recoverable if:
 - (a) lost capacity (so, evidence of pre-injury capacity is a guide); and
 - (b) that loss of capacity is productive of economic loss (so, evidence of exercise of pre-injury capacity or pre-injury intention is a guide).
3. The earnings of a comparable employee (in terms of skills and life circumstances) may be particularly useful: eg, *Judge v RH Grey & Son Pty Ltd* [2012] QDC 33.
4. Comments on the burden of proof were made in *Rabay v Bristow* [2005] NSWCA 199 (at [73]):

“Compensation for loss of earning capacity is awarded because the diminution in an injured plaintiff’s earning capacity ‘is or may be productive of financial loss’ ... It is incumbent upon the plaintiff to prove the loss for which compensation is claimed ... but, conversely, it is not incumbent upon the injured plaintiff to prove what employment he or she ‘is not incapacitated from performing’. It is for a defendant which contends that the plaintiff has a residual earning capacity to adduce evidence of what the plaintiff is capable of doing and what jobs are open to such a person ...”
5. Expectation of working life is also an element in the assessment: *Arthur Robinson (Grafton) Pty Limited v Carter* (1968) 122 CLR 649 (at 658); *State of New South Wales v Moss* [2000] NSWCA 133; (2000) 54 NSWLR 536 (at [66]–[67]). That is, for how long would the lost capacity have been exercised if not for the injury?

II. Awards based on identifiable weekly loss

6. Where possible, an assessment of future economic loss should be calculated based on identifiable weekly loss of income. *McDonald v Moore* [2003] WASCA 21 is an example of a more straightforward calculation of future economic loss. The plaintiff was a general practitioner who sustained a head injury in a car accident. She was 37 years of age at the time of the accident, and 45 by the time of the final judgment. As a result of the accident, she suffered ongoing “expressive aphasia, fatigue, memory loss, poor concentration, reduced

verbal fluency and an impaired attention span”. The impact was that, although she continued to practice, she was only able to do so part-time (2.5 days per week).

7. The Court found that the plaintiff was earning about \$45,000 per annum but would have been earning about \$130,000 if able to practice full time. After allowing for tax, it was found that the plaintiff's income had been reduced by about \$800-\$900 per week because of the injury. This was calculated as a lump sum of about \$440,000 representing lost income over the next 15 years (ie, to an assumed retirement age of 60: at [86], [93]).

III. Global awards for future economic loss

8. Where calculations based on identifiable weekly loss of income are not possible, the Court may make global award based on stated assumptions and methodology: *Civil Liability Act 2003*, s 55; *Allianz Australia Insurance Limited v McCarthy* [2012] QCA 312.
9. In *Allianz Australia Insurance Limited v McCarthy* [2012] QCA 312, the trial judge awarded \$40,000 as a global sum for future economic loss. It was accepted that her Honour's assumptions were sufficiently stated, but not her methodology. What are some methodologies? Perhaps:
 - (a) A rough estimate of the percentage of time the plaintiff might be unemployed (or under-employed) because of the injury.
 - (b) A rough estimate of the amount of time the plaintiff might have to take off work because of the injury.
 - (c) Estimate a value for the lost opportunities.
 - (d) Work out what the full (or partial) economic loss would be as a present value, and use a percentage of that.
 - (e) Etc ...
10. The principle in *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 remains applicable: “the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability”. So, potentially, a small chance of a loss could result in damages of relative substance (especially where other heads of damage produce little or no recovery).
11. The discussion *Allianz Australia Insurance Limited v McCarthy* [2012] QCA 312 might be instructive when measuring the reasonableness of a global assessment (at [63]):

“Mr Williams QC, for the appellant, sought to demonstrate that \$40,000 was manifestly excessive by engaging in a notional “reverse engineering” exercise, deconstructing that sum. He contended that on the assumption that the respondent's loss commenced in 2017 (after completing her degree and training for high end rowing competitions) at an annual income of \$80,000 net (ignoring the three to five years experience mentioned in the report), if it be assumed that the respondent was deprived immediately of the whole of her earning capacity for the rest of her working life, the discounted sum (present value) using the tables for early receipt, but not contingencies, would be \$807,422. A global award of \$40,000 is just under (4.95) five per cent of the respondent's total potential loss of future earning capacity. Mr Williams suggested that would be about \$60 per week for the whole of the respondent's working life, or, approximately, one working day per month for the respondent's working life, or two and a half weeks per

year. Mr Williams posited that if the injury led to progressive arthritis and the loss occurred into the future, for example, in 15 or 20 years into an event management career at about the age of 45, \$40,000 would become 13.5 per cent of a total potential loss and amounted to 32.4 days off work every year from the age of 46 to retirement. This, the appellant contended, demonstrates plainly the error in a global award of \$40,000.”

IV. Self employed plaintiffs

12. Generally, where a plaintiff is self-employed a plaintiff's loss may be assessed by a reference to the cost of replacement labour during the period of incapacity. No fixed rule, though, and may need to consider losses such as being unable to undertake certain types of work (leading to losses) or being only able to undertake a reduced amount of work with replacement labour impracticable.

13. Note *NRMA Insurance Limited v Pham* [2013] NSWSC 468, where it was said (at [104]):

“Whilst damages are intended to compensate for impairment of earning capacity rather than strictly represent compensation for earnings, where a person has been self-employed it is normally appropriate to have regard to the pre-injury earnings which often reflect the vagaries of the industry and other factors that can operate, for better or for worse, upon the profit-making capacity of a business.”

14. An interesting example of a self-employed type situation is *Corkery & Kingfisher Bay Resort Village Pt Ltd* [2010] QSC 161. There, the Plaintiff slipped and fell down stairs whilst on holidays. His injury caused ongoing back and neck pain, and some sexual dysfunction.

15. The Plaintiff operated a geological and environmental consultancy company, and was described as a pre-eminent geological and environmental consultant. Post-injury, the Plaintiff continued to work for and receive income from his company. He was able to continue work in the environmental aspect of his company. His injury had no significant effect on his personal ability to earn income, and so no award was made for economic loss (see [79]).

16. However, as a result of his injury, the Plaintiff was unable to continue the geological aspect of the business because of the long trips, including driving over rough terrain. Whilst this did not affect his personal earning ability, it did affect the company. The company attempted to continue the geological work, but clients were only attracted to the Plaintiff's individual reputation. The company employed a qualified person to take over the geological work, but clients did not find this satisfactory.

17. The company had to discontinue the geological work. It had to refer geological clients elsewhere, which also caused some loss of possible flow-on environmental work. The company (as a plaintiff) claimed that the Plaintiff's inability to carry out the geological work which he previously performed resulted in its suffering loss. This was explained at [98]:

“This claim is based on economic loss said to result from the injuries suffered by Mr Corkery. Four components of the claim have been identified: loss resulting from the discontinuance of geological work; loss of other work which it is alleged would have followed from the undertaking of geological work (flow-on work); costs of engaging assistants for Mr Corkery; and losses suffered while Mr Corkery was unable to work. While some parts of the claim are relatively uncontentious, there are major differences between the parties about much of this claim.”

18. Although the company discontinued the geological consulting, the environmental aspect of the business grew and became increasingly successful. Nevertheless, the Court said at [108]:

“Despite this [ie, success in the environmental practice], RW Corkery claims loss related to the fact that it has had to discontinue geological work, as a result of Mr Corkery’s injury. Its case, in essence, is that it has demonstrated that so far as environmental work is concerned, environmental consultants can be employed to perform work which the company is able to attract; whereas for geological work, that has not been so. The result is that the geological work has been lost; whereas if Mr Corkery had not been injured, he could have continued to do that work, and the environmental work which he now does in place of the geological work, could have been performed by an employed environmental consultant.”

19. The company's claim was largely accepted. The Court awarded (for future economic loss):
- (a) \$240,000 for future loss of geological work that Plaintiff could no longer do (and which the Company therefore lost), assessed by reference to accounting evidence.
 - (b) \$30,000 global award for likely loss of “flow on” work from not securing the geological work.
 - (c) \$15,000 for the cost of employing somebody to assist the Plaintiff in the environmental work because of his reduced capacity.

V. Some general case examples for discussion

1. *Judge v RH Grey & Son Pty Ltd* [2012] QDC 33
2. *Wilmink v Pinkerton Investments Pty Ltd* [2012] QDC 394
3. *WAQ v Di Pino* [2012] QCA 283
4. *Clifton & Ors v Lewis* [2012] NSWCA 229

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Case One

- Snapshot: 26 year-old male. Qualified as a plumber. From Ireland, but working at farm in Australian on working visa.
- Injury: Toes of right foot crushed by machine, 4 toes ultimately amputated. (7-8% WPI.)
- Post-injury: Stayed in Australia. Took up work as a plumber, including overtime.
- Findings: Will be able to continue with light plumbing work, but such work may not always be available. Will be unlikely to continue with overtime, because it is becoming increasingly exhausting.

Future economic loss?

- A Global award of \$160,000
- B Award of \$160,000 calculated by reference to loss of likely overtime.
- C Award of \$360,000 calculated by reference to loss of likely overtime.

Case Two

- Snapshot: 27 year-old male. Experienced worker at a turf farm.
- Injury: Compound fracture of his left tibia and fibula.
- Post-injury: After previous employer sold the business, he took up employment at another turf farm. Worked initially as technician, then took up position of farm manager.
- Findings: Post-injury income as farm manager was higher than pre-injury income. Without injury, he would have had success as employee in the industry or through owning his own farm. Injury caused him to be less efficient. Was able to hold down higher paying job because of his “general stoic nature, knowledge of turf farming and hard work”.

Future economic loss?

- A Global award of \$30,000
- B Global award of \$230,000
- C Global award of \$430,000

Case Three

- Snapshot: 15 year-old female (23 years old at trial). Was working part-time at hairdresser.
- Injury: Chronic PTSD, with residual symptomatology.
- Post-injury: Worked in her mother's hairdressing salon; became qualified hairdresser. Later had a baby and became “stay at home” mum.
- Findings: Plaintiff had aspirations of joining the police or the army, but even apart from the injury she had struggled with her education. The “plaintiff would not have been a particularly marketable employee anyway, but the range of jobs open to her and her ability to obtain and hold suitable employment would have been greater had it not been for the psychological consequences of the defendant’s assaults”. Conclusion that “at times she would have been a stay-at-home mother, and other times she would have worked, either full-time or part-time, as a hairdresser”.

Future economic loss?

- A Global award of \$80,000
- B Global award of \$180,000
- C Global award of \$280,000

Case Four

- Snapshot: 33 year-old male plaintiff. Hew as king hit at a hotel, fell to the ground, and was then kicked in the leg and ribs. Was an amateur boxer and working in quarry industry earning \$69,000 gross.
- Injury: Injury to common peroneal nerve to right leg, with chronic pain between knee and ankle.
- Post-injury: He remained in employment, although changed employers, and by the time of trial was earning \$125,000 gross.
- Findings: Plaintiff's aspirations of becoming a professional boxer were only a dream; no economic loss. He had minimal time off work, but occasions where he arrived late or left early because of pain. He had trouble at work, particularly driving or operating machinery for any length of time. In his work, he had ambitions of becoming an Operations Manager. He though he could to that work, but it involved much more driving.

Future economic loss?

- A Global award of \$20,000
- B Global award of \$70,000
- C Global award of \$120,000