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Personal Injury Scaffold

Introductory Paragraph

- Compensation principle places the plaintiff in the same position he or she would have been in but for the tort/injury
- Damages should be adjusted/reduced for remoteness, failure to mitigate, contributory negligence
- Future economic loss is assessed at date of trial and pre-trial losses are assessed in historic amounts

Loss of Earning Capacity

Introduction:

- Compensation lost “capacity” to earn not lost earnings (*Medlin v SGIC*)

Elements (*Medlin v SGIC*) → Entitlement to Damages

1. Capacity to earn has been totally or partially diminished or lost because of the injury
2. Loss of capacity has been and/or will be, productive of financial loss

Assessment of Damages

- Pre-injury earning capacity → capacity to earn if injury had not occurred (*Sharman v Evans*)
 - Compensated for loss of earning capacity until retirement age (65)
 - Pre-injury earning capacity capped at 3 times average weekly earnings (s12 CLA)
 - Minimum employer superannuation contributions added to loss of earnings (s15C)
 - Interest would also be awarded (s18(2))
- Lost years → compensation for loss of earning capacity for the lost years (*Sharman v Evans*)
 - “Years by which her life expectancy has been shortened, at least to the extent that they are years when she would otherwise have been earning income”
 - E.g. Injured at 50, total loss of earning capacity, without the injury could have worked to 65 but b/c of injury stopped work at 50, expected to die at 60 so lost years is loss of earning capacity b/w 60 and 65

- Deductions
 - Residual earning capacity (**Medlin v SGIC**) → deduction if the pl has partial earning capacity (only if relevant)
 - Can claim costs of retraining for alternate employment
 - Costs necessarily incurred in realising earning capacity e.g. travelling to and from work (**Sharman v Evans**)
- Not deducted
 - Living expenses not deducted unless pl has been institutionalized and there is double recovery (**Sharman v Evans**)
 - Living expenses deducted in lost years

Contingencies

- In the absence of evidence, damages reduced by **15% in NSW (Wynn)** as the law assumes that pl would have retired early rather than worked past retirement age
 - However, where P is close to retirement age and in good health, then less likely reduce damages for contingencies
 - **Negative contingencies**= prior injuries (**Malec**-unrelated, **Wynn**- related)
 - **Positive contingencies**= intention to work after retirement, promotions (**Wynn**)
- Alternatively, court may increase damages for positive contingencies (**Norris v Blake**)
- If assessing future loss, **s 13** requires any award to accord to her most likely future circumstances but for the injury
 - Possible need for more evidence may arise
- Courts will assess the significance of contingencies to determine the appropriate percentage reduction

Gratuitous Care

- Recovery for medical care is based on reasonable needs rather than actual expenditure (**Griffiths v Kerkemeyer**)
 - There must be a reasonable need for assistance (**s 15(2)(a); Griffiths v Kerkemeyer**)
 - The need for assistance must have arisen 'solely' from the injury (**s15(2)(b)**)

- No damages if assistance would have been provided anyway (**s15(2)(c)**)
- Therefore, courts may award damages for gratuitous care so P has the right to dispense with gratuitous care and replace it with paid care at any time (**Griffiths v Kerkemeyer**)
- No damages unless assistance required for (a) at least 6 hours a week AND (b) for at least 6 consecutive months (**s15 (3); Hill v Forrester**)
 - Must be for 6 consecutive months
- Damages only paid for up to 40 hours a week (**s15(4)**), max hourly rate= 1/40 of a.w.e. (**s15(5)**)

Loss of Domestic Capacity (s15B)

- Damages are recoverable for loss of domestic capacity to care for dependants who are physically or mentally incapable of caring for themselves (**s15B(2)(b)**)
 - Recipient of domestic care must be a dependant as per the definition (**s15B(1)**)
 - Claimant must have been providing the services before the injury (**s15B(2)(a)**)
 - 6 hour/6 month threshold must be satisfied (**s15B(c)(i)(ii); Hill v Forrester** for statutory interpretation)
 - The need for the services for those time periods must be reasonable (**s15B(2)(d)**)
- Limits in **s15(5)** apply → Damages only paid for up to 40 hours a week (s15(4)), max hourly rate= 1/40 of a.w.e. (**s15B(4)**)
- No interest is awarded for loss of domestic capacity (**s18(1)(c)**)
- An award for damages for future economic loss i.e. loss of domestic capacity is discounted to the present value of that future economic loss (**s 14**).
- There does not appear to be any double recovery of damages under **ss 15 & 15B (s 15B(10))**

Damages for Personal Injury

There are five broad types of damages:

1. Nominal (PI proves the wrong but fails to establish a claim for any other type of damages)
 - Only for common law wrongs actionable per se (e.g. trespass and breach of contract);
2. Compensatory (reflects the plaintiff's proven injury, incl. aggravated damages)
3. Restitutionary or gain-based
4. Lord Cairns' Act damages → separate from injunction or specific performance;
5. Exemplary or punitive (as punishment/deterrence).

Compensatory Damages

Summary → 2-step process

- Compensation → Is P worse off than he/she would have been if the wrong had not been committed? (“but for” causation)
 - **Cattanach v Melchior** (2003) HCA, **Harriton v Stephens** (2006) HCA
 - Principles for measuring loss depend mainly on nature of injury
- Limiting devices → Should damages be adjusted for intervening causes, remoteness, failure to mitigate & contributory negligence?
 - Contributory negligence important in personal injury, often the difference between a reasonable and an unreasonable offer
 - Reasonable settlement offer is at least what the court gives you in damage → rejecting reasonable settlement offer may result in loss of interest or an order to pay costs

Compensatory Damages – Personal Injury

- Compensation principle applies to personal injury even if it is impossible to restore pl to pre- injury position
- Does not distinguish between causes of action (equally applicable to personal injury arising in tort, contract, statute or otherwise)
- But may distinguish between where/how injury occurred (eg work accident, motor accident, defective product)

Heads of Damage

- Law says best way of assessing loss is to measure effect on P's
 - **1. Capacity to earn** (economic)
 - **2. Capacity to enjoy life** (non-economic)
 - **3. Costs of managing injury** (economic)
- General Principles on Damages
 - Assessed at **date of trial**
 - Costs of medical examinations/finding/procedures have already been paid and are not hypothetical (assessed in historical values)
 - No longer rule of assessment at date of injury
 - Provides greater certainty
 - Non-economic loss assessed in trial-date values
 - Pre-trial economic losses assessed in historic amounts (what you paid at the time), and interest may be added if P out of pocket
 - For each 6 month period → interest rate is 4% above last published cash rate
 - For personal injury damages → interest rate is lower – 10 year benchmark bond rate **CLA s 18**
 - Future economic losses assessed in trial-date values and present value of this is awarded, **CLA s 14**
 - Court considers inflation, that the money can be invested before needing to pay future economic losses → damages received discounted so the amount that they will eventually need does not include interest

Loss of Earning Capacity

- Compensated for lost “capacity” to earn, not lost earnings **Arthur Robinson (Grafton) P/L v Carter**
 - Applies even to students who have not entered the workforce yet
- Remoteness is never an issue
- Must prove (**Medlin v SGIC**)
 1. Capacity to earn has been diminished or lost **because** of the injury

2. Loss of capacity has been and/or will be, **productive of financial loss**
 - E.g. 80yo person injured by a bus will not likely get compensation for loss of earning capacity

Pre-Injury Earning Capacity

- If *CLA* applies, pre-injury gross earnings in excess of 3 times average weekly earnings disregarded, and tax payable is deducted (**s12 CLA**)
 - If post-injury earnings exceed this statutory maximum, no damages will be recoverable (*Tuohey v Freemasons Hospital*)
 - Court deducts the tax payable on earnings but interest may be added (**s18 CLA**)

Sharman v Evans

Facts: Woman rendered quadriplegic and epileptic

- Prior to injury she was earning \$70 a week but would have stopped working soon after to marry

Held:

- 'Expedient solution' equated financial security of marriage with earning capacity
- Then assumed that she would have kept working until retiring age and awarded damages accordingly

- Costs necessarily incurred in realising earning capacity deducted (eg travel expenses to and from work, *Sharman v Evans* (1976) HCA), which are "saved" by the injury
 - But not child care (i.e. not necessary) *Wynn v NSW Insurance* (1995) HCA)
- Living expenses not deducted (except in "lost years" – period by which injury reduced P's life expectancy)
 - Unless double recovery, *Sharman* → pl needed to be cared for in an institution for the rest of her life, payment for the institution would cover food and accommodation so no extra amount for food/accommodation
- Damages are awarded for loss of earning capacity for the "lost years" *Sharman*
 - Assessed on the basis of total incapacity for lost years (even for residual capacity cases)