

Damages for personal injury (Tort and Contract)

Introduction

- In the case of personal injury and death, damages are assessed the same way whether the action arises in negligence or an intentional tort, from a breach of contract or under statute
- **CLA Part 2** restriction on damages applies to all actions (**s 3B** sets out exclusions from Act)
- **Two rules governing the assessment of future economic losses :**
 - All future losses are assessed in trial date values
 - E.g. if P's earning capacity is destroyed, the award for future loss of earnings is based on what P, if not injured, would have been earning at the date of the trial
 - Because P is getting damages now, for losses that will not accrue or be realised for some time, future economic loss damages are discounted to their "present value"
 - 5% under legislation, 3% at common law
 - Actuarial tables used to calculate

Recognised heads of damages

- Loss of earning capacity
- Medical and related needs; and
- Loss of parenting or domestic capacity
- Non-economic loss
 - Pain and suffering
 - Loss of amenities or enjoyment of life
 - Loss of expectation of life
 - Disfigurement

Causation (concerned with type of loss)

- Common law test of causation re-stated for the torts in **March v E & MH Stramare Pty Ltd (1991) 171 CLR 506** – 'but for' test to determine factual causation
 - **CLA s 5D(1)** governing causation apply only to actions arising from negligence, where the Act otherwise applies, so the common law of causation remains applicable in other cases (legal causation + policy considerations)

Remoteness (concerned with type of loss)

- **Intentional torts and defamation** - Any harm actually intended by the D is never too remote **Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 208 CLR 388**
 - 'direct consequences test'
- **Negligence and nuisance** – test of reasonable foreseeability **Wagon Mound (No 2)**, precise manner in which injury occurred need not be foreseeable **Chapman v Hearse (1961)**

Standing

- Case can be brought or continued by or against estate of the deceased party **LRMPA 1994 (NSW) s 2(1)**

- However, where estate is bringing the action (whether or not the death resulted from the wrong), the estate cannot recover **LRMPA 1994 s 2(2)(a)(i), (ii)**
 - Exemplary damages
 - Damages for loss of earning capacity after the time of death

Loss of earning capacity

- **P must prove** **Medlin v SGIC (1995) 182 CLR 1**
 - His **capacity** to earn has been diminished or lost because of injury; and (“lost capacity” not “lost earnings”, therefore, non-realised potential compensable)
 - That loss of capacity has been, and/or will be, productive of financial loss (so that a plaintiff who has permanently retired from the workforce cannot recover)
- **Once the plaintiff’s pre-injury earning capacity is determined, the court then considers the plaintiff’s residual earning capacity, which is deducted**
 - Once the plaintiff establishes that his pre-injury earning capacity has been lost, the existence of a residual earning capacity will be asserted by the defendant who will then be required to adduce evidence to prove it **Woodhead v Barrow [1993] Aus Torts Reports 81-238**
- If injury contributed materially to decision to retire (causation), questions of mitigation and reasonableness do not therefore arise
- **CLA s 12** (Part 2) – **any pre-injury earnings in excess of 3x a.w.e. is disregarded**
 - So if P’s pre-injury earnings exceed statutory maximum, no damages will be recoverable
- Also reduced by contingencies (see below)

Sharman v Evans

- Facts
 - 20 y/o secretary and bible studies student, was rendered quadriplegic and epileptic. At time of injury she had been earning 70 a week and spending every cent. But for the accident, she would soon have permanently ceased her working life to marry, and would have been financially secure. Accident destroyed both her capacity to earn and prospects of marriage
- Finding
 - Court took expedient solution of equating, for the purposes of pre-injury earning capacity → the financial security of marriage **with** earning capacity, and then assuming that she would have worked to retirement age without marrying

Lost years

- Where P’s life expectancy is reduced by injury (non-economic), “lost years” are the period (if any) by which the P’s working life expectancy is reduced. Damages for loss of earning capacity are awarded for the “lost years” but:
- Any expenses P would have incurred in self-maintenance are deducted **Skelton v Collins (1966) 115 CLR 94**
- Always assessed on total incapacity (no residual earning capacity)

Medical and related expenses

- No max or min recovery is imposed by legislation, but like other economic losses, future expenditure is reduced to its present value **CLA s 14** (Part 2)
- Reduced by contingencies, where the wrong accelerates a medical condition that may have occurred sooner or later in any event **Malec v JC Hutton Pty Ltd** (see below)

Sharman v Evans

- See above for facts
- Plaintiff also sought damages for the cost of being cared at home, including modifications to the home and a live-in carer
- Institutionalisation (about \$130,000) or home care including house modifications (\$400,000)?
 - Institutionalisation awarded, plus \$20,000 for excursions
 - “The touchstone of reasonableness ... is cost matched against health benefits ... The present ... is a case of alternatives in which the difference in relative costs is great whereas the benefit to the plaintiff of the more expensive alternative is entirely [on the evidence given] one of amenity, in no way involving physical or mental well-being”

Gratuitous attendant care services

- Where needs met without cost, services provided gratuitously by friends or relatives, economic damages, **Griffiths v Kerkemeyer (1977)** HCA awarded economic damages
- Damages are assessed by reference to the market value of the services required, and not by reference to the cost to the carer **Van Gervan v Fenton (1992) 175 CLR 327**
 - This damage recoverable even where the defendant is the care provider **Kars v Kars (1996) 187 CLR 354**
 - The fact that services are being provided gratuitously up until the trial does not prevent an award for the future based on the commercial cost where the voluntary care may cease after trial **Allianz Australia Insurance v Kerr (2012) 83 NSWLR 302**
- Governed by **s 15 CLA** (Part 2)
 - must be “reasonable” need for assistance
 - need must have arisen “solely” from injury
 - no damages if assistance would have been provided anyway
 - no damages unless assistance required for more than 6 hours a week and for more than 6 consecutive months
 - Where a plaintiff satisfies the six month duration requirement contained in s 15(3)(b) of the CLA he or she is entitled to recover damages for gratuitous care provided during earlier broken periods of less than six months in duration as long as services during those periods were provided for at least six hours per week **Hill v Forrester (2010)**
 - I.e. the 6 month requirement only need to be satisfied one, whereas the six hour a week requirement needs to be satisfied every week
 - damages subject to maximum hourly rate 1/40 AWE, and weekly maximum of 40 hours
 - no interest: **s 18**

Loss of parenting or domestic capacity

- Governed by **s 15B**
 - No non-economic damages (e.g. loss of amenities) for lost capacity to provide services to defined dependents (defined in s 15B)
 - **Economic damages only available to dependents physically or mentally incapable of caring for themselves**
 - must be “reasonable” need for assistance
 - need must have arisen “solely” from injury
 - no damages if assistance would have been provided anyway
 - no damages unless assistance required for more than 6 hours a week and for more than 6 consecutive months
 - damages subject to maximum hourly rate 1/40 AWE, and weekly maximum of 40 hours
 - no interest: **s 18**

Non-economic loss

- Defined in **CLA s 3** as including:
 - physical pain and suffering (subjective)
 - loss of amenities of life (ability to engage in pleasurable activities, essentially subjective)
 - loss of expectation of life (where life expectancy shortened by injury)
 - disfigurement
- Governed by **CLA s 16** (Part 2)
 - statutory maximum (currently \$594,000) awarded only in “a most extreme case”
 - court assesses plaintiff’s total non-economic loss as percentage of “a most extreme case”
 - if less than 15%, award is zero **CLA s 16(1)**
 - if 33% or more, that percentage of maximum awarded **CLA s 16(3)**
 - if between 15% and 32%, damages increase from 1% to 30% of maximum **CLA s 16(3)**
 - no interest: **s 18**
- Non-economic damages may be reduced for contingencies in the appropriate case **Malec v Hutton** (see below)

Other losses

- Damages for losses falling outside usual heads of damage will generally depend on remoteness
 - E.g.
 - costs of mitigation, e.g. travel to medical treatment
 - costs of retraining for new career, interest on student loan
- Aggravated and exemplary damages
 - abolished along with exemplary damages for personal injury actions based on negligence **CLA s 21** (subject to **s 3B** exclusions)
 - However, still available in a case of intentional torts

Contingencies (reduction on damages)

Malec v JC Hutton Pty Ltd (1990) 169 CLR 638

- Facts
 - P had degenerative spine which was likely, sooner or later, to have rendered him unemployable, which in turn, may or may not have caused a psychiatric illness.
 - P had contracted an industrial disease due to his employer's negligence, which led to a permanently disabling psychiatric
- Finding
 - Court held that although the possibility of unrelated injury (degenerative spine) may have eventuated before trial, it could not be determined as a "past fact" and should therefore be treated as a contingency affecting not only loss of earnings, but, in this case, also medical expenses and non-economic loss
 - i.e. for future losses, you can't predict the future, don't use "more probably" or "less probable", use a 1-99% scale (this might assist in adjusting reduction for contingencies)
- Principle
 - In NSW, general practice is to start with a 15% reduction in damages for contingencies
 - Then adjust % up or down according to evidence in a particular case (weigh up positives and negatives)
 - Award is usually reduced (i.e. more discount), because negative contingencies tend to outweigh the positives
 - If a short period is involved (where P close to retiring age at trial and in good health, it may be that no deduction will be made)

Wynn v NSW Insurance Ministerial Corp (1995) 184 CLR 485

- Facts
 - Female executive aged 30
 - negatives – prior back injury, intention to start family
 - positives – very good prospects of promotion
- Finding
 - Trial Judge (5% reduction)
 - failed to reflect negatives
 - NSWCA (28% reduction)
 - based on generalisations, not on evidence
 - she hasn't had kids yet, when she had kids, she might have decided to stay at home
 - HCA (12.5% reduction)

Norris v Blake (No 2)

- Facts
 - Actor case, had a chance of being a superstar in Hollywood
- Finding
 - Positive far outweighed negative, award given actually increased

Collateral benefits

- Gifts, acts of charity or benevolence, are conferred with intention of benefitting P, not D, so not deducted, **Zheng v Cai (2009) HCA**
- First party insurance and personal pension plans not deducted, otherwise D would get benefit of premiums paid/contributions made by P
- Benefits similar to wages (e.g. sick, annual, long service leave) are deducted