

Damages for personal injury

Loss of Earning Capacity (ss 12, 13, 15C, 18)

- Damages are awarded for loss of the capacity to earn, rather than for loss of earnings as such, to the extent that the capacity would have been exercised but for the injury, ie to the extent that the loss of capacity is productive of financial loss (*Arthur Robinson (Grafton), Medlin v SGIC*)
- The loss of earning is [...] months, although affected by any payments in the nature of wages including [paid - sick, annual, long service – leave] which will be deducted from the award (*Paff v Speed* (1961)).
 - o Would not be compensated for the loss of sick leave credits as these are not transferable from one employment to another and are not paid out on termination of employment
 - o However, unused annual and long service leave credits are paid out on termination so could claim compensation for the annual and long service leave taken
 - o If *would* have taken the leave for a holiday, can claim non-economic loss for the loss of enjoyment she *could* have taken (*McCreary v Whitney*)
- voluntary payments, gifts and similar acts of charity and benevolence are ignored (intention is to benefit the plaintiff not punish the defendant)
- private insurance payments and pensions are also ignored because the plaintiff has purchased the payment through premiums or personal contributions (*National Insurance Co of New Zealand v Espagne; Zheng v Cai*)
- The benefit of [...] must be repaid out of the damages award, they are not to be a deduction.
 - statutory benefits in the form of workers compensation (*Workers Compensation Act 1987* (NSW), s 151A)
 - victims compensation (*Victims Support and Rehabilitation Act 1996* (NSW), s 43)
 - Medicare (*Health and Other Services (Compensation) Act 1995* (Cth))
 - Social security benefits (*Social Security Act 1991* (Cth), Part 3.14).
- If the plaintiff's earning potential is unknown, or his/her pre-injury work history does not enable court to determine pre-injury earning capacity, a "broad-brush" or "buffer" approach adopted (eg *State of NSW v Zerafa*)
- If the injuries contributed materially to the decision to retire (issue of causation), can claim damages on post-retirement loss of earnings (*Medlin v State Government Insurance Commission*)
- Under the *Civil Liability Act 2002* (NSW) any pre-injury earnings in excess of 3 times average weekly earnings is disregarded (s 12)
- Tax paid by the individual would be deducted from this
 - o (there have not been any cases decided on this point yet, but assume it would be that tax that would be payable on 3 times weekly earnings rather than the tax actually paid.

1. EXAMPLE ESSAY ON THE MEANING OF “IN TRADE AND COMMERCE” IN S18 ACL

Section 18 of the ACL (previously s52 TPA)

Misleading or Deceptive Conduct

- (1) A person must not in, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Introduction

- Section 18 of the *Australian Consumer Law* (ACL) states that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- In order to apply this section, it must be established what is meant by the term “in trade or commerce”.
- The courts have been consistently applied a narrow construction, focussing on the whether the conduct that was engaged in by a person was “in trade or commerce”.
- However, as the cases below demonstrate, each situation must be assessed in light of its facts and circumstances to determine whether the conduct is in trade or commerce.

Nelson v Concrete Constructions (1990) CLR 594

- In this case it was found that when an employer directs an employee to do something, this conduct is not “in trade or commerce”.
- Nelson was directed by the foreman of his employer to remove air conditioning grates, which had been secured by certain bolts. It was alleged by Nelson that this statement was untrue and as a result of relying on this, he fell down a shaft and injured himself.
- While the majority of the High Court (Mason CJ, Deane, Dawson and Gaudron JJ) considered both a broad and narrow approach, they favoured the narrow approach noting among other things that:
 - The phrase “in” trade or commerce has a restrictive operation and prohibits engaging in conduct of a specified kind;
 - It should be restricted to conduct “towards persons.....with whom it has or may have dealings in the course of those activities or transactions which of their nature bear a trading or commercial character”; and
 - The phrase should be interpreted in the context of the whole of the legislation which lends itself to a narrower interpretation
- The focus is on the conduct, not on the person being sued.
- It is clear that the conduct required needs to be commercial in nature; the act excludes conduct incidental to trade and commerce, such as just carrying out the normal duties of employment.
- To extend s 18 to all conduct, regardless of its nature, would open the floodgates allowing actions that are not within the plain meaning of the section.