JAMES GOUDKAMP, NSW

Favouring the more seriously injured plaintiff

INTRODUCTION

The common law principles governing the assessment of damages for personal injury and death in Australia are gradually being eroded by statutory compensation schemes. The driving factor behind this erosion is a perception that the level of compensation presently awarded under the common law is unacceptably high.[1] It is thought that a statutory reduction in awards will counteract, or at least check, the massive rises[2] in the cost of securing a contract for third-party personal injury and death insurance which have occurred over the last decade.[3]

Nevertheless, it is an oft-stated governmental policy that the more seriously injured should not have their rights to compensation diminished to the same extent – if at all – as the rights of the less seriously injured. In other words, when assessing damages, the more seriously injured ought to be afforded more favourable treatment. For instance, in the second reading speech of the *Motor Accidents Compensation Bill* 1999 (NSW) the Hon. John Della Bosca stated:

'This Government has accepted the challenge to introduce cheaper [third-party personal injury and death motor vehicle accident insurance]. *It has chosen to do so in a way ... that causes the least impact upon compensation paid to [injured people], particularly those who suffer serious and catastrophic injuries.*[4]

While a significant proportion of the savings in ... premiums will be achieved through changes to the system of claims handling and a reduction in legal expenses and insurers' profits, it has also been necessary to restore balance to compensation payments. *The bill keeps the changes to the benefits structure to a minimum and retains a very strong emphasis upon ensuring that compensation is directed primarily to those who have suffered permanent and severe injuries.*'[5]

In many respects, the majority of statutory schemes succeed in implementing this policy. This is generally accomplished by limiting the damages available to the less seriously injured through the scaling of general damages and the imposition of arbitrary thresholds. However, most schemes undermine this policy in at least three significant ways: by increasing the common law discount rate applied to damages for future-pecuniary loss, by imposing caps on heads of damage, and by limiting the availability of pre-judgment interest. It is with these derogations from the policy of favouring the more seriously injured with which this article is concerned.

James Goudkamp is a Law Clerk at Stacks the Law Firm
PHONE 02 4298 1144 **EMAIL** jg45@uow.edu.au

THE RATIONALE

The overarching axiom of the assessment of damages at common law is the compensation principle. Pursuant to this principle, the quantum of damages should be such as to restore the plaintiff, so far as money is capable of doing so, to the position that he or she would have occupied but for the defendant's tort.[6] This principle *prima facie* asserts that damages should always be equivalent to the loss.[7]

It is self-evident that the policy of favouring the more seriously injured strikes at the heart of the compensation principle. This policy advocates the skewing of damages awards so that damages received by the more seriously injured are relatively more generous. It is submitted that this policy is both conceptually sound and constitutes an improvement upon the common law system of assessing damages. In comparison to the less seriously injured, the more seriously injured have substantially greater needs. For example, the more seriously injured typically require more frequent and more expensive medical treatment. Such individuals are also far more reliant on others for assistance with their day-to-day activities. Furthermore, there is undoubtedly a strong inverse relationship between the degree of disability and the ability to generate income. In this connection, one commentator has observed:

'It is plain that long-term disability and chronic sickness raise ... problems for the victim ... which are different in kind from those raised by short-term sickness or minor injuries. Many (but by no means all) [individuals] can weather a short period of lost or reduced income without great hardship. Savings can be used; borrowing can be relied on; payment of bills deferred; expenditure can be cut down for short periods. ... But long-term or permanent income loss or reduction, ... [is] far more serious.'[8]

HOW IS THE POLICY PRESENTLY SUBVERTED?

Discounting for future pecuniary losses

Future pecuniary losses are losses that are readily reducible to a dollar value that will be incurred as a result of the negligence of the defendant. In order to prevent over-compensation, any damages awarded to compensate for such losses need to be adjusted to take account of the fact that the damages are being awarded at the time of the judgment rather than as the losses occur. Essentially, the present value of the future losses must be estimated.[9] This requires a balancing of several factors. On one hand, the plaintiff has the capacity to invest and earn interest on the portion of the award that pertains to future pecuniary losses before those losses will be sustained. This is a reason for making a negative adjustment. On the other hand, there are several reasons for making positive adjustments, such as the effect of inflation, the costs of earning the interest (such as taxation)[10], and a future rise in the cost of goods and services.

In order to obviate the need to adduce expert evidence at each trial and to make awards more predictable, the High Court held, in its conjoined decisions in *Todorovic v Waller*; *Jetson v Hankin*,[11] that damages awarded to compensate for future pecuniary losses are appropriately adjusted if they are discounted at the rate of 3%. However, following this decision, all state legislatures and that of the Northern Territory increased this rate. In New South Wales the discount rate is set at 5% in motor vehicle, workplace accident, health care, and public liability cases. In the Northern Territory and South Australia a discount rate of 6% has been adopted in motor vehicle cases. In Victoria, the discount rate is set at 6% in transport and workplace accident cases. In Queensland, Tasmania, and Western Australia the discount rate has been increased to 5%, 7% and 6% respectively in all cases.

It is submitted that these statutory increases were effected, not as a result of a belief that a rate of 3% led to the overcompensation of injured persons, but because raising the discount rate is an easy and effective means of reducing the amount of money which insurers (and ultimately, the insured) will be required to pay.

Increases in the rate of discount have little effect on future losses temporally proximate to the date of the judgment, but have an enormous impact on the present value of temporally distant future losses. For example, the present value of $100,000 in one year's time at a rate of 3%, 5%, and 7% is $97,087, $95,238 and $93,458 respectively. However, the present value of $100,000 in 30 year's time is $41,199, $23,138 and $13,137 respectively. The more seriously injured are therefore 'disastrously'[12] effected by any increase because these individuals are far more likely to incur substantial future pecuniary losses and to incur such losses for an extended period of time. Increasing the discount rate is diametrically opposed to the policy of favouring the more seriously injured.[13]

The imposition of caps on heads of damage

Arbitrary caps on certain heads of damage have been imposed in particular types of cases in all jurisdictions other than the Australian Capital Territory. By their very nature, such caps defy the policy of favouring the more seriously injured. This is particularly so in relation to caps on heads of damage, such as *Griffiths v Kerkemeyer*[14] damages, under which the more seriously injured are likely to sustain significantly greater losses than the less seriously injured.

Pre-judgment interest

Pre-judgment interest is interest on damages awarded in respect of losses sustained between the date of the injury and the date of the judgment. Such past losses typically include both non-pecuniary losses such as pain and suffering, and pecuniary losses such as past out-of-pocket expenses. The primary justification for the award of pre-judgment interest is that such an award is an 'integral and essential'[15] aspect of the compensation principle.[16] A defendant who, by his or her tort, causes loss to an injured person, does not pay any damages until the date of the judgment. This forces the injured person to effectively make a loan to the defendant for the amount of his or her loss during this period.[17] An award of pre-judgment interest is therefore necessary to compensate the injured person for being kept out of the use of this money.[18]

Courts in all jurisdictions other than Tasmania are vested with the power to award pre-judgment interest. However, in recent years, this power has been circumscribed in a variety of ways in the personal injury context. In New South Wales, pre-judgment interest may not be awarded on damages for non-pecuniary losses or *Griffiths v Kerkemeyer*[19] damages. Pre-judgment interest is not available on damages for non-pecuniary losses to which the *Civil Liability Act* 2002 (NSW) applies. Pre-judgment interest on non-pecuniary loss has been abolished in all cases in South Australia[20] and Western Australia.[21] In Victoria, pre-judgment interest is not available on damages for non-pecuniary loss in motor vehicle[22] or workplace accident[23] cases. At present, pre-judgment interest is available on all heads of damage in Queensland and the Australian Capital Territory.

Unfortunately, all of these restrictions on the availability of pre-judgment interest impinge to a greater degree on damages awarded to the more seriously injured than on damages awarded to the less seriously injured. The reason for this is that it generally takes longer to resolve the claims of more seriously injured individuals. Assessing the loss of severely injured persons is a drawn-out process because these individuals will inevitably incur loss in the distant future which is difficult to quantify.

CONCLUSION

Public attitudes towards tort law and the role which it plays in distributing losses throughout society and deterring negligent behaviour have undergone a radical change. Tort law has become unfashionable[24], and is presently the subject of much public debate. A demonstrable change has also occurred in the minds of judges as to the cognisance which should be taken of the economic and social ramifications of their decisions.[25]

Governments, in their haste to respond to these changes, have implemented piecemeal statutory reforms. Unfortunately, the aspects of these reforms which have been the subject of this article have been so poorly planned that they have not only managed to fail to implement the policy of favouring the more seriously injured, but they have positively subverted it. PL

Footnotes:

1 Negligence Review Panel, (2002), *Final Report on the Review of the Law of Negligence*, p. 26; H Coonan, 'Minister Welcomes Final Negligence Review Report', *Press Release*, 2 October 2002.

2 *Risk and Opportunity*, Thomson Legal & Regulatory, Canberra, p. 51.

3 See, for example, Spigelman, J.J., (2002), 'Negligence: The Last Outpost of the Welfare State', 76 *ALJ* 432 at pp.434-435 and p.440.

4 NSW Parliamentary Hansard, Legislative Council, 3 June 1999, p. 902 (emphasis added).

5 ibid., pp. 904-905 (emphasis added).

6 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn (HL); *Butler v Egg & Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191 per Taylor and Owen JJ.

7 Tilbury, M.J., (1990), *Civil Remedies: Volume 1 – Principles of Civil Remedies*, Butterworths, Sydney, p. 53.

8 Cane, P., (1999), *Atiyah's Accidents, Compensation and the Law*, (6th ed.), Butterworths, Sydney, p. 19.

9 Sieper, E., (1990), 'The Choice of Discount Rate in the Assessment of Damages', 17 *MULR* 614 at p. 615.

10 Although note that if the *Taxation Amendment (Structured Settlements) Bill* 2002 (Cth) is passed monies received under eligible structured settlements will be tax-free.

11 (1981) 150 CLR 402.

12 Law Council of Australia, (2002), Submission to the Negligence Review Panel, p. 137.

13 Luntz, H., (2002), *Assessment of Damages for Personal Injury and Death* (4th ed.), Butterworths, Sydney, pp.413-417; Mullany, N., (2002), 'New Tort Reform Agenda: Same Old Myths', 40(6) LSJ 52 at p. 53. This situation was recognised by the Negligence Review Panel, (2002), above n1, pp. 209-210.

14 (1977) 139 CLR 161.

15 *Whitaker v Federal Commissioner of Taxation* (1998) 153 ALR 334 at 335 per Black CJ.

16 *Haines v Bendall* (1991) 172 CLR 60 at 66-67 per Mason CJ, Dawson, Toohey and Gaudron JJ.

17 Davis, J.L.R., (1992), 'Interest as Compensation', in Finn, P.D., (ed.), *Essays on Damages*, 129 at p.129.

18 *Batchelor v Burke* (1981) 148 CLR 448 at 455 per Gibbs CJ.

19 Negligence Review Panel, (2002), above n1, p. 213.

20 *Wrongs (Liability and Damages for Personal Injury) Amendment Act* 2002 (SA) s24F.

21 *Supreme Court Act* 1935 (NSW) s32(2).

22 *Transport Accident Act* 1986 (Vic) s93(15) and (16).

23 *Accident Compensation Act* 1985 (Vic) s134AB(34).

24 Mullany, N. (2002), above n14, p. 52.

25 Compare, for example, the comments of Stephen J in *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Ltd* (1981) 55 ALJR 258 at 269-270 with those of Spigelman CJ in *Kinzett v McCourt* (1999) 46 NSWLR 32 at 51.