

with no feeling whatsoever, yet blushed when it was pointed out to him that he had forgotten to stand when his verdict was read.

In such a context, Chief Justice Bhagwati's remarks are somewhat consoling. Locally, in Perth, Chief Justice Wayne Martin, at the start of law week, called for a fresh approach to tackling the high imprisonment rate of Aboriginal people in WA. He stated that there was no easy or short-term solution and conceded that 'Perhaps whatever we have done in the past does not appear to have worked.'¹⁸ His Honour was addressing the problem in terms of looking at the results of our legal system in dealing with the Aboriginal people. He spoke of the recommendations of the WA Law Reform Commission, particularly those aimed at enhancing the relevance of the law for Aboriginal people. Such comments and insights are far removed from the indifference to the plight of Aboriginal people that Lord Eldon would have felt.

The need for a healthy planet and human rights is surely better served by judges and advocates who care and are perhaps even passionate about justice, freedoms and responsibilities. By extolling 'indifference to the result' as a virtue in the legal profession, we may be contributing to a psychic numbing that will have serious consequences for us all. ■

Notes: 1 The Right Hon Earl of Birkenhead (1926) *Fourteen English Judges*, Cassell & Co Ltd, p237. 2 *Ex parte Lloyd*, 5 November 1822, reported as a note in *Ex parte Elsee* (1830) Mont 69, 70n at p72. 3 Hon Mr Justice PN Bhagwati, *Democratisation of Remedies and Access to Justice*, First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002. 4 [2007] HCA 11 (21 March 2007) at [180]. 5 That a man accused of complicity in a policeman's murder should effectively be acquitted because the prosecution wanted to alter the charges against him after his trial had taken place. 6 Above Note 4 at [182]. 7 The Magna Carta 1215, para 39. 8 See above, note 3. 9 David Wexler is a Lyons Professor of Law and Professor of Psychology at the University of Arizona. He is also a Professor of Law and Director of the International Network on Therapeutic Jurisprudence at the University of Puerto Rico. The Network maintains a website, which includes a comprehensive therapeutic jurisprudence bibliography, at <http://www.law.arizona.edu/upr.intj>. 10 D Wexler (2000) 'Therapeutic Jurisprudence: An Overview' 17 *Thomas M Cooley Law Review* 125-34, available at <http://www.law.arizona.edu/upr.intj>. 11 P Mugliston and P Nichols, *Does the legal system deal with Aboriginal people and Gays/Lesbians in a therapeutic or anti-therapeutic way, and what lessons may we learn from history?*, Transforming Legal Processes in Court and Beyond: Third International Conference on Therapeutic Jurisprudence, 7 June 2006. 12 *Ibid*. 13 S Freud (1937) 'Constructions in Analysis' in J Strachey (trans, ed) *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, vol 23 (1937-1939), pp255-70, at p269. 14 <http://www.newdawnmagazine.com.au/Articles/Origin%20of%20CivilisationP1.html>. 15 <http://www.newdawnmagazine.com.au/Articles/Origin%20of%20CivilisationP1.html>. 16 'Act only on the maxim whereby thou canst at the same time will that it should become a universal law': I Kant [1785] (*JW Ellington, ed, trans (1993) Grounding for the Metaphysics of Morals*, 3rd ed, Hackett, p30). 17 A Miller (H Hannun and H Hannun, trans (1983)) *For Your Own Good*, Farrar, Straus, Giroux. 18 *The West Australian*, 8 May 2007, p10.

Patrick Mugliston is a barrister at Francis Burt Chambers in Perth. PHONE (08) 9220 0483
EMAIL pmugliston@francisburt.com.au

Deductions fo

This article updates tables of deductions published in the February 2001 issue of *Plaintiff* (pages 31-35). Mortality, unemployment and strike rates have all dropped, giving generally lower deductions.

Allowing for death, unemployment, sickness, disability and strikes, the lowest calculated deduction for any age, sex or occupation is 3% – for young females in skilled occupations. The highest is 11% – for older male labourers. These estimates suggest that the 15% deduction traditionally used by Australian courts is too high.

The NSW Court of Appeal, in *Zhang v Golden Eagle International Trading Pty Ltd & Ors* [2006] NSWCA 25, accepted the trial judge's decision to adopt the standard discount of 15% for vicissitudes, rather the 7.5% we had estimated based on the age, sex and occupation of the injured. Basten JA said at 59:

'The figures relied upon by the appellant give little indication as to the basis on which they were calculated, but they are clearly calculated by reference to occupational groups, and not by reference to the individual circumstances of the appellant.'

Table 1 is intended to give reasonable estimates for persons of average health and heredity, given their sex, age and occupation. The table is based on:

- future mortality rates, as projected by the Australian Bureau of Statistics in *Population Projections Australia 2004-2101* (published 29 November 2005);
- Australian unemployment rates in the 10 years to August 2006;
- Australian disability claim frequencies and durations, from *1997 Report of the Disability Committee*, Institute of Actuaries of Australia;
- Australian industrial dispute rates from 1996 to 2005; and
- Australian total and permanent disablement rates from *Report on the Industry Funds Investigation 1994-95*, Institute of Actuaries of Australia.

Table 2 is intended for use where multipliers explicitly allow for the chances of death. Such multipliers are often used in Victoria, South Australia and the Northern Territory. Both tables assume retirement at 65, and a discount rate of 5%. Different discount rates make little difference to the estimates.

Evidence of a plaintiff's particular circumstances could justify large adjustments up or down from these tables. For example, a plaintiff who had been in stable employment, exercised frequently, did not smoke or drink, had an average body mass index and long-lived parents might properly have a lower-than-normal deduction for vicissitudes. ■

vicissitudes

when estimating the value of future earnings

By Richard Cumpston and Hugh Sarjeant

TABLE 1: DEDUCTIONS FOR DEATH, UNEMPLOYMENT, SICKNESS, DISABILITY & STRIKES (relevant in NSW, QLD, WA, Tas & ACT)

Occupation	Age – 25	Age – 35	Age – 45	Age – 55
Males				
Managers & administrators	4%	5%	6%	6%
Professionals	4%	5%	6%	6%
Associate professionals	4%	5%	6%	6%
Tradespersons & related workers	6%	7%	8%	8%
Advanced clerical & service workers	5%	6%	7%	7%
Intermediate clerical, sales & service workers	5%	6%	7%	7%
Intermediate production & transport workers	6%	7%	9%	9%
Elementary clerical, sales & service workers	5%	6%	6%	7%
Labourers & related workers	9%	9%	11%	11%
Females				
Managers & administrators	3%	4%	5%	6%
Professionals	3%	4%	4%	6%
Associate professionals	3%	4%	5%	6%
Tradespersons & related workers	4%	5%	6%	7%
Advanced clerical & service workers	3%	4%	5%	6%
Intermediate clerical, sales & service workers	3%	4%	5%	6%
Intermediate production & transport workers	4%	5%	6%	8%
Elementary clerical, sales & service workers	3%	3%	4%	4%
Labourers & related workers	5%	6%	6%	8%

TABLE 2: DEDUCTIONS FOR UNEMPLOYMENT, SICKNESS, DISABILITY & STRIKES (relevant in Vic, SA and NT)

Occupation	Age – 25	Age – 35	Age – 45	Age – 55
Males				
Managers & administrators	2%	3%	4%	4%
Professionals	3%	3%	4%	4%
Associate professionals	3%	3%	4%	4%
Tradespersons & related workers	4%	5%	6%	6%
Advanced clerical & service workers	3%	4%	5%	5%
Intermediate clerical, sales & service workers	4%	4%	5%	5%
Intermediate production & transport workers	5%	6%	7%	7%
Elementary clerical, sales & service workers	4%	4%	4%	5%
Labourers & related workers	7%	8%	9%	10%
Females				
Managers & administrators	2%	2%	3%	5%
Professionals	2%	2%	3%	4%
Associate professionals	2%	3%	3%	4%
Tradespersons & related workers	3%	4%	5%	6%
Advanced clerical & service workers	2%	3%	3%	5%
Intermediate clerical, sales & service workers	2%	3%	3%	4%
Intermediate production & transport workers	4%	4%	5%	6%
Elementary clerical, sales & service workers	2%	2%	2%	3%
Labourers & related workers	4%	4%	5%	7%

Richard Cumpston and Hugh Sarjeant are directors of Cumpston Sarjeant Pty Ltd, Consulting Actuaries.

PHONE (03) 9642 2242 EMAIL Richard.Cumpston@cumsar.com.au, Hugh.Sarjeant@cumsar.com.au WEBSITE www.cumsar.com.au