

# Compensation payments: hard come, easy go!

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*It is not uncommon for Judges to pass comments alluding to the inadequacy of the 3% discounting rate used to calculate a present value lump sum capable of funding a young plaintiff's lifestyle for the remainder of his or her life. The younger the plaintiff, the greater the likely inadequacy.*

This sentiment is echoed in the political debate surrounding the lump sum versus regular instalment compensation which recently surfaced in a Parliamentary debate involving DSS preclusion periods for injury compensation recipients of more than \$10,000. Minister Jocelyn Newman, in support of these recent Federal Budget cost-cutting measures, pointed out that the rationale was in part driven by the fact that one-off payouts quickly dissipated and did not offer long-term support.

As a plaintiff lawyer, you may well ask "What has such debates got to do with the job at hand of securing the best possible outcome for my clients?" The answer depends on where you see your role with your client finishing.

If you view your role as complete once you hand your client possibly the largest cheque they have ever received...then the answer to the above question is probably "Nothing!"

If, on the other hand, you are concerned with the ultimate well-being of the client then you may "cross-refer" your client to someone who can help with the investment issues confronting that client.

After all, when you identify a specialist area of law affecting your client in which you have little experience, you do not hesitate in cross-referring either to other partners within your firm or to other firms with the requisite expertise to benefit your client.

Why then should this matter be any different? To do otherwise may see all your good work in securing the best compensation outcome for your client quickly

undone and may take away much of the personal pleasure you derive in actually helping your client achieve the best solution to their problems.

As with all acts of cross-referral, certain due diligence is required to be exercised. But to abrogate such responsibility exposes your client to greater risks than are often anticipated at the time of securing victory for your client.

The following real-life case studies show just how different the outcomes can be for two identical compensation settlements...and highlight how important your last meeting with the client can be when you have the opportunity to hand over a little more than just the cheque and your best wishes.

Following the case studies are 10 Golden Rules which not only provide a framework for your clients to follow in this area but importantly provide you, the plaintiff's lawyer, with a basis for your due diligence associated with any cross-referral. Further to this point, the ASIC has a publication entitled "Don't Kiss Your Money Goodbye" which lists criteria relevant in the selection of any financial planner or investment adviser.

You should be aware that while a lawyer may give financial advice as incidental to his or her legal advice, you will need to hold an appropriate securities licence or "proper authority" to give "securities advice".

## The facts

**Seven years ago two clients, Eddy and Thomas were rendered quadriplegic in separate car accidents, both aged 33. Both with \$1.7m to invest, to provide for the rest of their life. Both wanting to avoid "risky" investments.**

## Case Study 1: Eddy

### Received advice from:

- Accountant (running tax schemes and property syndications);
- Insurance agents;
- Brother;
- Real Estate Agents.

### Action taken:

- Invested \$750,000 into a direct industrial property syndicate, promising high lock-in rental and phenomenal capital growth.
- Purchased a holiday house (\$350,000) "to escape". Converted to wheelchair access and usage.
- Purchased a Fish Bait and Tackle business "that would provide an interest" for Eddy and a job for his brother (\$150,000 with renovations).
- Invested the rest, mostly in mortgages and term deposits (\$450,000).

### Seven years on ....

- The property syndicate dramatically underperformed income projections as tenants went out of business and replacement tenants were not found for eighteen months. Sale occurred at low point in market for \$550,000.
- The Bait and Tackle business did not do well. Sold two years later for \$65,000 (loss of \$85,000).
- Eddy and his brother and sister-in-law decided to move up the coast to a "better lifestyle". Bought before selling existing home. Overcapitalised on existing home and eventually sold at a loss of \$75,000. (Net additional cost to relocate \$200,000).
- Holiday house sold, after 2 years on the market for \$200,000 (\$150,000 loss).
- Total value of portfolio of investments \$365,000
- Modelling shows portfolio is likely to last for only a further 3 years (ie. Eddy's age 43).



## Case Study 2: Thomas

### Received advice from:

- Lawyer, (who advised client to seek independent Financial Planning advice).
- Accountant.
- Independent Financial Planner.

### Action taken:

- Established an investment strategy for \$1.7m to target a long-term return of Inflation Rate plus a further 7% per annum, (as an average over at least a 7-year period).
- This involved a spread across the following classes of investment:

	%
• Cash	3
• Australian Fixed Interest	10
• International Fixed Interest	2
• Australian Shares	40
• International Shares	29
• Australian Property	11
• International Property Companies	5

### Seven years on ....

- Through the use of pooled managed funds, access was made available to literally thousands of individual investments. The result...if one or two go broke, it doesn't impact on Thomas' portfolio.
- Drawdown paid to Thomas' bank account each month of \$10,000 (akin to a "salary" from his investments).
- Superannuation utilised for Thomas due to his ability to undertake some gainful employment. This reduced significantly his tax rate.
- Total portfolio valued at \$1,828,900 and modelling suggests Thomas' portfolio is on track to last until his 65th Birthday.

### The 10 Golden Rules of Wealth Creation/Preservation

The following rules will be of assistance to you and your clients in improving their chances of actually achieving their objectives. In other words, helping them to avoid the pitfalls confronting Eddy in our case study above.

#### 1. Your clients need a plan - put it in writing.

It is often said that those who fail to plan, plan to fail. If we all spent as much time planning our financial affairs as we do planning our holidays, we would all be better off financially.

#### 2. Diversification.

Generally speaking the more your clients spread their assets across the various asset types (shares, property fixed interest and cash) and between a variety of fund managers, the more resistant their portfolio will be to serious damage.

#### 3. Regular reviews.

Clients should revisit their plan often to ensure their investments are performing appropriately. They should expect change - and change will need to be dealt with. Don't fall for the trap of 'setting and forgetting.'

#### 4. Don't lock in (or out).

This means investing clients' money in such a way that they can access it quickly if they need to. They must at all times be ready to, swiftly and cheaply, rearrange your assets if necessary to either avoid a threat or to take up a favourable opportunity.

#### 5. Understand the risks.

It is an immutable law of nature that the higher the return, the higher the risk. The mistake a lot of people make is to confuse return for performance. Chasing high returns over the short term makes you a speculator. Prudent investors instead look for consistent returns over the long term. Short term fluctuations don't trouble investors because it's the long term behaviour of their chosen assets which they focus on.

#### 6. Minimise tax.

This doesn't mean that clients should chase every nefarious tax scheme going. On the contrary, just about everyone can benefit from conservative tax planning. Saving tax is one way where you can increase their returns without increasing

risk.

#### 7. Keep good records.

Every investment asset is subject to Capital Gains Tax. So many people lose deductions to which they are entitled because they haven't kept proper records. It is tedious, but unless clients (or their adviser) are keeping all the records it could cost you in the long run.

#### 8. Get independent professional advice and, for clients' protection, get it in writing.

9. Have a Will and Power of Attorney in place and update them regularly. This will provide further cross-referral opportunities.

#### 10. Pass the sleep test.

If it is keeping clients awake at night then, either they are taking too much risk or they are unsure of what they are doing. ■



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