

# Mugged by reality: how lawyers ignore labour economics and clients pay

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The lion's share of damages in many personal injury claims relates to reduced earning capacity, the "economic loss" of the plaintiff. It is surprising, then, that claims can go forward with little regard having been paid to the true amount of damages under this head.

A small oversight or error in a large claim can amount to tens of thousands of dollars foregone in a plaintiff's one shot at economic justice.

Reference firstly to the plaintiff's group certificate at the time of injury and secondly to the published tables for a present value multiplier can be useful in putting a litigator into the ballpark of quantifying a claim - or can be totally misleading.

The realities of today's labour markets can have a significant influence on the amount of a personal injury claim. Two recent cases highlight some of the issues for plaintiff lawyers.

## Case 1. Charlie, 28, hydraulic fitter.

The first case is a relatively straightforward one. Our brief was to ascertain the vocational effects of Charlie's injuries, whether or not there were training or rehabilitation options open to him, and to calculate his loss on the basis of his wages at the time of injury.

The nature of his injuries and his educational limitations left little room to argue about the totality of his incapacity. His wages, however, were a different matter.

Five years had elapsed since Charlie's injury. His group certificate suggested his wages then were equivalent in present value to the current industrial award of \$462 plus about 15% before tax.

That would seem a reasonable basis for calculation of his loss of future earnings, except for one factor: the current state of the labour market. Things have changed in five years. Australia's chronic skills shortage rears its head in Charlie's case.

Reference to recent wage surveys sug-

gested current market wages for a person of Charlie's skills and experience of between \$800 and \$950 per week. Interviews with employers confirmed the surveys' results and the strong demand for such skilled labour.

Taking into account the steady increase in wages foregone over his five years of unemployment since the injury, plus interest, plus past and future superannuation entitlements resulted in an 80% increase in the claim.

## Case 2. George, 36, professional.

The second case involving alleged medical malpractice is somewhat more complex and subtle. George's injuries had resulted in profound psychological effects upon him. His extremely sensitivity to the personal contact essential to his work forced him to quit. His promising career was on ice for a decade.

After extensive psychotherapy and a "refresher" course at University, he was ready to resume. At first glance, his economic loss was crystallised as the years of wages foregone plus interest. Not so.

Research among firms in his profession revealed that due to intensified competition for work, he would have to virtually start his career all over again, accepting lower pay than at his injury date in order to get a foot in the door. But for his injury, his extra decade of experience would have entitled him to a salary two to three times higher than his start-again level.

There's more. Opinion was obtained from several partners of firms in George's profession and from placement professionals that, due to his psychiatric history, he would not be viewed favourably as a potential partner, otherwise a realistic career objective. We established a fair salary package expectation at partner level.

To quantify his future losses involved quite complex calculations. To simplify somewhat, a proxy "but for injury" career

was modelled and earnings from it calculated, plus superannuation. His anticipated career after returning to work post-injury was also modelled over the time-span of his anticipated working life. Total earnings from the two modelled careers were discounted to present value and compared to arrive at his loss of earning capacity.

**As a result, his claim was increased by almost half a million dollars over the amount lost up until his return to work.**

Plaintiff lawyers should also be aware that labour market realities can work to reduce as well as increase a claim. Wages in industries can and do fall, just as they can rise. Plaintiff lawyers would do well to obtain these facts before they learn them the hard way - from better-prepared defendants.

It is possible also to analyse Australian Bureau of Statistics data relating to unemployment and labour force participation rates to show quite accurately the probability of lifetime employment among various groups of workers. The results can be very different from the 15% "vicissitudes of life" discount favoured by NSW courts.

Expert evidence which addresses a plaintiff's vocational outlook, the labour market factors affecting his earning capacity and the calculations which pin-point the quantum of his claim is essential to litigators who wish to be in command of all the facts before entering negotiations or the Court to represent their client.

A single report incorporating all these elements, produced under one roof, written in clear and unambiguous language and summarised on a single page, is the standard demanded by leading litigators. ■

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