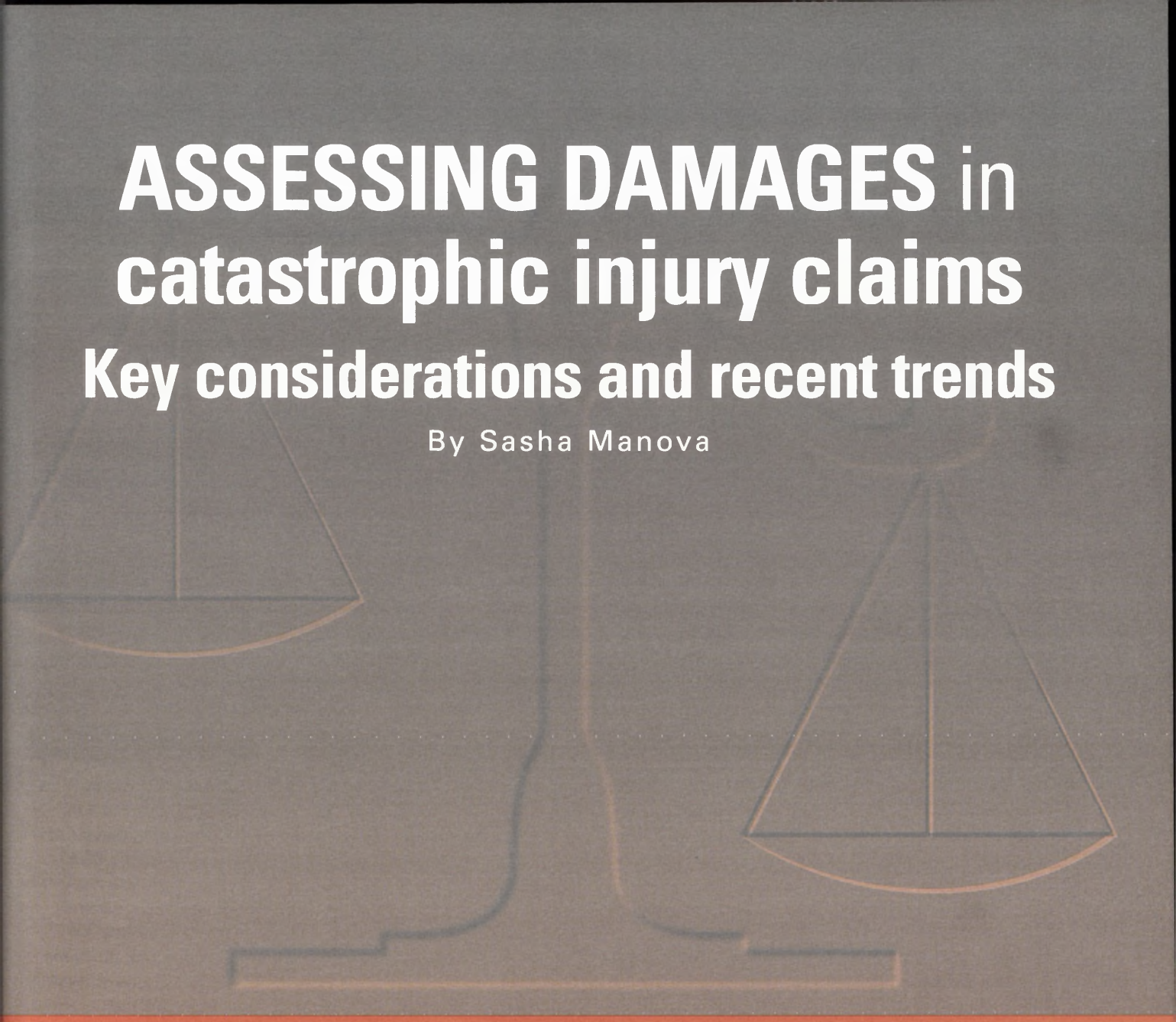
ASSESSING DAMAGES in catastrophic injury claims

Key considerations and recent trends

By Sasha Manova



The task of assessing damages in cases involving catastrophic injury is both time-consuming and complex. This article addresses the key considerations that apply when undertaking such an assessment, with a focus on recent trends emerging from Australian authorities over the last decade or so.

An award of damages is subject to the thresholds and limitations set out in the applicable legislation of each state and territory. Nonetheless, some general principles as to the assessment of damages can be gleaned from a study of the case law. This article focuses on the principles relevant to the assessment of particular heads of damage and the issue of assessing life expectancy.

WHAT PRINCIPLES APPLY IN ASSESSING DAMAGES FOR CATASTROPHIC INJURY?

There are no special principles that apply exclusively to the assessment of damages in cases involving catastrophic injury. However, the severe damage that flows from such injuries usually requires complex considerations of matters such as life expectancy, past and future care needs, medical treatment, housing, therapeutic aids, appliances and equipment.

As in all damages cases, a thorough analysis of the likely occurrence of potential events is required.[1] This is particularly so in cases involving injuries at birth, where the plaintiff's circumstances and potential, but for the occurrence of the injury, are unknown. Once the most likely past and future events are estimated, an assessment of the damages that are reasonably necessary to compensate the plaintiff for those likely events can be made. >>

REVIEW OF PARTICULAR HEADS OF DAMAGE

General damages

Assessments of general damages are often at the higher end of the spectrum, unless the plaintiff has diminished consciousness.

In *Sullivan v GIO*,[2] the plaintiff identified six categories of harm in the analysis of general damages:
(1) pain and suffering;
(2) substantial loss of amenities of life;
(3) severe and ongoing disability;
(4) body disfigurement and physical impairment;
(5) intellectual and cognitive impairment; and
(6) severe diminution of the quality of life.
The court noted that 'there is some overlap in concept' in the six categories, and that care must be taken to avoid 'double counting' especially having regard to the awards that will be made for future attendant care, holiday assistance, past care, loss of support from a co-dependency relationship and other matters.[3]

Special considerations apply in cases where a plaintiff has suffered brain injury and has diminished consciousness and/or insight into his or her condition. For example, in *Skelton v Collins*,[4] the infant plaintiff was and would remain permanently unconscious. He was therefore entitled only to a moderate sum for damages for loss of enjoyment of life, and a small allowance for loss of expectation of life. Taylor J held that where a plaintiff is insensible to physical pain and suffering, it is inappropriate to award damages under this head.

Economic loss

The assessment of economic loss is fairly straightforward, as the plaintiff has usually lost all capacity for employment.

Special considerations apply to assessing economic loss in the case of injured babies and children, who have not yet demonstrated their intellectual capacity, work ethic or future career plans. In *State of New South Wales v Moss*, Jayden JA said:[5]

> *'An illustation of the court's readiness to award damages for diminution of earning capacity arises when very young children are injured. Strictly speaking, it would be impossible to prove that the child would have had an earning capacity as an adult or would have exploited it. But it is conventional to rely on the occupations, attitudes to life and work, histories of parents and other relatives.'*

Although it is highly speculative to attempt a *direct comparison* between a child plaintiff's prospects and the achievement of family members, evidence of the circumstances of parents and siblings will assist in determining the plaintiff's most likely career choices and/or income.[6]

Some examples:
In *Sullivan v GIO*, the plaintiff was severely brain injured in a motor vehicle accident when he was three years of age. It was argued that he would have become a high-income earner having regard to the income of his father. While not assuming that the plaintiff would have followed in his father's footsteps, the court did have regard to the father's diligence and status as a geotechnical engineer, the conscientiousness of his mother and the effect this would have had on family values. James J concluded the plaintiff would probably have attained a tertiary qualification, and that his prospects were well above average. Ultimately, a sum equivalent to double the average weekly earnings with 15% vicissitudes was applied.[7]

In *Simpson v Diamond*,[8] the plaintiff was born severely disabled with athetoid cerebral palsy as a result of medical mismanagement of her birth, leading to hypoxia and brain damage. At first instance, the trial judge took into account evidence of the intellect and achievements of the plaintiff's parents and sisters. Although the plaintiff's argument that she would have become a lawyer but for the injury was rejected, some allowance was made for the possibility that she may have become a high-income earner in a business career. On this basis, the trial judge applied the average weekly earning rates for all adults rather than the average weekly earnings rates for females.[9] On appeal, the Court of Appeal held that there was no error in taking this approach.[10]

Future care needs

The joint judgment of Gibbs and Stephens JJ in *Sharman v Evans* suggests that the approach to be adopted in assessing future care needs is as follows:[11]

> *'The touchstone of reasonableness in the case of the cost of providing nursing and medical care for the plaintiff in the future is, no doubt, cost matched against health benefits to the plaintiff. If cost is very great and benefits to health slight or speculative the cost-involving treatment will clearly be unreasonable, the more so if there is available an alternative and relatively inexpensive mode of treatment, affording equal or only slightly lesser benefits.'*

Consideration should be given to the care regime in place at the time of the hearing, as well as any likely future contingencies that would result in changes to the level of care required. For example, even if at the date of hearing a plaintiff is being substantially cared for by parents, it may be accepted that he or she is entitled to live separately and to have the benefit of care provided commercially rather than by parents.[12]

Gratuitous care

A catastrophically injured plaintiff will often have a substantial claim for past and future *Griffiths v Kerkemeyer* damages,[13] as family members commonly take on an onerous and substantial role in the day-to-day care of the injured person.

The following principles apply:

(1) Whether or not the plaintiff has paid or will have to pay for those services is irrelevant: *Nguyen v Nguyen.*[14] The true basis of a claim for damages with respect to gratuitous care is the need of the plaintiff for those services, not the actual financial loss suffered as a result of their provision.[15]

(2) The plaintiff's damages are to be determined by reference to the market cost of providing the services, rather than the actual cost to the plaintiff or the income foregone by the service provider: *Van Gervan v Fenton.*[16]

(3) Interest should be allowed on a claim for damages for past gratuitous care. The interest calculation should be made in a way that reflects the fact that damages comprise amounts accruing over time, not a simple lump sum: *Grincelis v House.*[17]

Often parents providing gratuitous care for their injured children in their own home will be able to perform other tasks in the house while caring for the injured child, such as attending to personal matters or other children. However, this fact does not diminish the value of the care they are providing, and the market cost of the services still applies: *Hills v State of Queensland.*[18]

In recognition of a 'moral claim' for the past provision of gratuitous services, the court has a discretion to order that part of the gratuitous care damages be paid directly to the carer, as the plaintiff's next friend.[19] In weighing up whether to exercise a discretion to make such an award, McKechnie J in *Bryn Jones, An infant by His Next Friend Jean Isabella Jones & Anor v Moylan*[20] stated:

> *'Evidence from the trustee as to the costs of care, having regard to life expectancy, the performance of the fund, and the effect of a diminution of the fund on possible future outcome, will always be necessary to the proper exercise of the discretion. Without such evidence, the court will be unable to evaluate all the relevant circumstances to decide whether a payment should be made.'*

Aids, appliances and equipment

In assessing special damages such as aids, appliances and equipment, considerations of reasonableness and proportionality need to be applied.

The judicial task in assessing damages is to address what is required to meet the plaintiff's 'reasonable requirements' and not his or her 'ideal requirements': *Arthur Robinson (Grafton) Pty Limited v Carter.*[21] Further, in assessing whether the relevant benefit is *reasonably* required, it is relevant to ask what amount of money a person, *'(assuming) he was spending his own money and assuming that he had sufficient to do as he would and was well advised and reasonably careful for his own welfare, would be likely to expend in protection of himself and his condition'.*[22]

Damages for equipment that is expensive but does no more than increase a plaintiff's amenity to a limited extent may be disallowed. For example, a four wheel drive motorised wheelchair (which was sought in addition to the plaintiff's usual wheelchair), was disallowed by the court as it represented an 'ideal' requirement that was not medically necessary: *Simpson v Diamond.*[23]

Consideration will also be given to whether the plaintiff would have incurred the expense associated with the item, regardless of the injury. Damages are recoverable only if the requirement for the equipment arose from the negligence of the defendant. However, no reduction in damages should be made on the basis that the plaintiff may have elected to incur the expense in the absence of the injury. In the joint judgment of Mason CJ, Toohey and McHugh JJ in *Van Gervan v Fenton*, their Honours said:[24]

> *'If the defendant has created the need for the services, that person is not entitled to have the damages reduced because, before the accident, the plaintiff elected to pay for similar services or had the benefit of having them performed gratuitously. By the tort, the defendant has transformed the choice of the plaintiff to pay for such services or to have them done voluntarily into the need for the plaintiff to have those services performed for him or her.'*

Thus, an allowance for costs associated with basic computer equipment or a mobile telephone may still be made, even though such equipment is a common expense for many members of the community.

In *Toomey v Scalaro's Concrete Constructions Pty Ltd (in liq),*[25] although the plaintiff would have used a mobile phone in any event, an allowance was made for it as *'a mobile phone has now become a vital necessity and that use of a mobile is likely to be greater, in comparison to the situation which would have pertained but for the accident'.*[26]

In *Nominal Defendant v Armstead,*[27] the plaintiff was allowed damages for the costs of a computer system *'in order to facilitate written communication and as an essential life-line to the outside world as well as part of his rehabilitation'.*[28] The court observed that had he not been injured, his use or ownership of a computer would have remained a matter of choice, and concluded that *'he should not suffer any reduction in his damages based on the probability that he would have come round to buying a computer, uninjured; the computer is now a clear necessity'.*[29]

Once it is determined that particular equipment is reasonably necessary, allowance should be made for the initial outlay for the capital item, as well as recurring expenses associated with maintenance, upgrades and replacements over the years. In cases where complex technology is to be used, such as computer aids specifically adapted for the disabled, additional allowance may be made for the costs associated with training the plaintiff to use the equipment: *Simpson v Diamond.*[30]

Housing

The assessment of the plaintiff's housing needs will be based on a standard of accommodation to which the person was previously accustomed. In *Weideck v Williams*, the court observed that:

> *'The award must take into account the facts of the particular case. In some cases, it will be anticipated that the injured plaintiff will live in an institution. In those cases, the cost of the purchase of the home is irrelevant. In some cases, it will be anticipated that the injured plaintiff will continue to live in his or her existing home. In such a case, only the cost of modifying the home will be taken into account. In other cases, it will be anticipated that the injured plaintiff must move from an existing home to another more suitable to the plaintiff in his or her injured state. In those cases, the standard of the accommodation in which the plaintiff is accustomed to live will be a relevant factor. In other cases, if the plaintiff has lived prior to the injury, not in his or her own home, but in a boarding house or in a caravan or in rented accommodation, the award of damages must take that into account.'*

The costs associated with housing may include either providing modifications to an existing house or constructing a purpose-built home. The costs associated with modifying a parent's home that is not the plaintiff's primary residence may be allowed if it is reasonable that the plaintiff will be visiting there. Similarly, the costs of modifying a holiday home may also be allowed, provided that the plaintiff is likely to holiday there regularly and that the benefit in amenity to the plaintiff justifies the additional costs of the modifications.[32]

In assessing housing needs, a separate allowance for home maintenance and running costs may also be made, for items such as painting, plumbing, electrical, appliance repairs, gardening, air conditioning and swimming pool maintenance.[33]

Heating and air-conditioning

An allowance for heating and air conditioning is routinely made where the catastrophically injured plaintiff must spend extended periods of time indoors.

In *Toomey*, a claim for hydronic heating was made on the basis that the plaintiff had to avoid respiratory complaints. The claim was allowed, even though this was described by the defendant's expert as the 'Rolls Royce' of heating, on the basis that the high-quality air that it provided was an important factor for a person spending an abnormal amount of time indoors.

Hydrotherapy

An allowance for the costs of a purpose-built hydrotherapy pool is often made. Evidence is commonly adduced as to the therapeutic benefits of warm water for people with mobility problems.

However, if a plaintiff lives in close proximity to a public facility that can conveniently meet his or her health needs, then it may be that the costs of attendance at a public facility will be allowed in preference to the costs of building a private pool. If the plaintiff is to use a public facility, the court should take into account whether the plaintiff has a carer available to assist the plaintiff to attend the facility, and whether there is appropriate wheelchair access at the centre.

In *Hills v State of Queensland*,[34] the plaintiff was allowed damages for the cost of attending the public facility together with an additional $20,000 for the contingency that such a facility would not be available at some point in the future.

In *Simpson v Diamond and Anor*, a separate allowance of $95,000 was made for the cost of an enclosed hydrotherapy pool.[35]

In *Munzer v Johnston*,[36] the plaintiff was also allowed her own hydrotherapy pool on the basis that she had a particular difficulty using the public facility.

Motor vehicles

Catastrophically injured plaintiffs usually have special mobility and transportation needs. An allowance may be made for the costs associated with a motor vehicle such as a van that can accommodate a wheelchair. A private car may be assessed as a more practical and realistic option for a disabled plaintiff than relying on taxi services.[37]

Since most people today would incur the capital cost and running expenses associated with car ownership in any event, it has been held that only the increased costs associated with the injury should be payable, such as the additional cost of purchasing a specially adapted car, or the costs of modifying an existing vehicle.[38]

The allowance will include an initial outlay for the capital item, as well as recurring expenses associated with maintenance, upgrades and replacements over the years. In making the appropriate allowance, a weekly figure representing the standing and running costs of the motor vehicle will be assessed and the likely depreciation of the vehicle taken into account. The weekly figure will then be capitalised for the period of years assessed as the plaintiff's life expectancy.[39]

In *Simpson v Diamond,* the plaintiff was awarded $161,623 in motor vehicle expenses, which represented an allowance for the cheaper vehicle suggested by the defendant. The court noted that there was no medical reason to prefer the more expensive vehicle.[40]

Education costs

A plaintiff with some reduction in cognitive function may be awarded damages for education costs. For example, in *Simpson v Diamond*, the plaintiff could not speak, but had retained an above-average intelligence and completed Year 10. She was determined to complete her HSC. In the circumstances, the court at first instance awarded a sum of $171,628 for the cost of a special education teacher to assist the plaintiff to complete her final year of secondary school and four further years in a tertiary course.[41] Similarly, in *Hills v State of Queensland*, the court allowed $108,000 for education costs associated with the provision of a teaching aide and some tuition.

Holiday costs

An allowance is often made for the costs of holidays, and the costs associated with a carer attending may be also taken into consideration.

In *Sullivan v GIO,* a three-week holiday every five years was deemed to be reasonable.[42] In *Simpson v Diamond,* the court took a broad-brush approach in determining the cost of future holidays, and allowed $330,000.[43] This figure was subsequently reduced on appeal to $200,000 on the basis that *'the additional sum of $330,000 representing local and overseas holidays with two carers for more than 50 years seems to us to have an air of unreality about it'.*[44]

In *Waller v Suncorp Metway Insurance Ltd,*[45] Martin J upheld the trial judge's decision in refusing to make an allowance for holidays, noting that the plaintiff suffered a profound neurological injury and there was no evidence that he would benefit from holidays or would, in fact, holiday away from his family.[46]

Case management and administrative costs

Where the plaintiff requires assistance from carers, it may be necessary to appoint an independent case manager to assist the carers to plan their day–to-day role, to supervise and monitor the carers and to mediate between plaintiff and carer where necessary.

In such circumstances, the case manager performs an independent function, which differs from the administrative services provided by care agencies.[47]

An assessment of damages can include an allowance for the administrative costs of care agencies and the costs of appointing an independent case manager.[48]

Fund management costs

When a trustee is appointed to administer the plaintiff's funds, a claim for fund management costs can be made.

In *Willet v Futcher,*[49] the High Court held that the plaintiff could recoup *'an amount assessed as allowing for remuneration and expenditures properly charged or incurred by the administrator of the fund during the intended life of the fund'.* This means that all establishment fees, management fees, brokerage fees and any other ongoing fees levied by the trustee on the funds managed will be payable by the defendant. The Court did not draw any distinction between investment advice and other services in assessing that amount.

Where a plaintiff is a minor and does not suffer an intellectual incapacity, fund management costs may be allowed only until the age of 18 years. In *Hills v State of Queensland,* the court allowed only $287,011 for fund management costs, on the basis that after attaining 18 years of age, the plaintiff *'will be able to make his own decisions about his money. He will be able to engage his own advisers and do his own research. He will be able to give instructions to those who assist him. In particular he will be able to use the internet and emails.'*[50]

The net amount received by the plaintiff (after any deductions for contributory negligence, repayments and/or payment of solicitor and client costs) will determine the quantum of fund management costs. This is because it is the net amount that will ultimately be managed by the trustee on the plaintiff's behalf.

Two approaches may be taken in assessing the appropriate allowance for fund management costs:

(1) to assume that money will be drawn from the fund to support the plaintiff at a constant rate from inception so that the fund diminishes to zero over the appellant's life expectancy (a concept called 'straight line amortisation'); or

(b) to assume that the fund would initially increase as it generated income from investments in excess of expenditure, and then decline.[51]

Whether or not straight line amortisation should apply will depend on whether the capital sum is likely to deplete at a constant rate over the expected life of the fund: *Waller v Suncorp Metway Insurance Ltd.* In *Waller,* the appellant's mother had been paid $670 per week for her services as a carer in the past and it was anticipated that she would continue to be paid for her services in future from the fund. The straight line amortisation approach was applied, which resulted in the commission being charged by an administrator being reduced by half.

Damages for fund management costs cannot be reduced for contributory negligence, as this would result in a double reduction and would leave the plaintiff with inadequate funds to manage his or her finances. In *Nicholson v Nicholson,* Kirby P stated:[52]

'[I] would accept the appellant's argument that to reduce this head of damages would involve a double reduction. The reason this head of damage is allowed is because the plaintiff is incapable (either intellectually or physically) of managing the damages which have been awarded. To reduce the fund management fee for contributory negligence would leave a plaintiff with inadequate funds to manage his damages. That would defeat the very purpose of providing damages on that head. Although the amount allowed for fund management is part of the damages recoverable, it would not be just or equitable to reduce this component for contributory negligence.'[53]

LIFE EXPECTANCY

The assessment of life expectancy impacts on almost all heads of damage in cases involving catastrophic injuries. It is usually the first and often most highly contested matter to be determined in an assessment of damages, as it provides the basis on which the damages for future attendant care, medical expenses and other recurrent expenses are to be incurred. It is a matter that involves the interplay of medical evidence, statistical evidence and other expert evidence regarding the standard of care afforded to the plaintiff.

A recent case study

In a recent case, *Victorian WorkCover Authority v Asixa Pty Ltd & Ors*,[54] Kaye J in the Supreme Court of Victoria provided a detailed analysis of the assessment of life expectancy.

As a starting point, the plaintiff relied on detailed evidence as to the nature and quality of the care that had been provided to him, and the gratuitous care provided by his parents. The court accepted that the level of care accorded to the plaintiff was first class and quite exceptional.

There were no specific studies identifying the impact of quality of care on a chronically brain injured person such as the plaintiff. Nonetheless, the plaintiff adduced evidence from a rehabilitation specialist (Professor Rawicki) and a general practitioner (Dr Tierney) to support the view that the level of proactive management of his condition had a significantly beneficial effect on his life expectancy. Kaye J accepted that the plaintiff's prospects of survival were enhanced by the standard of care he received.[55]

The medical experts relied on by each party took very different approaches to the assessment of life expectancy. The plaintiff's experts relied almost exclusively on their own anecdotal experience, while the defendant's experts placed primary weight on the conclusions of the defendant's expert statistician.[56]

The expert statisticians relied on by each party also took different approaches. The plaintiff's expert, Professor Jane Hutton, relied on a combination of a cerebral palsy register study and a method referred to as the 'Disability Rating Scale'.[57] The defendant's expert, Dr Shavelle, relied on five studies of the life expectancy of severely disabled persons. He made adjustments to the life expectancy, which was stated in each study, to allow for differences that he considered existed between the disabilities of the cohorts which were the subjects of the studies, and the disabilities of the plaintiff.[58]

At the conclusion of the evidence of other witnesses in the case, the trial was adjourned in order to enable the statisticians relied on by each party to confer and prepare a joint report, setting out the common ground and the differences between them. Kaye J commented that this approach was particularly helpful in assisting him to reach a decision.[59]

Ultimately, Kaye J noted that '*no valid reason has been identified as to how, or why, I should prefer the views of one expert over the other*'.[60] In any event, His Honour placed significant weight on the approach taken by the defendant's expert neurologists:

> *'In my view, the basic approach to the issue of life expectancy by Professor Davis, Professor Starke and Dr King, is the correct and appropriate means of estimating Wally's life expectancy. As I have stated, I do not accept that the substantial experience of Professor Rawicki and Dr Tierney and their estimates based on that experience have primary weight in determining this issue. Rather, I consider that the more sound and appropriate method of dealing with the question is to base such an estimate on the statistical evidence (adjusted for the reasons which I have already given) and to adjust it by giving appropriate weight both to the exceptional quality of care given to Wally and also to the anecdotal experience of Professor Rawicki and Dr Tierney.'*[61]

His Honour concluded that *'the appropriate statistical basis should compromise a synthesis of the adjusted estimates of Dr Shavelle and Professor Hutton; that is, in the range of 14 to 18 years. To that statistical basis should be added an appropriate allowance for the exceptionally high quality of care provided to Wally.*'[62] The estimate reached was 20 years, which accorded with the evidence of Dr Tierney.[63]

Evidentiary considerations in assessing life expectancy

The approach taken by Kaye J in *Asixa* suggests that in preparing a case involving a determination of life expectancy, consideration should be given to calling evidence from:

(a) an expert or experts in medical statistics;
(b) a physician in rehabilitation medicine;
(c) specialist surgeons or consultants in the field relevant to the injury; and/or
(d) a general practitioner with a special interest in the field of the plaintiff's injury.

Generally speaking, a medico-legal expert may provide relevant evidence as to:

(a) the nature and extent of the plaintiff's condition including whether any special or additional risk factors are likely to significantly impact on life expectancy;
(b) the major cause of mortality for people with the plaintiff's condition; and
(c) any anecdotal personal experience of the medical practitioner in working with patients suffering from the same or similar condition to the plaintiff.

In order to deal thoroughly with the considerations relevant to the issue of life expectancy, the medical evidence should address the statistical evidence (with any relevant adjustments made for the particular circumstances of the plaintiff) and the quality of care given to the plaintiff. Where there is a significant contest as to the appropriate statistical conclusions in a particular case, consideration should be given to obtaining a joint report from the experts involved, setting out the common ground and differences between them.

CONCLUSION

The assessment of what is reasonably necessary to compensate a catastrophically injured plaintiff will always involve an element of value judgment. As modern technology evolves, so too does the quality of life that can be afforded to the catastrophically injured.

An analysis of the Australian case law over the last decade or so reveals assessments of damages that are increasingly respectful of the individual's right to lead a life that is as independent, stimulating and dignified as possible. This is reflected in the types of allowances made for complex care regimes, computer technology, mobile telephones, education and holiday allowances, private hydrotherapy pools and specialised motor vehicle expenses.

When preparing and assessing a case involving catastrophic injury, care should be taken to obtain credible and thoroughly researched expert evidence as to both the issue of life expectancy and the various potential heads of damage. ■

Notes: **1** *Malec v Hutton* [1990] HCA 20; (1990) 169 CLR 638 (Deane, Gaudron and McHugh JJ at 643 and Brennan and Dawson JJ at 639-40). **2** *Sullivan v GIO* [2005] NSWSC 135. **3** At para [26]. **4** *Skelton v Collins* [1966] HCA 14; 1966 115 CLR 94. **5** *State of New South Wales v Moss* (2000) NSWCA 133 at para [84]. **6** *Sullivan v GIO* at para 163. **7** At para 165-6. **8** *Simpson v Diamond* [2001] NSWSC 925. **9** At para 362. **10** *Diamond v Simpson (No 1)* [2003] NSWCA 67. **11** *Sharman v Evans* (1977) 138 CLR 463, at [473]. **12** *Sullivan v GIO* at para 103. **13** *Griffiths v Kerkemeyer* [1977] HCA 45; (1977) 139 CLR 161. **14** *Nguyen v Nguyen* [1990] HCA 9; (1990) 169 CLR 245. **15** *Van Gervan v Fenton* [1992] HCA 54; (1992) 175 CLR 327; *Kars v Kars* [1996] HCA 37; (1996) 187 CLR 354 at 369-370; *Grincelis v House* [2000] HCA 42; (2000) 201 CLR 321 at 327. **16** *Van Gervan v Fenton* [1992] HCA 54; (1992) 175 CLR 327. **17** *Grincelis v House* [2000] HCA 42; (2000) 201 CLR 321 at [330]. **18** *Hills v State of Queensland* [2006] QSC 244. **19** *Goode v Thompson* [2001] QSC 287; *Jones & Anor v Moylan* [No. 2] 2000 WASCA 361 (2000). **20** *Bryn Jones, An infant by His Next Friend Jean Isabella Jones & Anor v Moylan* (2000) WASCA 361 [at para 85]. **21** *Arthur Robinson (Grafton) Pty Limited v Carter* [1968] HCA 9; (1968) 122 CLR 649. **22** Per Barwick CJ at 662. **23** At para 609. **24** At para 338. **25** *Toomey v Scalaro's Concrete Constructions Pty Ltd (in liq) (No. 2)* [2001] VSC 279. **26** At para 541. **27** *Nominal Defendant v Armstead* [2005] NSWCA 429. **28** At para 144. **29** At para 145-6. **30** At paras 634-44. Note that the defendant appealed against this aspect of the judgment, but the Court of Appeal held that there was no error in the trial judge's reasoning: *Diamond v Simpson* at paras 153-5. **31** *Weideck v Williams* [1999] NSWCA 346. **32** An allowance for modifications to two holiday homes was allowed by the trial judge in the matter of *Simpson v Diamond* at para 535-48. However, this aspect of the judgment was overturned on appeal, on the basis that there was insufficient evidence to suggest that the plaintiff would use the holiday homes regularly if modifications were made: *Diamond v Simpson* at paras 91-111. **33** In *Simpson v Diamond*, the court did not accept that any reduction should be made for the fact that carers can assist in performing some of these tasks [para 591]. **34** *Hills v State of Queensland* [2006] QSC 244. **35** This aspect of the award of damages was not appealed in the subsequent Court of Appeal proceeding of *Diamond v Simpson*. **36** *Munzer v Johnston* [2009] QCA 190. **37** *Simpson v Diamond* at para 690. This aspect of the award of damages was not appealed in the subsequent Court of Appeal proceeding of *Diamond v Simpson*. **38** See *Cull v Judd* [1980] WAR 161 at 170-71; *Campbell v Nangle* (1985) 40 SASR 161 (FC) at 190 per King CJ. **39** See approach taken in *Simpson v Diamond* at paras 682-96. **40** At para 691. This aspect of the judgment was not considered in the subsequent appeal. **41** At paras 677-80. This approach was subsequently endorsed by the Court of Appeal in *Diamond v Simpson*, although some discount was made to account for an overlap in the economic loss damages on the basis that the plaintiff would have worked part time while studying. **42** At para 176. **43** At para 772. **44** *Diamond v Simpson* at para 188. **45** *Waller v Suncorp Metway Insurance Ltd* [2010] QCA 17. **46** At para 40-3. **47** *Waller v Suncorp Metway Insurance Limited* [2010] QCA 17, para 101. **48** See, for example, *Sullivan v GIO* at para 122-124, *Waller v Suncorp Metway* at para 101. **49** *Willet v Futcher* (2005) 221 CLR 627. **50** At para 275. **51** At para 54. **52** *Nicholson v Nicholson* (1994) 35 NSWLR 308, at paras [29-20]. **53** This principle was more recently applied by the New South Wales Court of Appeal in *Shellharbour City Council v Rhiannon Rigby* [2006] NSWCA 308. **54** *Victorian WorkCover Authority v Asixa Pty Ltd & Ors* [2010] VSC 467. **55** At para 90. **56** At para 62. **57** At para 63. **58** At para 95. **59** At para 65. **60** At para 135. **61** At para 143. **62** At para 147. **63** At para 148.

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