# *ASSESSMENT OF PERSONAL INJURY CLAIMS IN THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY*

## *ART, SCIENCE OR "A BROAD AXE AND A SOUND IMAGINATION"*

***A paper for the National Injury Management and Prevention Summit, Canberra, 27 March 2004***

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***Supreme Court of the Australian Capital Territory***

**OVERVIEW**

Justice Connolly will outline the approach adopted by the Supreme Court for determining claims for accident-related personal injuries, focussing on the determination of general damages, and damages for economic loss. He will also discuss evidential requirements to establish such a claim, and new reforms to encourage the use of agreed single expert witnesses for personal injury claims.

Canberra has for some years now remained an island of common law assessment of damages for personal injury claims surrounded by various statutory schemes. It remains open for persons injured in transport accidents and employment accidents to bring a personal injury claim in the ACT Supreme Court, and personal injury litigation remains a major part of the work of the Court. An examination of court records some years ago showed that the level of filings for motor vehicle claims was relatively steady over a five year period at about 300 actions a year, amounting to about one third of all civil filings.[1] There has been a relatively steady number of claims lodged on the compulsory third party insurer in Canberra over the past 20 years, particularly given the proliferation in solicitors advertising on radio and television for personal injury claims in recent years.[2]

The assessment of damages in motor vehicle and industrial accident claims forms the larger part of the jurisdiction of the Master of the ACT Supreme Court. Indeed, the position was created largely to address the problem of a growing list of motor vehicle accident claims, but the jurisdiction was expanded in recent years to cover all personal injury claims. While the Master's jurisdiction is concurrent with the general jurisdiction of the Judges, the reality is that the bulk of personal injury claims are listed before the Master. With an appeal running from the Master to the Court of Appeal of three Judges, and before that to the Full Court of three Judges, the fact that the bulk of claims are heard by one judicial officer has meant that, over time, practitioners have been able to make reasonably sound judgments as to ranges of damages awards, which has encouraged realistic settlement negotiations. A well

[1] Information from ACT Supreme Court Registry for motor vehicle personal injury action commencements 1996-2002.

[2] Claims lodged were 842 in 1981/2 and 856 in 1999-2000, with a peak of 1023 in 1984/5 and a trough of 791 in 1990-91. With Canberra's population increase, this means that claim frequencies have actually been declining during this period. Information supplied by NRMA 1999 to 2000.

developed practice of settlement conferencing means that there is in truth little delay in obtaining hearing dates once the necessary pre-trial work has been completed.

It would be nice to say that there were clear guidelines for the assessment of damages for personal injuries. The legal principles to be applied are clear enough, and are well summarised by McHugh J in *The Nominal Defendant v Gardikiotis*[3] where his Honour said:

> *When a defendant has negligently injured a plaintiff, the common law requires the defendant to pay a money sum to the plaintiff to compensate that person for any damage that is causally connected to the defendant's negligence and that ought to have been reasonably foreseen by the defendant when the negligence occurred. The sum of money to be paid to the plaintiff is that sum which will put the plaintiff, so far as is possible, "in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation".*

While this passage does explain the goal of the law, that is to place the injured party in the same position as if the injury had not occurred - for those fond of Latin the principle is of course summarised as *restitutio in integrum* - it does not of course set out to explain how that sum of money is to be quantified. And here we come to the heart of the problem.

In a provocative work published in 1997, Professor Patrick Atiyah, well known as a former Professor at Oxford and author of successive editions of *Accidents, Compensation and the Law*, asked himself the question of how fair was the English system of compensating persons who suffer personal injury in accidents. He said:

[3] (1996) 186 CLR 49 at 54

> *The answer is that the system is about as fair as a lottery. In fact it is not too much to say that it is a lottery, a lottery by law. It is almost a matter of chance whether you can obtain damages for disabilities and injuries, it is almost a matter of chance who will pay them, it is almost a matter of chance how much you will get.*[4]

Professor Atiyah was commenting on the vagaries which operate within what is at least a unitary system of tort law. If he was analysing the situation in Australia he would no doubt have added that it is almost a matter of chance whether the geographical location of the accident will permit or prevent the injured person from even obtaining a ticket in the lottery, as various statutory modifications to common law claims have been introduced with increasing frequency, but relatively little co-ordination, in different jurisdictions in recent years. Since the High Court has put an end to forum shopping in personal injury claims,[5] an accident on one side of a state or territory border can lead to a quite different outcome to an identical accident on the other side of the border.

In this jurisdiction we do not have to wrestle with a statutory scheme, unless hearing a case that arises from an interstate accident. The common law approach is to find the appropriate level of damages by breaking down the claim into the conventional categories of general damages - the so-called pain and suffering component - and economic loss, being past and future earnings, medical expenses, and care needs created by the accident. It is of course necessary to consider each head of damages in turn in preparing a reasoned judgment following a hearing of an assessment.[6]

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[4] Atiyah*, The Damages Lottery,* Hart Publishing, Oxford, 1997 at 143
[5] *John Pfeiffer Pty Limited v Rogerson* [2000] HCA 36, (2000) 203 CLR 503
[6] *Sharman v Evans* (1977) 138 CLR 563 at 571 per Gibbs and Stephen JJ

The Chief Justice of New South Wales has in recent years described the common law of negligence as "the last outpost of the welfare state".[7] As Professor Harold Luntz has observed, however:

> *No welfare state would ever have created a system so irrational, expensive, wasteful, slow and discriminatory.*[8]

I hope this paper can provide some practical overview to the apparently simple question of how do we assess damages (a comprehensive theoretical evaluation may be found in M Tilbury, *Reconstructing Damages*[9]*).*

**GENERAL DAMAGES**

The task of the Court in assessing general damages, or damages for non-pecuniary loss, is to find a sum which "must be fair and reasonable compensation for the injuries received and the disabilities caused".[10] Again, this is all very well, but the difficulty is to put a dollar value on this sum. The dilemma was well stated by Windeyer J in *Papanayiotou v Heath,*[11] where his Honour observed:

> *What is a reasonable sum for general damages for personal injuries cannot be measured and tested as a reasonable price can be, by the experience of the market-place ....*

It must distress the economist to be told that there is a discipline where a court must arrive at a dollar value without reference to a market, even though legal scholars,

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[7] Spigelman CJ, *Reynolds v Katoomba RSL Club Ltd* (2001) Aust Torts Rep 81-624, see also article Spigelman, *Negligence: The Last Outpost of the Welfare State* (2002) 76 ALJ 432
[8] H. Luntz, *Assessment of Damages for Personal Injury and Death,* 4th ed, Butterworths 2002 Preface
[9] (2003) 27 MULR 697, P Cane, *The Anatomy of Tort Law, Oxford, 1997*
[10] per Barwick CJ, Kitto and Menzies JJ, *Planet Fisheries Proprietary Limited v La Rosa* (1969) 119 CLR 118 at 125
[11] [1970] ALR 105 at 112

particularly in the United States, have devoted considerable effort to developing an economic analysis of tort law.[12]

If quantum cannot be tested by a market, can it be tested by reference to comparable awards? The common sense answer must be yes, but there has been a degree of judicial debate about whether it is appropriate to expressly consider a "tariff" of other awards in determining the appropriate range for a particular case. The use of comparable awards was criticised by the High Court in *Planet Fisheries Pty Ltd v La Rosa*, where it was said that:

> *The fair and reasonable [sum] is to be proportionate to the situation of the claimant party, and not to the situation of other parties in other actions, even if some similarity between their situations may be supposed to be seen. What was sought to be done in this case by the appellant's counsel, namely, to derive a norm or standard from a group of judgments of this Court reviewing awards of damages on appeal is erroneous. The same would be true if the same course were sought to be pursued in relation to awards of a Supreme Court or of a County or District Court. The judgment of a Court awarding damages is not to be overborne by what other minds have judged right and proper for other situations.*[13]

The High Court's injunction to avoid reference to a tariff at the risk of straying into error has been criticised as being somewhat unrealistic. While acknowledging quite properly that no two injuries are ever the same, Professor Luntz in his work *Assessment of Damages for Personal Injuries and Death* says:

> *... but the existence of a tariff for the non-pecuniary elements of damages, allowing for individual variations by providing a range or*

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[12] G Edward White, *Tort Law in America: An intellectual history*, Oxford Uni Press 1985, 219 ff
[13] per Barwick CJ, Kitto and Menzies JJ (1969) 119 CLR 118 at 125

> *brackets between which awards may fluctuate and moving overall upward from time to time, is the only explanation of how a legal adviser can recommend a settlement to a party, of how a judge without a jury can award a given sum, or how an appellate court can set aside a verdict as inadequate or excessive, and of why publications such as Australian Legal Monthly Digest continue to set out each month details of awards.*[14]

The English courts have expressly recognised that it is appropriate, and even necessary, to have regard to comparable verdicts in determining a general damages award. As Lord Diplock said in *Wright v British Railways Board:*[15]

> *... such a loss is not susceptible of* ***measurement*** *in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, the figure must be "basically a conventional figure derived from experience and from awards in comparable cases".*

The explicit use of comparable verdicts in the United Kingdom has extended to the publication and regular updating of a booklet by the Judicial Studies Board entitled *Guidelines for the Assessment of General Damages in Personal Injuries Cases* which is, according to Lord Woolf in the foreword to the 1996 edition, the most reliable tool for the use of all courts in determining the appropriate quantum of damages.[16]

The traditional reticence to refer to comparable verdicts was developed at a time when most awards for damages were made by juries. That is no longer the case and has

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[14] 4th ed, Butterworths, 2002 at 217
[15] [1983] 2 AC 773 at 777
[16] *McGregor on Damages*, 16th ed, Sweet and Maxwell, London, para 1702

never been the case in this jurisdiction. The Full Federal Court has observed in *Grincelis v House*[17] that:

> *... the High Court might now countenance the possibility of a court obtaining some assistance from the size of other awards in personal injuries cases.*

The High Court, while not expressly over-ruling *Planet Fisheries*, has acknowledged in *Carson v John Fairfax & Sons Limited*[18] that:

> *We see no significant danger in permitting trial judges to provide to the jury an indication of the ordinary level of the general damages component of personal injury awards for comparative purposes, nor in counsel being permitted to make a similar reference. Although there is authority in this Court to the effect that the quantum of damages is not to be resolved by reference to a norm or standard supposedly to be derived from a consideration of amounts awarded in a number of other specific cases, there is much to be said for trial judges offering some guidance on damages.*

There is no doubt that advisers to plaintiffs and defendants, and indeed Judges and Masters, maintain a form of database of general damages decisions in order to assist in advising clients or determining awards, not in a mechanical sense, but in order to facilitate consistency. It would be quite unrealistic to do otherwise, particularly when judicial officers must turn their minds not only to common law assessments, but to statutory scheme assessments where general damages type components of awards are to be determined by express statutory formulas based on percentage of worst case

[17] (1998) 156 ALR 443 at 458 per Hill and Kiefel JJ
[18] (1993) 178 CLR 44

awards (see M. Kirby, Harold Luntz: *Doyen of the Australian Law of Torts*[19]). This has been recognised by the ACT Full Court which said in *Hebditch v Sheppard*:[20]

> *... it is not out of place for the Court in its endeavour to assess damages within a recognised range to search for any trend of awards in reasonably comparable cases and use a current path as a guide to making its assessment. By looking at comparable cases the Court does not leave itself little room for flexibility. The proper award cannot be arrived at by adopting fixed limits. But it is proper for a judge to take notice of recent assessments made by other judges of the Court in cases which bear a reasonably close resemblance to the case under consideration.*

The ACT Legislative Assembly has recently put this matter beyond doubt in this jurisdiction by enacting that a party may bring to the Court's attention earlier awards.[21]

## ECONOMIC LOSS CLAIMS

### Income loss past and future

The major component of an economic loss claim will of course be loss of earning capacity, both for the past and the future. The injured plaintiff is entitled to damages which represent the loss of capacity, but that capacity must be, or be capable of being, productive of financial loss.[22] It is not only the nature of the injury that must be looked at here, but the impact of the injury on the individual plaintiff. A loss of a finger might be productive of very little economic loss for a barrister, but the same injury could lead to great loss for a surgeon or a concert pianist.

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[19] (2003) 27 MULR 635 at 640
[20] unreported, 12 July 1996, per Gallop, Higgins and Ryan JJ
[21] *Civil Law (Wrongs) Act 2002*, s 99
[22] *Graham v Baker* (1961) 106 CLR 340

The simplest claim to deal with here would be the person who suffers such significant injury as to be unable to work at all, and the appropriate quantum would be to take their net earnings and multiply that by their future available working years to normal retirement age (whatever that may now be), subject to the appropriate discounts to reflect present value and a discount for contingencies. This is the so-called "arithmetic approach", which can of course apply to loss to the date of hearing and to future loss, where the Court in considering what is likely to occur into the future will bear in mind the approach of the High Court in *Malec v JC Hutton Proprietary Limited.*[23] This approach is entirely appropriate and will provide a clear answer for a plaintiff in steady employment with a clearly identifiable loss of earning capacity.

The arithmetical approach can also be of assistance where further variables are loaded into the equation. It may be that the evidence will establish that the plaintiff suffers from a partial incapacity but is able to engage in active employment for restricted periods so that it is possible to identify with some clarity the difference between pre and post accident earnings. It can be appropriate to apply a higher or lower discount figure for contingencies where the facts justify this.[24]

At one time it seemed to be common practice to commission reports on economic loss from economic loss consultants as evidence of future loss. These reports can add significantly to the cost of proceedings, and the assistance they provide to the Court can be questionable. As Kelly J noted some 20 years ago in *White v Combridge:*[25]

> *... actuarial evidence is only as good as the questions asked of the actuary.*

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[23] (1990) 169 CLR 638)
[24] *Koeck v Persic* [1996] Aust Torts Reports ¶81-386
[25] (1984) 59 ACTR 18 at 25

In most cases the real issue will not be how to multiply a given earning rate by a number of years, but whether the plaintiff is really disabled, and to what extent. Economic loss reports, in my experience, frequently start with assumptions that are usually the very matters that are in dispute at the hearing.

The widespread use of economic loss reports has been expressly criticised by the Full Court in a decision concerning professional practice standards where Miles CJ, Higgins and Madgwick JJ said in *The Law Society of the Australian Capital Territory v L and A.*[26]

> *It is commonplace that in practice the calculations of financial consultants are of little or no use at trial because those calculations are based on assumptions of facts which are not made out on the evidence at trial. Ultimately, the arithmetic is done at or after trial, on the findings of fact based on the evidence. Solicitors should not incur the expense of financial consultants in personal injury claims unless reasonably necessary.*

In many cases the facts are not sufficiently clear to establish an arithmetic claim, and counsel for both plaintiff and defendant will address the Court on the basis that the claim should be dealt with as a "buffer type claim", in relation to past or future economic loss or both. This can occur where a plaintiff has been in irregular employment both pre and post accident, or where they continue to work full hours, but claim that the accident related disability will impact on future promotion prospects or limit their hours in the future. In such a case, any attempt at mathematical precision will, in the words of the Privy Council "pile unreality upon unreality".[27]

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[26] [1998] ACTSC 24
[27] *Paul v Rendell* (1981) 34 ALR 569 at 579

A global approach may also be appropriate where abundant arithmetic material has been tendered, but where the medical evidence does not match the hypothesis on which the arithmetic analysis was based.[28]

A global approach has been endorsed as appropriate on appeal. In *Laird v Smith*[29] the Full Court said:

> *The nature of the work and the advancement of age are complicating factors. Accordingly, to make an assessment of the respondent's future loss by reference to what the respondent would have been earning at the date of assessment if there had been no injury, which is purely speculative, and doing the calculation for the future on that figure is not appropriate in this case and involves not merely double prophesy but guess work. It gives a false sense of mathematical accuracy in a case where it is impossible to achieve accuracy of that nature.*

Certainly it is desirable, where circumstances permit, to adopt an arithmetic approach to calculation of future economic loss, but where this is not possible, a buffer approach is permissible provided the process of arriving at the buffer is explained. It is always essential for a judicial officer to provide reasons for a decision. The obligation to provide reasons:

> *... does not require lengthy or elaborate reasons. ... But it is necessary that the essential ground or grounds upon which the decision rests should be articulated.*[30]

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[28] see for example *Rose v Chang-Sup Kwow* [1996] ACTSC 56 [36], per Miles CJ
[29] unreported, 31 May 1996, per Miles CJ and Gallop J
[30] Per McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 280

In the High Court, Kirby J, in *Wong v The Queen,*[31] has applied a similar formulation to the requirement to provide reasons in the context of criminal sentencing, saying:

> *The channels of logic should normally be displayed so that the persons affected, a court to which appeal may lie and the community are aware of the essential chain of reasoning that brought about the judgment.*

**Special Damages- Needs created by the accident**

As well as claims for loss of earning capacity, a significant factor in any personal injuries claim will be special damages for needs created by the accident, most significantly medical expenses for past and the future, and the need for domestic or nursing type assistance.

**Medical expenses**

It is obvious that a defendant found liable for causing an injury will be held responsible for the cost of medical care, both for the past and into the future. In most cases there will be little real debate on the question of past care, as an insurer will in many cases have been meeting the costs as they emerge. However, it is well to restate the principles relating to the need for medical expenses to be both necessary and reasonable.

The basis of an award for medical expenses is that the accident created a need that would not otherwise exist. In *Teubner v Humble,*[32] Windeyer J explained that:

> *In most cases the most obvious of such needs are the cost of past and future medical and nursing attention, and of special equipment,*

[31] (2001) 207 CLR 584 at 629
[32] (1963) 108 CLR 491 at 507

> *crutches, a wheel chair and such like. But the list is not closed. Any requirement which arises as a consequence, and a not too remote consequence, of the injury, can I think be considered.*

The means used to satisfy the need must be reasonable. In *Sharman v Evans*[33] the High Court said:

> *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. When the factors are more evenly balanced no intuitive answer presents itself and the real difficulty of attempting to weigh against each other two in comparables, financial cost against relative health benefits to the plaintiff, becomes manifest.*

The question of reasonableness can be relevant where alternative type therapies are utilised. Therapeutic massage is commonly utilised in soft tissue type injuries. This can often be recommended by providers and general practitioners to be beneficial over a long term even where specialist orthopaedic evidence is that no further active treatment is appropriate. Ongoing claims for $50 a week for therapeutic massage can amount to a substantial sum, and may be challenged as being unreasonable.

It is fair to observe that courts will generally afford some latitude in respect of past claims. It is well accepted that the mere lack of success of a therapy does not mean that it is not recoverable[34] and where a plaintiff has been attempting a range of therapies in order to try to obtain relief it seems reasonable that they be compensated for expenses they have in fact incurred in trying various solutions at least for

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[33] (1977) 138 CLR 563 at 573
[34] *Lamb v Winston* [1962] QWN 18

treatments not "palpably bogus" until a plaintiff receives clear medical advice that the treatment is not effective.[35] Where such remedies are proposed to continue long into the future, at considerable expense, the plaintiff will have to satisfy the test of *Sharman v Evans* that the treatment is reasonable. Where the evidence from a specialist orthopaedic surgeon is that no further treatment is likely to be of assistance, the assertion by a general practitioner or provider of therapeutic massage that they consider a plaintiff would benefit from ongoing massage is unlikely to be successful. In an award as Master I allowed past therapeutic massage, but declined to make an award for long-term future massage. This was challenged on appeal as an inconsistent approach, but was affirmed on appeal (*Fry v McGufficke*[36]).

**Nursing and domestic services**

It has been well established since *Griffiths v Kerkemeyer*[37] that a plaintiff is entitled to recover the cost of domestic assistance and nursing needs even when that has been provided gratuitously by a family member. This is undoubtedly correct in principle, but it did lead to many claims which, in my view, were quite unrealistic. In a paper I presented to a continuing legal education seminar in 1996 entitled *The Finances of Dishwashing,* I made the observation that:

> *Claims for hundreds of thousands of dollars based on the fact that a husband now does half of the washing up will not, in my experience, elicit any sympathy from politicians or ministers charged with the responsibility for spreading ever diminishing welfare and health resources equitably across a community. If this head of damages is to remain a part of Australian law, a degree of restraint may be prudent, lest parliaments strike it away.*

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[35] *Lipovac v Hamilton Holdings Pty Ltd* (1997) 136 FLR 400 at 405
[36] [1998] SCACT 20
[37] (1977) 139 CLR 161

It should be recalled that the principle that an injured plaintiff is to be compensated at the market value for domestic and nursing services provided by a family member arose in a case where the plaintiff had sustained truly catastrophic injury. In *Griffiths v Kerkemeyer,*[38] Mason J described the unfortunate plaintiff as being:

> *... completely unemployable and wholly unable to look after himself. He has no control of his lower limbs or trunk, he has limited control of his arms but none of his hands which remain permanently clenched. He cannot feed himself even with the aid of a special spoon. He cannot bathe or dress himself, clean his teeth or shave. He has no control of his urinary or excretory functions.*

Extension of this principle to cases of relatively minor soft tissue injury, where any contribution by other family members to the running of a household is carefully quantified and claimed at commercial rates has always seemed to me to be inappropriate, and to ignore the qualification referred to by Deane and Dawson JJ in *Van Gervan v Fenton*[39] where their Honours made it clear that it was inappropriate to claim for matters that would fall within the "give and take" or marital or domestic relations. It seems to me that the position is well stated in the Damages chapter of Halsbury's *Laws of Australia*[40] that:

> *the plaintiff cannot claim the costs of services which are provided as part of the ordinary incidents of family life and obligation or those services which are replaced in a sensible post injury rearrangement of domestic services.*

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[38] (1977) 139 CLR 161 at 182
[39] (1992) 175 CLR 327
[40] Vol 9 par 135-935

I have applied these principles in determining such claims, and as Master frequently declined to make an award, or made but a modest award, where substantial *Griffiths v Kerkemeyer* claims were made based on, say, the claimed cost for teenage children doing some household chores, or a spouse taking up a share of the cooking or cleaning. In no case was such a finding reversed on appeal. I note that the warning I made in 1996 about the risk of excessive *Griffiths v Kerkemeyer* claims leading to parliaments abolishing or substantially modifying this entitlement has proven prophetic, and this type of claim is now heavily prescribed in other jurisdictions. In the ACT the claim is still available, in appropriate cases.

**Matters of Evidence**

If the foregoing discussion of the principles to be applied in the assessment of damages is accepted, it might be said that the process itself is relatively straight forward, and indeed of the type that could at some time be performed by a computer. Unfortunately, or perhaps for judges and lawyers, fortunately, it is never so simple, because the process assumes that "the facts" will be applied to the relevant legal principle. But as every lawyer practicing in this field well knows, what "the facts" are will usually be the central issue in any hearing, and no doubt during pre-hearing settlement negotiations as well.

Some years ago the editor of the Australian Law Journal, Justice Young, noted, with some scepticism, media reports of hand-held lie detectors that were to appear as a consumer item to assist persons to determine when statements were true.[41] No such reliable instrument exists, of course, and so Judges and Masters must do their best to

[41] *Scientific Fact Finding* (1999) 73 ALJ 233

assess the credibility of witnesses. In doing my best I humbly accept that the best studies tend to show that judges, police officers and psychiatrists, whatever expertise they may claim, are in fact no more likely than any general control group to be able with any reliability to detect lying under controlled study conditions.[42] We simply have to do the best we can. Traditionally this fact-finding role was performed by juries, and their reasoning was never made public. They simply returned a verdict. In judge alone trials, which is the case for all civil trials in the ACT, the Judge or Master must set out in the decision their reasoning process in relation to fact-finding, and this process is open to challenge on appeal.

The possible development of technology to determine witness credibility was referred to by Kirby J in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd*[43] where his Honour said:

> *In the future, technology may be developed which will assist courts in the conclusive determination of issues of witness credibility where these are disputed. In the United States of America, polygraphs are already in use in some jurisdictions. In Australia, they have not been treated as sufficiently reliable for judicial use. Our courts must therefore continue to struggle with the aid of human estimation. Until the courts are afforded technological relief, they do well to realise the imperfections of the currently available tools of decision-making. They need to minimise, and not exaggerate, the role of the judicial assessment of credibility from appearances.*

At first instance a judge undoubtedly has an advantage in being able to form a view as to the demeanour of witnesses that will not necessarily be apparent on a mere reading

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[42] *Who can catch a liar?* P Ekman and M O'Sullivan September 1991 American Psychologist 913
[43] (1999) 160 ALR 588 at 618

of the transcript of the trial.[44] But demeanour can be a notoriously unreliable guide. A person may appear to be evasive and devious, but they may be merely nervous. The best confidence tricksters are always poised and confident. Judicial officers need to be mindful that demeanour is a poor guide to truthfulness. As Justice Kirby has observed:[45]

> *Empirical evidence casts serious doubt on the capacity of any human being to tell truth from falsehood from the observations of a witness giving testimony, in the artificial and stressful circumstances of a courtroom. Appearances can sometimes be affected by cultural factors. Considerations such as these have tended to undermine the judicial conviction that, with appointment, comes a capacity to discern truth from falsehood. Appellate courts encourage judges to search for the truth in the contemporary materials, objective and indisputable facts and the logic of the evidence rather than basing conclusions on responses to witnesses which may be erroneous and completely unfair.*

The Supreme Court Rules provide ample avenues for parties to obtain information by way of contemporary materials that can be far more effective than impressions taken from a witness' demeanour in getting to the truth of the matter. A plaintiff's prior medical records from a range of providers can be obtained before trial, either by way of subpoena, or pursuant to a more recent innovation, a notice for non-party production. This procedure[46] allows a party to obtain copies of documents, rather than the originals, and so is widely used for obtaining notes from treating doctors. A plaintiff hoping to obtain a large judgment by claiming that an accident has caused a previously asymptomatic spinal degenerative condition to become symptomatic has

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[44] *Abalos v Australian Postal Commission* (1990-1991) 171 CLR 167
[45] Kirby, *Judging: Reflections on the Moment of Decision* (1999) 18 Aust Bar Rev 1 at 17
[46] Supreme Court Rules, Order 34B

not infrequently been caught out by the production of earlier treating doctors' notes showing that the plaintiff had been complaining of back pain in the relevant area well before the accident.

In assessing credit, the use of surveillance material can be of value if the film shows that the plaintiff is undertaking activities which are inconsistent with the extent of their claimed disabilities. This material can be quite decisive in determining credit,[47] or it can be of limited assistance.[48]

A dramatic example of the use of video surveillance recently was highlighted[49] where video surveillance was ordered by the insurer to take place over a period of months. Film was obtained of the plaintiff showing obvious limitation of movement, and the matter settled for a considerable sum. The insurer, however, forgot to tell the surveillance operator that the matter had settled, and the operator was amazed when he next exposed film showing the plaintiff engaged in vigorous activities, climbing ladders and carrying bricks on a construction site. The insurer successfully brought an action to have the consent judgment set aside as having been obtained by misrepresentation.

Insurers have been known to go to considerable lengths to obtain video material. In one case before me there had been extensive film, all showing the plaintiff with obvious limitations. During this period he took a trip to England and video was

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[47] eg. *Tanaskovic v Bateman* [1998] ACTSC 84, where a plaintiff was filmed raising his arm repeatedly in a manner that he denied was possible, and when confronted with the film, repeated the action in the witness box.

[48] eg. *Ledger v ACT Society for the Physically Handicapped* [1999] ACTSC 23 where the plaintiff was filmed in the sedentary activity of sitting and playing bingo.

[49] *Zardo v Ivancic* (2003) 149 ACTR 1

produced of him concreting his mother's driveway with no limitation. As soon as this was shown, the case settled for a very modest sum.

Where video material is to be relied upon, care must be taken that it has been lawfully obtained. Most material is filmed in a public place, and it is apparent that the operator who made the film was on a public street or in a shopping mall. In *Klein v Bryant,*[50] I had a situation where the plaintiff was residing on an isolated rural property, and the video material that was shown was clearly taken by a person who had entered the property without consent or authority. In that case I exercised the discretion under s 138 of the *Evidence Act* to exclude the evidence.

Video surveillance material is regarded in the Australian Capital Territory as being privileged from pre trial discovery. This is not the case in some other jurisdictions where all material must be disclosed before trial. It seems to me that while generally it is desirable that all the cards be on the table to facilitate meaningful settlement negotiation, the forensic value of the video film can be totally undermined by disclosure to a dishonest plaintiff before trial. This is particularly the case in soft tissue type claims, where the reality is that the best medical technology simply cannot objectively verify the presence of or the extent of a disability. The Court, along with the medical expert, is thus entirely dependent on the truthfulness of the plaintiff as they describe their symptoms and the impact this has on their activities.

Much of the evidence that will be considered in assessing a personal injuries claim comes from medical experts, and I would like to make some observations about two

[50] [1998] ACTSC 89

aspects of this - the appropriate material that an expert may include in his or her report, and the situation where an expert report is based on a history which is later shown to have been invalid, before turning to recent reforms to encourage the use of joint expert reports.

The usual expert report is from a medical practitioner who may or may not hold specialist qualifications. Where an expert medical report may stray into error is where the expert moves from being an impartial commentator on the medical aspect to assuming the role of advocate. Many Australian jurisdictions have adopted rules or codes of conduct for expert witnesses that make clear that the expert's prime duty is to the Court not the parties, and that they are to be impartial. The ACT Expert Witness Code of Conduct is modelled on the equivalent NSW code, and provides that:[51]

- An expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise.
- An expert witness' paramount duty is to the Court and not to the person retaining the expert.

There have been tendencies over the years for some defendants' doctors to give gratuitous advice in relation to possible surveillance of the plaintiff. I have been critical of such reports, saying:

> *It is not appropriate for a doctor, who is presenting as an expert witness, to make suggestions in a medical report as to forensic tactics that might be used by an insurer. Defendants in third party actions in this Court are well advised by experienced practitioners,*

[51] Practice Direction 2/2004

> *and insurers have experienced claims managers, who are well aware of the availability of private investigators. A medical examiner who makes such suggestions can appear to cross the line between impartial expert and partisan advocate, and this is not helpful to the Court.*[52]

It is also inappropriate for the expert to stray into comment on veracity generally or to offer their views on the outcome of the litigation. In *Forrester v Harris Farm Pty Limited*[53], the former Chief Justice was quite critical of a report from an ergonomist, who also claimed expertise in "legal liability evaluation". Miles CJ said that the report:

> *... ranges so far and wide that at worst it reads as if he were an advocate for the plaintiff and at best an arbitrator called upon to decide the case on liability. To his eight page report are added another eight pages of extracts from various sources of a technical or academic nature. These are no doubt of considerable interest but I find them of dubious probative value. Some are in the nature of selective self-corroboration, others are simply confusing. They are embarrassing to a court charged with the duty of finding the facts because it is impossible to know how far the court is expected to evaluate and analyse them or to master them or to discuss them in any reasons for decision in respect of which they may be relevant.*
>
> *It is a trite principle of evidence law that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts, which facts are proved by the evidence in the case, exclusive of the evidence of the expert, to the satisfaction of the Court according to the appropriate standard of proof. Whether or not the expert believes in that sub-stratum of facts or knows them to be true or is satisfied that they are true, is completely beside the*

[52] Petterson v Poulson [1999] ACTSC 2
[53] [1996] ACTSC 1; 129 FLR 431 at 438

> *point. The expert's function is to express an opinion based on assumed facts, not to express a view on whether the assumptions are justified: see* Clarke v Ryan.[54]

The best medical evidence is a report and oral evidence which strive to be fair and objective. To take a hypothetical case, consider a back injury with some frank disc damage verifiable on MRI scan. The plaintiff continues in part-time work for some years, but complains of increasing restrictions, and still has some active hobby interests. A range of opinions will typically be presented, which may include a plaintiff's doctor who will say that the plaintiff will never work again and requires extensive domestic assistance, and a defendant's doctor who will say the plaintiff is fit for full-time work. Such doctors tend to hold rigidly to their views in cross-examination, generally refusing to make any concessions even where different factual versions are put to them.

There will also be reports from doctors who may regularly report for both insurers and plaintiffs who will take a middle ground, tending to show a genuine ongoing disability, but with significant residual work capacity. Such doctors will be likely, if cross-examined, to make concessions as different facts emerge. You will not be surprised to learn that the more extreme and rigid views will tend to be disregarded in favour of a view to be found or derived from the confluence of the more moderate doctors. It is perfectly proper to be suspicious of the partisan and rigid expert.[55]

In this context it is appropriate to note that the trial judge is entitled to draw an adverse inference when it is shown that a medical report has been obtained but not

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[54] (1960) 103 CLR 486
[55] *Joyce v Yeomans* [1981] 2 All ER 21 at 26 per Brandon LJ

served. The inference that may be drawn is that the absent witness or report "would not have helped" that party's case.[56] Where, to return to the hypothetical, the defendant sends the plaintiff to a range of doctors, but only serves the report of the extreme view, the sole defendant expert is unlikely to be preferred. There is something of an unlevel playing field at work here though, which needs to be guarded against. The plaintiff will always know if there is an unserved defendant's doctor's report, because the plaintiff will have presented for examination by the defendant doctor. The defendant, however, will have no way of knowing how many medico-legal experts the plaintiff may have consulted. There have been proposals to amend the rules to require disclosure, but such rules could easily be subverted.

In this jurisdiction it is the norm for parties to tender expert reports without a need to call each expert for cross-examination. This will not involve any breach of the rule in *Browne v Dunn.*[57] The practice of proceeding without calling all or even any experts was encouraged by Miles CJ who said in *Goldsborough v O'Neill:*[58]

> *Litigation, particularly personal injury cases, would become more protracted and more expensive if such a rule were to be observed. Professional witnesses whose reports are in evidence should not be brought to Court to be examined in chief or to be cross-examined unless the examiner has made an informed decision that something is able to be got from the witness which is not in the report.*

This obviously saves time and expense. Where doctors are required for cross-examination, it is very common for this to take place, by consent, by telephone, so that alternative versions of the history or the facts underlying the report can be put to

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[56] *Jones v Dunkel* (1959) 101 CLR 298
[57] (1893) GR 67
[58] [1996] ACTSC 18 at [3]

the doctor. Again, the savings are considerable, particularly as many medico-legal consultants have a principal practice in Sydney. It must not be forgotten that reports so tendered are not automatically accepted. There will still be the question of resolving any dispute between the experts.[59] Moreover, the Court is not bound to act on an expert opinion, even if uncontradicted.[60]

Although excessive use of cross-examination of expert witnesses has not been a problem in our personal injury practice, the ACT has gone along with reforms in other jurisdictions that encourage the use of single expert medical witnesses. This is provided for in the *Civil Law (Wrongs) Act 2002* by Chapter 6, which provides that for causes of action arising after September 2003 expert medical evidence may be given in a proceeding in a court only by an expert appointed jointly by the parties as an agreed expert, or an expert appointed by the Court when the parties have been unable to agree. Rules to set down the procedure for a court appointed expert are presently being prepared, but the expectation is that the parties will wherever possible seek to reach agreement on the appointment of an agreed expert, rather than have to rely on the court appointed expert.

The ACT regime will be similar to the Queensland proposals to limit expert medical evidence to agreed or appointed experts. The proposal to require single experts was a decision of the Parliament, and was opposed by the legal profession. In a paper to the Australian Supreme Court Judges Conference in January this year, Justice Davies of the Queensland Court of Appeal noted the legal profession's opposition to any limitation to the right of a party to call a witness of their choosing, but said:

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[59] see generally Von Dousa, *Difficulties of Assessing Expert Evidence* (1987) ALJ 615
[60] *Davies v Magistrates of Edinborough* [1953] SC 34, Byrne & Heydon, *Cross on Evidence*, para 29075

> *It should be noted that the emphasis is on the party's right (for which a cynic might substitute a litigation lawyer's right) to call evidence on a question involving expertise, and that the statement implies that a party (or his lawyer) not only has the right to call expert evidence on such a question, but to call as much of it as he or she likes.*[61]

The Act expressly preserves the right of the Court to allow additional expert material if the interests of justice so require it (s 86). This is an important qualification, as any absolute bar to additional evidence could create grounds for a legal challenge, at least in courts exercising federal jurisdiction. The High Court has held that the exercise of judicial power involves "the application of the relevant law to the facts as found" and that for this to occur there must be an opportunity for the parties to "present their evidence and to challenge evidence led against them".[62] As legislatures around Australia move to limit the ability of a party to present expert evidence of their choice, it seems inevitable that someone will take the point that a legislative provision that limits the ability to call a witness (particularly in a case where the executive government might be a party to the litigation) may interfere with the proper exercise of judicial power. But that will be a question for the High Court.

While our Court has generally not had problems with expert witnesses, beyond the issues of the over-enthusiastic expert bordering on the partisan, there have been notorious examples in Australia where it has been shown that an expert's report has been adjusted to best suit a party's forensic needs. In *Marsden v Amalgamated*

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[61] Davies, Court Appointed Experts, paper to Supreme and Federal Court Judges Conference, Auckland, 2004

[62] *Bass v Permanent Trustee Company Limited* (1999) 198 CLR 334 at 359 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ

*Television Services Pty Ltd*[63] a psychiatrist admitted in cross-examination in a defamation trial that he had removed significant material from his report at the request of a solicitor for the party that had engaged him. The matter only came to light when an earlier version of the report was accidentally passed to cross-examining counsel. Instances such as this have no doubt prompted legislatures to move to limit the ability to call "hired gun" experts.

A common problem with expert medical reports occurs when the facts which emerge at the hearing are contrary to the facts which the expert has assumed to be true for the purposes of the report. This can frequently be the case in soft tissue type cases where the objective evidence shows a degree of underlying degeneration, and where it is claimed that the plaintiff was symptom free before the accident. Where these facts are made out, the plaintiff will of course be entitled to be assessed for damages on the basis that the accident aggravated the pre-existing condition and rendered symptomatic a previously asymptomatic underlying degenerative disease. In these common types of cases, the finding of pre-accident symptoms or treatment for pre-existing spinal pain can be significant.

In *Falasca v Morrissy*[64] a plaintiff had tendered a range of medical material to establish such a claim, premised on an asymptomatic spinal condition before the accident. At the hearing material was produced on subpoena from a physiotherapist which showed a series of prior complaints of and treatment for neck pain. I held that this undermined the basis of the reports, so that I could no longer rely on them. This approach was sustained on appeal, where the Full Court said:

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[63] [2001] NSWSC 510
[64] [1998] SCACT 35 at [14]

> *In so concluding, the Master relied upon the decisions of the High Court of Australia in* Ramsay v Watson *(1960) 108 CLR 462 in which Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ observed at 649, that when the medical history is the foundation or part of the foundation for an expert medical opinion and that history is not established in evidence then "the physician's opinion may have little or no value, for part of the basis of it has gone". This observation was echoed in the more recent decision of the High Court in* Paric v John Holland (Constructions) Pty Ltd *(1985) 59 ALJR 844 when in a joint judgment Mason ACJ, Wilson, Brennan, Deane and Dawson JJ cited* Ramsay v Watson *as authority for the proposition that 'it is trite law that for an expert medical opinion to be of any value the facts upon which it is based must be proved by admissible evidence.*

**Conclusion**

The life of the law, it was famously said, is not logic but experience.[65] My own professional background, prior to entering politics, which can certainly be said to be more about experience than logic, was mostly involved in public law - constitutional, administrative and international law. Practicing and teaching in those fields led one to a view that the law comprised a logical body of principle. On accepting the appointment of Master of the Supreme Court, which mostly involved hearing and determining personal injuries claims, you can imagine how comforted I was to read in what is generally regarded as the leading Australian text, *Luntz on Assessment of Damages for Personal Injury and Death*, of the "chaotic internal logicality of the law of damages for personal injury".[66]

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[65] Oliver Wendell Holmes, *The Common Law*, 1881
[66] Preface to 3rd ed

Is there an underlying logic to all of this? Is the assessment of damages an art or a science? I hope that the foregoing discussion has been of some assistance in outlining some of the issues which I consider to be relevant in the assessment of damages for personal injury. There are underlying principles to the process, and the process of decision making does involve something more than what a South Australian Supreme Court Judge once described as the use of "a broad axe and sound imagination".[67]

[67] [1939] SASR 389 at 392, per Cleland J