



PERSONAL INJURIES - DISCOUNTING FOR CONTINGENCIES

In personal injury cases damages for lost past income and for lost future earning capacity usually include a deduction for contingencies. The deduction is made because the 'vicissitudes of life' might have dictated that the plaintiff would not have earned the income or realised the earning capacity in full. While these vicissitudes, such as illness, non-tortious¹ injuries, unemployment and strikes², may be positive as well as negative³, courts have universally held that, in the absence of special factors, a deduction should be made. The deduction is generally determined by adjusting a standard or 'rule of thumb' discount to allow for the characteristics and circumstances of the particular plaintiff.

In Victoria the rule of thumb deduction is 15%⁴. For lost future earning capacity this discount is applied to the capital value of the future income which the plaintiff is assessed to have lost over his or her future working lifetime. As this capital value includes an actuarial allowance, generally between 3% and 4%, for the possibility of death before retirement, the total standard deduction for lost future earning capacity is of the order of 18% or 19%. In other States the standard discount is most commonly 15% but is as low as 2% to 6% (in Western Australia).

In fact, any reasonable analysis of published statistics reveals that a standard discount of 15%, particularly when applied to a value that already includes allowance for mortality, is far too high. Indeed it is the discount in Western Australia, of the order of 5%, which actually represents a suitable base⁵.

The Attitude of the High Court

The allowance for general contingencies was considered by the High Court in *Wynn v NSW Insurance Ministerial Corporation*⁶ and in *De Sales v Ingrilli*⁷.

In *Wynn* the High Court decided unanimously⁸ that the discount for contingencies should be 12.5% for the particular plaintiff, a woman who was aged 30 when injured. However, despite there having been 'no adverse comment

about the standard discount in NSW⁹ and the 12.5% having been wrongly interpreted as being based on the 15% standard¹⁰, the 12.5% actually included *no* allowance either for mortality or for other general contingencies. It was simply held to be 'an appropriate discount for maternity leave' and an existing condition of the plaintiff, balanced against 'the prospect of future advancement'¹¹.

De Sales was a wrongful death case in which the High Court was primarily concerned whether there should be a discount for the possible remarriage of the widow and whether such a discount, if applicable, should be subsumed into the discount for general contingencies. The allowance for contingencies, which had been set at 5% by Full Court of the Supreme Court of Western Australia, was, however, a ground for appeal and offered the High Court an opportunity to consider the general question. That opportunity was taken only to the extent of confirming the 5% discount on the ground that it was within the standard range of 2% to 6% in Western Australia.

Thus, to date, the High Court has not directly considered the standard discount, nor whether it should be uniform across jurisdictions.

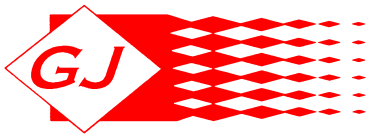
Time for a Test Case?

Courts have generally been ambivalent about using statistics. One extreme was exemplified by Meagher JA who commented that:

*both parties ... employed actuaries who threw themselves into the task of forecasting the events of the next sixty-one years like ancient Etruscan soothsayers examining the entrails of sacrificial birds.*¹²

But in *De Sales*, another, and in the writer's opinion, more rational, view was expressed by McHugh J:

*I see no reason why courts should not invoke the aid of [statistics] whenever it is feasible to do so. In this particular area of the law, the search for highly individualised justice borders on delusional.*¹³



Perhaps it is time for statistical evidence to be led in support of a plaintiff for whom the 15% rule of thumb is clearly and harshly inappropriate.

Biographical Information

Richard Greenfield is a member of the Victorian Bar who is also a qualified actuary.



- ¹ *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485, 498.
- ² Harold Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002) [6.4.6].
- ³ *ArthurRobinson (Grafton) Pty Ltd & Anor v Carter* (1968) 122 CLR 649, 659; *Bresatz v Przibilla* (1962) 108 CLR 541, 544.
- ⁴ See for example *Club Italia (Geelong) Inc v Ritchie & Anor* (2001) 2 VR 447, 464.
- ⁵ Luntz, above n2, [6.4.14]; Richard Cumpston and Hugh Sarjeant (2001) 'Deductions for vicissitudes when estimating the value of future earnings' 43 *Plaintiff* 32.
- ⁶ (1995) 184 CLR 485.
- ⁷ (2002) 212 CLR 338.
- ⁸ Brennan CJ adopted the joint judgment of Dawson, Toohey, Gaudron and Gummow JJ.
- ⁹ (1995) 184 CLR 485, 395 (Kirby J).
- ¹⁰ See for example *Halsbury's Laws of Australia* [135-905] in which Footnote 10 reads "conventional rate reduced to 12.5 per cent in consideration of the plaintiff's chance of promotion".
- ¹¹ (1995) 184 CLR 485, 499
- ¹² *Government Insurance Office of NSW v Rosniak* (1992) 27 NSWLR 664, 699.
- ¹³ (2002) 212 CLR 338, 377-378.

WINDFALL OR PITFALL? The retail lease disclosure statement controversy continues

Can a landlord's failure to give a retail tenant a disclosure statement entitle the tenant to a complete rent refund? For the moment at least, the answer is "yes".

This apparent windfall for tenants was upheld by the Supreme Court last October in *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd*¹ ("Dog Depot"). But that decision has now been appealed to Court of Appeal where it might not be dealt with for another 12 months.

It is likely to be a very anxious wait for some landlords, solicitors, leasing agents and professional indemnity insurers.

In recent times retail premises landlords have been required to give tenants disclosure statements in prescribed written form setting out certain details connected with leases of retail premises before the commencement of those leases. That requirement was imposed by s 8 of the *Retail Leases Reform Act 1998* ("the old Act") until that Act was repealed. Very similar requirements regarding disclosure statements

were then reproduced in s 17 of the *Retail Leases Act 2003* ("the new Act")

A disclosure statement tends to be an innocuous document. Its purpose is to set out in fine detail minutiae of the lease of which the parties are usually broadly aware anyway. Because of this, it is notorious that disclosure statements are frequently overlooked when leases are entered.

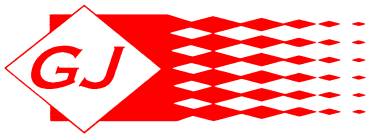
Such oversights can go unnoticed for years. The potential consequences of both the original oversights and their subsequent discovery differ between the old Act and the new Act. But under either regime the absence of a disclosure statement will be good news for the tenant and bad news for the landlord and, more particularly, for the solicitors and/or leasing agents responsible for preparing lease documentation on the landlord's behalf.

Under the new Act the landlord's failure to supply a disclosure statement can entitle the defendant to withhold rent in some circumstances. Such a rent strike will obviously alert the landlord to the problem and typically will enable it to be rectified. The genie cannot be put back into the bottle instantly however – a tenant is still able to terminate the lease at any time up to 28 days after the disclosure statement is provided.

And even more drastic consequences can arise from the failure to provide a disclosure statement under the old Act. Although the old Act has been repealed it continues to apply for most purposes today to leases entered before mid-2003. The old Act was the legislation considered in *Dog Depot*.

Dog Depot concerned a lease entered in August 2000. Through an oversight the landlord's agent omitted to give the tenant a disclosure statement until almost 3 years later. In the interim the tenant paid rent totaling almost \$65,000. Following the belated supply of the disclosure statement the tenant successfully claimed in VCAT for a refund of the rent paid before that time on the basis that the absence of the disclosure statement meant that the rent had been paid under a mistake of law. On appeal the Supreme Court upheld the VCAT decision. Both the appeal and first instance decisions rely heavily on the High Court's decision in *David Securities v Commonwealth Bank of Australia*²

As the law presently stands a retail tenant who entered a lease between 1998 and 2003 without receiving a disclosure statement would appear to have a good claim to the entirety



GORDON & JACKSON
BARRISTERS CLERKS



of the rent it has subsequently paid. That handsome kitty might ultimately be paid by the landlord's solicitor or leasing agent depending upon who was responsible for drawing up the lease documentation on the landlord's behalf.

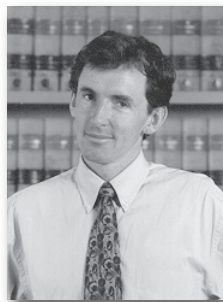
This principle presents tenants with a powerful weapon in both offensive and defensive contexts. Consider the case³ of the car dealer who was sued for several months' rental arrears. At the eleventh hour he responded with a counterclaim for the entirety of the rent he had paid in the absence of a disclosure statement. The case was determined on the disclosure statement point alone and the landlord who had claimed \$26,350 in arrears from the tenant was instead ordered to refund \$72,220 to the tenant.

Who might be savaged by *Dog Depot*?

Four groups spring to mind as having an obvious interest in this area whether under the old Act or the new Act:

- tenants who have not received a disclosure statement prior to entering into a retail tenancy (even where their lease is otherwise to all parties' satisfaction);
- tenants who are in arrears or default and otherwise unable to avail themselves of a defence to a claim by a landlord;
- solicitors, leasing agents and others who have prepared lease documentation on behalf of landlords generally; and
- solicitors and leasing agents who will inevitably find themselves in a conflict of interest when a landlord on whose behalf they failed to deliver a disclosure statement seeks advice and/or representation from them regarding a tenant in default under that lease.

Paul Duggan has been a member of Gordon & Jackson's List since coming to the Bar in 1996. He appeared for the tenant in Fabian Amber Pty Ltd v Liano (2004) VConvR58-574, [2003] VCAT 2005. He is secretary of the Insurance and Professional Negligence Section of the Commercial Bar Association.



¹ *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd* [2004] VSC 400 (Kaye J) (15 October 2004)

² *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353

³ *Fabian Amber Pty Ltd v Liano* (2004) VConvR58-574

**STOP PRESS STOP PRESS
STOP PRESS STOP PRESS**

Gordon & Jackson's List was overwhelmed with the response for the breakfast seminar held on 21 April. 130 solicitors found the presentation on "Asset Protection: Spotlight on Trusts, Superannuation and Family Law" held in conjunction with Pitcher Partners, to be very practical and applicable to their practice.

NEW LIST MEMBERS

We welcome the following Readers who commence taking briefs on 13 May

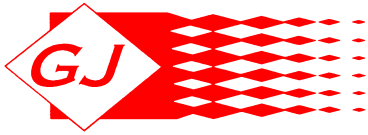
PAUL ADAMI B.A., B.Comm, LL.B.

Paul was admitted to practice in February 2004. Prior to coming to the Bar, Paul worked at Perillo Adami & Frank, a small busy firm which gave him the opportunity to experience a wide range of commercial and criminal matters. He worked energetically as a solicitor for both small companies and private clients focusing on four key areas, probate and wills, residential and retail leases, property law and family law.



Paul's work not only involved generally advising but also included initiating and defending probate applications and family maintenance claims, action by lessee's and lessor's, easement and boundary disputes, Land Title's Office applications and divorce proceedings. He has also been involved in applications at VOCAT.

Paul intends to practice in wills and estates, retail and residential tenancy, property and family law.



GORDON & JACKSON
BARRISTERS CLERKS



NEW LIST MEMBERS - *Continued*

We welcome the following Readers who commence taking briefs on 13 May

KATHRYN STYNES B.Sc, LLB

For the past fourteen years Katie has worked for Minter Ellison in the Insurance Group and the Construction Group. Over this time Katie has practised in the areas of construction, professional indemnity, public liability, aviation and maritime law. In the Construction Group Katie was the senior member of the team involved in the Fluor Australia Ltd and Fluor Corporation(US) claim by Anaconda Nickel/Glencore AG joint venture.



Katie has written a number of articles and has presented many seminars on her areas of expertise.

Katie will practise in the areas of construction law, insurance law, aviation and maritime law and commercial law.

GARRY MOFFATT B.Comm, LLB

For ten years after admission Garry worked as an associate with several medium sized country and suburban firms in the areas of family law, personal injuries and workers compensation, probate, wills and conveyancing.



For the past fifteen years Garry has been the Head of Litigation in the Legal Department of the Commonwealth Bank.

Garry will practise principally in the areas of banking and finance, bankruptcy and insolvency and insurance litigation.

STEPHEN WALDREN B.A, LLB

Stephen comes to the Bar with the benefit of 10 years experience in practice as a solicitor. His experience includes over four years as a solicitor in private practice specializing in insolvency and commercial litigation as well as six months working in insolvency for a large United Kingdom firm.



Stephen also spent four years at Deacons where he was a Senior Associate specializing in construction and engineering litigation. Immediately prior to coming to the Bar Stephen spent 18 months at ASIC where he was the senior lawyer in its recently formed National Insolvency Coordination Unit. At ASIC and in private practice, Stephen has enjoyed working closely with members of the insolvency profession.

Stephen has a keen interest in both insolvency and Corporations Act matters and in construction and engineering disputes. He is experienced in the conduct of commercial litigation in all Courts and in commercial arbitrations.

At the Bar Stephen intends to practice generally in the area of commercial litigation with a particular focus upon corporate and personal insolvency, Corporations Act matters, matters concerning ASIC and other regulatory bodies and construction and engineering disputes.

GORDON & JACKSON BARRISTERS CLERKS ~ OWEN DIXON CHAMBERS WEST
205 William Street, Melbourne 3000 Phone 9225 7333 Fax 9225 7907 DX 94 Melbourne
Website: www.gordonandjackson.com.au Email: clerks@gordonandjackson.com.au