



## Précis Paper

### Quantifying Loss and Other Considerations in Personal Injury Matters

This presentation addresses key considerations in personal injury cases, including how to quantify economic loss when the plaintiff is young and earnings may increase over time.

#### Discussion Includes

- Difficulties in acting for an overseas plaintiff
- Identifying the dominant injury
- Quantifying economic loss
- Obtaining instructions regarding ongoing care requirements
- Advising clients with limited capacity
- Costs
- Identifying the necessary level of detail to convince the Court

## Précis Paper

### Quantifying Loss and Other Considerations in Personal Injury Matters

1. In this edition of BenchTV, Mitchell Clark (Partner, MBA Lawyers, Gold Coast) and Louise Mathias (Barrister, Elizabeth Street Chambers, Sydney) discuss the recent decision of the Supreme Court of Queensland in *Yamaguchi v Phipps* [2016] QSC 151.

#### Background and Material Facts

2. The plaintiff was a young woman and a Japanese national. She was badly injured when struck by a bus on a pedestrian crossing in Cairns on 30 December 2011. She suffered brain damage, orthopaedic injuries and various other injuries. She suffered from cognitive impairments and major depression, which had a devastating effect on the quality of her life.
3. Before her multiple injuries, Ms Yamaguchi was a socially active, 23 year old female in full-time employment. She enjoyed a range of sporting and recreational activities and good relationships. She lived in her own apartment, independent of her parents. She had secure employment and prospects of promotion.
4. After the injury, the plaintiff attempted to return to work. Her employer made extensive allowances to accommodate her injury, however after a trial of employment for one year, Ms Yamaguchi was forced to resign as the attempt to return to work proved unsuccessful. The physical and cognitive features of her injury, including difficulties with short-term memory, prevented her from returning to work. Ms Yamaguchi returned to live with her parents, who provided significant ongoing care.
5. Liability was not disputed, however quantification of the claim was put into issue by the defendant insurer. The insurer argued that by returning to work for such a long period of time, it was demonstrative of the plaintiff's capacity to work. The fundamental areas in dispute were allowances for financial compensation in the future, specifically future economic loss and future care needs.
6. The case involved difficult issues in itself, but also raised additional challenges due to the fact that the plaintiff ordinarily resided in Japan. The differences between the Australian and Japanese employment, social security and medical systems meant that Mr Clark, who acted for the plaintiff, had to spend significant time becoming familiar with the foreign systems, as well as explaining them sufficiently in evidence to the judge.

#### Identifying the Dominant Injury

7. The system in Queensland for damages under the *Civil Liability Regulation 2003* (Qld) requires the identification of the dominant injury. Because Ms Yamaguchi had a multitude of injuries, an assessment was made of the dominant injury by the Court.
8. Ms Yamaguchi's most serious conditions were a brain injury and major depressive disorder. The judge found that the brain injury was the dominant injury, which was given an Injury Scale Value (ISV) of 21 to 55. In assessing the psychiatric condition, the experts had set aside the cognitive impairment, but in reality, these conditions sometimes overlap. The judge therefore found that had the psychiatric injury been found to be the dominant injury, almost the same result would have been arrived at, because he would have given greater weight to the effect of the cognitive impairment when assessing the impairment level.

### Damages

9. Because of the plaintiff's residence in Japan, different heads of damages were determined in different currencies. General damages were assessed in Australian dollars, whereas economic loss and gratuitous assistance were determined in Japanese yen.
10. After the plaintiff left her work trial, she had not been employed. The evidence established that her prospects of returning to work in the future were virtually nil.
11. In determining economic loss, the Court considered evidence that Ms Yamaguchi was well-regarded in her employment, and that there were prospects of career and salary advancement over the course of her working life. The judge concluded that relying solely on her salary at the time of the accident was insufficient as a measure of her loss, because of her long-term prospects of promotion and advancement. The judge dismissed arguments raised by the defendant insurer that the plaintiff would improve in her health with particular therapy. These arguments were rejected largely because the evidence showed that the health professionals who had been treating Ms Yamaguchi in Japan had not engaged in or proposed the therapy suggested by the defendant's experts, and there was no evidence that the proposed programs would be available in Japan.
12. Past and future care was also a large component of the award of damages. Mr Clark advised that for an instructing solicitor, this was a difficult element of the claim to quantify and to take instructions on. The idea of home care can be artificial when given by relatives, as they may not appreciate the level of care that they give to an injured family member. Trying to define in rigid terms what is involved in home care can therefore be difficult. The need for care can fluctuate, particularly when psychiatric conditions are involved, and family members may discount the number of hours they spend caring for an injured person when giving instructions. In this case, for example, when instructions were received, the

rate of care per week was estimated at 10 hours, but by the time of trial, the estimate was 28 hours per week. This created difficulties as the insurer was not accepting that the rate of care could increase so dramatically. Ultimately, however, evidence from lay people and from medical experts indicating that the plaintiff's condition had deteriorated over time led the judge to accept the increased rate of care.

13. The plaintiff also received special damages for expensive medical and hospital treatment received both in Australia and Japan. Ms Yamaguchi was awarded \$2.3 million in total damages.

#### Advising Clients with Limited Capacity

14. In addition to \$2.3 million in damages, the insurer was required to pay fees for professional administration. This was because the plaintiff had limited capacity and medically required professional support in managing a large sum of money.
15. Despite her inability to manage money, the plaintiff was found to have legal capacity and therefore able to give instructions. However, Mr Clark suggested that where the issue of capacity is in doubt, solicitors should ensure that the question is investigated by an appropriately qualified medical practitioner.

#### Costs

16. The issue of costs was determined in a separate judgment: *Yamaguchi v Phipps* [2016] QSC 170. The plaintiff sought indemnity costs as she had delivered a formal offer of compromise one month before the start of the trial. The formal offer was for \$1.1445 million, plus costs and the fees of the professional administrator. The offer was not accepted by the defendant insurer, who themselves made an offer to settle for \$1 million.
17. The insurer alleged that at the time the offer was made, it was not in a position to be informed about the quantification of the plaintiff's claim. This argument was not accepted by the judge, who took into account the fact that the insurer had been apprised of the relevant evidence for a considerable period of time prior to the start of the trial. At the time of making the offer, the plaintiff had delivered an updated statement of loss and damage and notified the defendant of the intention to serve an updated statement of claim, which included a much greater claim for the costs of future care and gratuitous assistance than was contained in the previous pleadings. The judge accepted that, although the updated statement of claim was served just prior to the start of the trial, the defendant had been given a large amount of evidence which foreshadowed the updated costs some time prior.

18. The judge ultimately found that an order of indemnity costs was appropriate as the costs could have been avoided if the defendant insurer had accepted the offer at the time it was made. Mr Clark noted that the award of indemnity costs versus standard costs could turn on the way in which evidence was delivered and the timing when this occurred, and there is therefore significant responsibility in the hands of the instructing solicitor.

#### Advice for Practitioners

19. Mr Clark advised practitioners that preparation and evidence are the keys to winning a trial. Although it is important to check the relevance of evidence and filter it accordingly, in some circumstances, it may be necessary to include more evidence than may initially be thought, as the nuance and details may be seized upon by the judge in determining key issues.
20. Mr Clark also advised that it is crucial to serve evidence in a timely manner, as this can impact how questions of costs are determined.
21. Finally, in personal injury cases where there is a young plaintiff with potentially a long working life in front of them, it is important to map out what the plaintiff would have achieved and earned over the rest of his or her working life had the injury not occurred, and not rely solely on the salary at the time of the injury.

## **BIOGRAPHY**

### Mitchell Clark

Partner, MBA Lawyers, Gold Coast

Mitchell Clark was admitted as a solicitor in 1991. Mitchell has a wide range of legal experience, predominantly in litigation, risk management and dispute resolution, with his primary focus being in compensation law. He was one of the first solicitors in Queensland to be awarded Specialist Accreditation in the field of Personal Injuries law, from the Queensland Law Society. He is a past President of the Management Committee of the *Gold Coast Centre Against Sexual Violence*. Mitchell is also an avid bushwalker and amateur nature photographer.

### Louise Mathias

Barrister, Elizabeth Street Chambers, Sydney

Louise Mathias is a barrister and Accredited Mediator, providing advice and advocacy in family law, medical negligence and personal injury matters. In addition to assisting leading firms to implement effective dispute resolution strategies, Louise has lectured in law at the University of Sydney, and developed the Family Law Masters Parenting Masters course for the College of Law Australia. She has been widely published, including in the Law Society Journal and Commercial Law Quarterly, and has contributed content to The Laws of Australia encyclopaedia. Louise regularly writes on diverse topics on her blog at <http://www.sydneymbarrister.net.au>.

## **BIBLIOGRAPHY**

### Focus Case

*Yamaguchi v Phipps* [2016] QSC 151

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/banking/benchmark\\_04-07-2016\\_banking.pdf](https://benchmarkinc.com.au/benchmark/banking/benchmark_04-07-2016_banking.pdf)

### Judgment Link

<http://archive.sclqld.org.au/qjudgment/2016/QSC16-151.pdf>

### Cases

*Yamaguchi v Phipps* [2016] QSC 170

### Legislation

*Civil Liability Regulation 2003* (Qld)