



Assessment of Damages for Survivors of Institutional Abuse

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INTRODUCTION / THE GENERAL APPROACH

The assessment of losses suffered by survivors of institutional abuse are governed by the same underlying principles in the assessment of other personal injuries; namely a comparison of the notional benefits the claimant would have obtained but for the matters that form the basis of the action and the actual benefits they have / will obtain as a result of the matters that form the basis of the action.

The introduction of legislation via the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016* has removed limitations in relation to claims relating to institutional sexual abuse.

Accordingly, in nearly all instances, the most challenging aspect of assessing a claimant's losses from institutional abuse is the period or length of time that has elapsed since the abuse and the impact on the claimant's earning capacity.

ISSUES THAT SHOULD BE CONSIDERED

Whilst many of the usual principles of assessment of loss in other personal injuries will apply when assessing the damages of survivors of institutional abuse, the following notable matters should be considered:

- (i) Determining Notional Earnings;
- (ii) Determining Actual Earnings;
- (iii) Superannuation – Statutory Regime and Occupational Schemes; and
- (iv) Other Issues to Consider.

I deal with each of these issues separately hereunder.

DETERMINING NOTIONAL EARNINGS

As previously noted, ascertaining the claimant's notional earnings in institutional abuse matters is similar to other assessments of economic loss. Therefore, it is important to ascertain what the earnings of the claimant would have been, but for the abuse.

In my experience, when ascertaining notional earnings, the following should be considered:

- (i) Reasonableness of instructions;
- (ii) Sourcing relevant earnings information;
- (iii) Reasonableness of career progression; and
- (iv) Historical earnings.

Reasonableness of instructions

Generally, the matters that form the basis of the action occur prior to the claimant undertaking any form of employment and accordingly they are “untested” in the workforce.

Due to the above, as forensic accountants, we would be guided by our instructions in relation to the claimant’s interests and career aspirations. However, it is important to consider whether such instructions are reasonable.

So what would constitute a reasonable set of instructions? Obviously it is a question of fact and there is no one definitive test, however the following items may assist:

- (i) What have been the career paths of other members of the claimant’s family? For example, what were occupations of the claimant’s parents? What were the careers of any siblings?
- (ii) Did the claimant demonstrate any particular skill or excellence in any particular field of education prior to the abuse that may tend to suggest they were likely to attend university or were more suited to another career path (e.g. a tradesperson)?

In addition, given the uncertainty in relation to the claimant’s career paths, sometimes more general assumptions, such as the average earnings of Tradespersons, Public Servants or tertiary qualified employees may be more appropriate.

In many matters, I have also been instructed to undertake an assessment based on Average Weekly Earnings as an alternate approach as to the claimant’s earnings.

Sourcing of earnings information

In many instances the matters that form the basis of the action occurred a long time ago. This might extend to the 1960’s and accordingly, the duration of the loss means that it can be difficult to source earnings information back to that time. In many circumstances extensive research is required in order to ascertain relevant earning rates.

In my experience, no single set of data can be used for all cases. Instead, the source of information will depend on the claimant’s intended career path and whether the source of information is reliable and / or likely to give a reasonable estimate of earnings over time.

For many career paths, it may be possible to source relevant agreements and awards that provide earnings information throughout the claimant’s notional career. However, it may require obtaining the information from physical sources (e.g. from published gazette books) or requesting it directly from Fairwork Australia or associated industry organisations.

In addition, the Australian Bureau of Statistics and the Australian Taxation Office have collated data that discloses the historical earnings for some (but not all) occupations.

However, in relation to the above sources of data, it is important to understand that the information may be quite general and provide simple averages, rather than specific earnings (e.g. information for commencement earnings / earnings involving part-time workers etc.).

Other possible sources include using contemporary earnings information and then making various adjustments (e.g. movements in average weekly earnings, consumer price indexes or wage price indexes) to estimate the value over time.

Reasonableness of career progression

Given the duration of assessments of economic loss in many of institutional abuse matters, the career path of numerous occupations has changed over time.

Specifically, over time, there has generally been an increased requirement for higher levels of education and, at times, an increased number of years of experience to progress.

In undertaking an assessment of reasonable career progressions, generally the approach would be to consider all available statistical information.

For example, most Governments within the country compile information in relation to the state of their public service organisations. This information includes, but is not limited to:

- (i) Length of service;
- (ii) Number of people per classification;
- (iii) Age of employees; and
- (iv) Location.

By using a combination of this information, general conclusions can be made regarding a claimant's likely career progression.

As another example, Australian Bureau of Statistics information may assist in relation to the impact on earnings for tradespersons and professionals after completing an apprenticeship or additional qualifications.

Historical earnings

A review of the claimant's historical earnings and career path may provide guidance in relation to their notional earnings. Specifically, this may apply in situations where the claimant has both notionally (but for the abuse) and actually (as a result of the abuse) worked in the same occupation.

In matters where the claimant would have notionally (but for the abuse) undertaken work in a certain occupation and they have actually (as a result of the abuse) worked in that occupation, generally, a review of their actual earnings provides a foundation for the assessment of their notional earnings.

In this regard, I note that a build-up approach can be adopted once an understanding of the manner in which the abuse has impacted their capacity in their chosen occupation. Examples of impacts can include, but are not limited to:

- (i) Working reduced hours;
- (ii) An inability to expand their business;
- (iii) An inability to seek promotion, undertake roles with higher seniority levels;
- (iv) Taking extended periods away from work; or
- (v) A delay in the commencement of their career.

In addition, if the claimant has had a career deriving earnings that are, prima facie, consistent with the commercial range of earnings, it may indicate that but for the matters that form the basis of the action, they may have been more successful in that role. Accordingly, it may be more appropriate to consider earnings at the higher end of the commercial range.

DETERMINING ACTUAL EARNINGS

Ascertaining the actual earnings of a survivor of institutional abuse can be more complicated than other assessments of economic loss.

In my experience, when ascertaining actual earnings, the following should be considered:

- (i) Financial documents;
- (ii) Assumptions during periods where no financial documents are available;
- (iii) Review of financial documents provided;
- (iv) Other intervening events; and
- (v) Residual earnings.

Financial documents

Similar to assessing loss in other personal injury matters, in undertaking my assessment of actual earnings, I utilise primary financial documents such as Income Tax Returns, Profit and Loss Statements, Notices of Assessment, PAYG Payment Summaries, Payslips etc.

Assumptions during period where no financial documents are available

Given the extended period over which loss is normally assessed, it is likely that a complete set of financial documents cannot be provided and therefore the actual earnings of the claimant are difficult to ascertain.

In estimating a claimant's actual earnings during periods in which documents do not exist, it may be appropriate to adopt a variety of assumptions and approaches. These may include, but are not limited to, the following:

- (i) Adopting average historical earnings;
- (ii) Adopting a commercial level of earnings for the type of work the claimant was undertaking during the period; or
- (iii) Relying on specific instructions.

The most appropriate approach / assumptions to adopt will depend on the individual case / facts however, in my opinion, the underlying cornerstone should be a reasonable / conservative estimate of those earnings.

Review of financial documents provided

Similar to assessing loss in other personal injury matters, a detailed review of the provided documents is required to provide an accurate assessment of actual earnings.

In some instances, the survivor may have periods of "normal" employment / self-employment and accordingly, those periods may demonstrate a commercial return on their labour. Possible reasons for this may involve, in some instances, a survivor who has had a mentor that has "shielded" them, or the abuse has not manifested itself until later in their career.

In cases such as the above, a detailed review of financial and associated documents is required to determine the time the matters that form the basis of the action commenced impacting the earnings of the claimant.

In addition, a complicating factor in these matters is in relation to the claimant's understanding of financial related questions or further questions in relation to career path.

Other or intervening events

In some events, claimants are impacted by intervening events subsequent to the matters that form the basis of the action. For example motor vehicle accidents or workplace injuries.

Intervening events such as the above complicate the assessment of actual earnings as the survivor's actual career path may be impacted / altered by the intervening event resulting in earnings that may be lower or higher than expected due solely to the matters that form the basis of the action.

In these situations, it may be appropriate to adopt an alternate assessment of actual earnings based on average historical earnings or the commercial earnings of comparable, pre-intervening event roles as this alternate view implicitly adjusts for the impact of unrelated events.

In the event it is found that the intervening events would have occurred regardless of the matters that form the basis of the action, the impact on the claimant's earnings may not be readily identifiable. In particular, the injuries may impact the claimant differently due to the alleged psychological impacts of the institutional abuse.

Residual earnings

In my experience, the assessment of residual / likely earnings is complicated in matters relating to institutional abuse. This is because the claimant may have had a relatively successful career up to a certain point of time before the matters that form the basis of the action have subsequently impacted the claimant's working capacity. In situations such as these, the historical financial data may not be the best indicator of the future residual capacity.

In addition, in undertaking an estimate of residual earnings, it may be necessary to make an allowance for periods of reduced employment, unemployment or a change in career (eg. a role that is less stressful).

It may also be appropriate to consider circumstances where the claimant may be "forced" to retire earlier than they would have, but for the matters that form the basis of the action.

To assist the court, in matters where there is substantial uncertainty in relation to the residual capacity of a claimant, it may be appropriate to present a number of different residual capacities.

As with other economic loss matters, the assessment of residual earnings is a matter of fact and may be assisted with expert medical evidence to assess the impact of the matters that form the basis of the action on the survivor's residual earning capacity.

SUPERANNUATION – STATUTORY REGIME AND OCCUPATIONAL SCHEMES

Given that the majority of the reports I have undertaken are prior to the introduction of compulsory superannuation contributions, I have been required to make various assumptions in relation to their superannuation benefits. In this regard, the following factors need to be determined:

- (i) What type of fund the claimant would have been a member of?; and
- (ii) What level of contributions would have been provided to the claimant, but for the matters that form the basis of the action?

History of the Statutory Scheme

In the 1991 Federal Budget the Government introduced the Superannuation Guarantee legislation to provide a compulsory system of Superannuation for Australian employers to take effect from 01 July 1992.

The superannuation guarantee is an accumulation based benefit that is calculated based on a percentage of ordinary time employment earnings. In many matters, this is the most appropriate superannuation approach for assessing a loss of superannuation.

Under the Superannuation Guarantee Act, the minimum statutory contribution rate has increased since being enacted, as follows:

RELEVANT PERIOD	RATE
01 July 1992 to 30 June 1993	3.00% / 4.00%
01 July 1993 to 30 June 1994	3.00% / 5.00%
01 July 1994 to 30 June 1995	4.00% / 5.00%
01 July 1995 to 30 June 1996	5.00% / 6.00%
01 July 1996 to 30 June 1998	6.00%
01 July 1998 to 30 June 2000	7.00%
01 July 2000 to 30 June 2002	8.00%
01 July 2002 to 30 June 2013	9.00%
01 July 2013 to 30 June 2014	9.25%
01 July 2014 to 30 June 2020	9.50%
01 July 2020 to 30 June 2021	10.00%
01 July 2021 to 30 June 2022	10.50%
01 July 2022 to 30 June 2023	11.00%
01 July 2023 to 30 June 2024	11.50%
01 July 2024 onwards	12.00%

In relation to the rates above, I note that up to 30 June 1996 the applicable rate depended upon the overall size of the payroll of the employer (e.g. larger employers were required to pay a higher rate).

Examples of the Occupational Schemes

Prior to the introduction of the statutory superannuation scheme, some employers provided their employees with their own superannuation funds (e.g. Police Officers, Public Servants and Military Personnel). Generally these superannuation funds provide a “defined benefit”, based on duration of employment and historical earnings.

In addition, some occupations still provide access to membership in defined superannuation funds.

In my experience, the occupational schemes can provide for benefits far higher than compulsory accumulation superannuation benefits. For example, the Commonwealth Superannuation Scheme, available for Commonwealth public servants, during a limited period of time, provides a CPI indexed pension and the option of either a non-CPI indexed pension or a lump sum payment.

In my experience, research is required to ensure the applicability of “defined benefit” superannuation and the calculation of loss derived therefrom is reasonable.

OTHER ISSUES TO CONSIDER

Communicating with claimants

Generally, in undertaking any assessment of loss, I ask the claimant a number of questions in order to provide additional details in relation to background matters, request additional information or clarification etc. However, in matters relating to institutional abuse, there may be difficulties in communicating with the claimant as they may have had learning difficulties due to the matters that form the basis of the action, difficulty with authority, inability to speak to men, incarceration or need for assistance of a mentor to discuss matters.

In our experience, we have had success in dealing with claimants by speaking with spouses or other support people or providing alternate staff to speak with a claimant (e.g. a female member of staff where the claimant is uncomfortable with dealing with males).

Income tax rates

Given the duration of the loss in institutional abuse matters and that economic loss is assessed on an after-tax basis, consideration must be made to the relevant Income Tax rates. In this regard, I note that historically the income tax regime in Australia has changed significantly in the past few decades.

An example of the changes referred to above is the highest marginal tax rate. I provide a summary of the highest marginal tax rates, since 1970 as follows:

YEAR ENDED	HIGHEST MARGINAL TAX RATE
30 June 1970	66.70%
30 June 1975	65.00%
30 June 1980	61.07%
30 June 1985	60.00%
30 June 1990	48.00%
30 June 1995	47.00%
30 June 2000	47.00%
30 June 2005	47.00%
30 June 2010	45.00%
30 June 2015	45.00%

Retirement age

As with other matters, whilst the notional intended date of retirement for any claimant is a question of fact having regard to their personal circumstances, there has been a tendency to adopt the pensionable age as being representative of a claimant's likely date of retirement.

As discussed previously, due to the matters that form the basis of the action, the claimant may be "forced" to retire earlier than pensionable age.

Salary packaging

In certain occupations, the claimant may have notionally and / or actually utilised various salary sacrificing arrangements. For example, reportable fringe benefits and salary sacrificed superannuation contributions.

Both of the above salary sacrificing arrangements have the ability to reduce the claimant's taxable earnings, with the effect of increasing their effective, real earnings on an after tax basis.

CONCLUSION

When it comes to undertaking an assessment of losses suffered by a survivor of institutional abuse, it is important that legal representatives are fully aware of the issues and unique circumstances which are likely to impact any claim.

In nearly all instances the most challenging aspect of assessing losses in institutional abuse claims relate to the period of time that has elapsed since the abuse allegedly occurred.

In my experience, difficulties often arise in attempting to estimate both the claimant's notional and actual earnings. As a result, calculating damages using a simple approach is likely to misstate the level of economic loss suffered by the claimant.

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Assessment of Damages for Survivors of International Abuse

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He has in excess of 20 years of experience as a forensic accountant.

Michael is the author of numerous papers including "Agreed statistical tables for loss of financial dependency in Australia" and "Personal Consumption Percentages in Australia – Current Tables for 2015".

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