

# The assault on general damages

By Tom Goudkamp

**M**D is a 16-year-old school student who suffered a fractured right femur and left humerus and severe lacerations to his right leg in a road accident in 2001. He underwent multiple operations and was in hospital for several weeks. On discharge he had to use a wheelchair and, thereafter, crutches for many months. His schooling was severely disrupted. He has been left with significant scarring to his leg. He has pain, discomfort and restricted movement. He has been unable to resume his normal sports and other activities. It is inevitable, on the medical evidence, that he will suffer osteoarthritic problems later in life.

Despite the severity of his injuries, the learned doctors who assessed his eligibility for an award of general damages, via a modified AMA whole-person permanent impairment gateway, decided that his injuries did not meet the required threshold.

He and his parents are flabbergasted and angry. How could this be? There was nothing I could say except shrug my shoulders and suggest they complain to their local state member of parliament.

This scenario is being repeated throughout Australia many times every week. Most of us who act for injured people have the unpleasant task of having to explain to our clients that they have no right to compensation for pain and suffering, loss of amenities and loss of enjoyment of life, despite having sustained serious injuries.

Why is it that 'general damages' is often the first head of damage to be put to the sword by the tort reformers in their seemingly never-ending quest to deliver maximum profits to insurers?

Maybe it's because 'general damages' is seen as a soft target, which is often portrayed in the media as the undeserving 'pot of gold' encouraging unmeritorious claims and contributing to the mythical explosion of personal injury claims and indemnity crises?

Throughout Australia, the availability of general damages has been severely restricted by the creation of artificial caps and thresholds. In many cases, the thresholds consist of whole-person permanent impairment gateways, some as high as 30% (Tasmania), with the assessment having little regard for pain, dislocation of normal lifestyle, disabilities and future deterioration and complications.

Indeed, the adoption of the *AMA Guides to the Evaluation of Permanent Impairment* has come under considerable criticism



both here and in the US for being an inappropriate method of assessing entitlement to general damages. These AMA guidelines do not take into account an injured person's loss of quality of life, ignore an individual's particular circumstances, often discriminate against women who have suffered injuries to their reproduction organs, and fail to provide appropriate categories for many injuries, including internal injuries. General damages for depression and other psychological sequelae have almost become a thing of the past.

This unjustified assault on general damages disregards the benefits that an award of such damages can offer an injured person.

General damages provides financial empowerment to the victim. In many cases, general damages is the main – or only – head of damage payable where other heads of damage (for example, economic loss) are inapplicable or unavailable. This is particularly so for the elderly, retirees, housewives, the unemployed and children. Indeed, these are arguably the very classes of people who are most vulnerable to injury through negligent practices, slippery supermarket floors, dangerous premises, and unsafe playground equipment.

Furthermore, general damages provides a psychological benefit and a source of solace to accident victims who, understandably, are often angry and resentful that the negligent behaviour of others has robbed them of their normal pleasures in life.

The benefit of solace and a sense of justice – and even revenge – should not be disregarded. It's time that Australian governments stood up to the tort law reform lobbyists and supported their true constituents, namely the citizens of Australia, by opposing any further erosion of common law rights and, in particular, by restoring general damages to its rightful position in all compensation schemes.

The Australian Lawyers Alliance is calling on its members to provide its head office with case studies of their clients who have been severely financially disadvantaged by tort law reform. ■

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