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Proving and Advocating Quantum in Personal Injuries Trials

Justice JD Henry[1]

At the outset I express my appreciation to Justice North, Justice Crow and his judicial predecessor Duncan McMeekin KC, for providing me with their helpful thoughts on the topic at hand. It helped crystallise my thinking in identifying the points of importance I now attempt to convey. Of course, all responsibility for any oversight or infelicity in what follows is my own.

This session is not intended to be an academic mathematical lecture, as perhaps was implied by its advertised title, "Assessing quantum in personal injuries matters". Rather the session's object is to provide practitioners with practical advice about the proof and advocacy of the quantum assessment they submit for in personal injuries trials. By quantum assessment I mean the Court's assessments of general damages and heads of special damages such as loss of earning capacity, gratuitous services and past and future pecuniary loss.

The session's focus is upon the practical aspects of proof and advocacy of quantum at trial which are not always as well understood or executed as may be. It struck me such practical advice might be of value, given that personal injuries trials are less common than they were a generation ago.

As a result of that infrequency, some PI practitioners may not be as well practised in the legal arts of evidentiary proof and advocacy as they are in the business arts of negotiation and mediation. The link between those business arts and the law is that they are being deployed to resolve a legal dispute which must otherwise be resolved by a court. Lawyers who negotiate and mediate cases purport to do so informed by their appraisal of the likely outcome of the case, should it go to trial. They apply their knowledge of courtroom proof and advocacy to forecast what each side will likely be able to prove and what decision the judge will likely arrive at. If follows that, while what I have to say is targeted at your effective proof and advocacy of quantum at trial, some of it may enhance your effective conduct of settlement conferences and mediations as well.

Much of what I have to say derives from the importance of a commodity sometimes under-rated by some PI lawyers, despite it being so vital to success at trial: evidence.

The need for evidence

In personal injuries cases judges must necessarily draw inference upon inference in arriving at their assessment of the quantum of the award. Different inferences, for

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[1] Far Northern Judge, Supreme Court of Queensland. The author gratefully acknowledges the assistance of his associate, Madison Thieme, for the creation of the powerpoint images displayed during the session.

instance about the appropriate discount for contingencies, applied to other different inferences, for instance about how long the plaintiff would likely have continued to work, can give rise to dramatically different quantum awards. The process is fraught with imprecision. But the baseline remains the same – there has to be some evidence to draw inferences from. Evidence is the currency of persuasion. The less evidentiary fuel you provide the court with to support the outcome you seek, the less persuasive your submissions will be in seeking that outcome.

Some words of caution now, for lawyers on each side, beginning with the defence. Defendant lawyers should be wary of the temptation of meeting a weak area of plaitiff's proof by merely arguing the problematic evidence is too vague to support any award of damages. Remember, the premise of assessing quantum is that the defendant has been found liable and is thus liable to pay for the damages caused. The judicial task at this point is to do one's best in estimating those damages.

The point was explained in this way in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 83:

> "The settled rule, both here and in England, is that mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can. Indeed, in *Jones v Schiffmann* Menzies J went so far as to say that the "assessment of damages … does sometimes, of necessity, involve what is guesswork rather than estimation". Where precise evidence is not available the court must do the best it can do." (emphasis added)

Sometimes the very nature of the evidentiary area is imprecise. For example, in *Towers v Hevilift Ltd (No 2)* [2020] QSC 77 Mr Towers' tetraplegia left him with a likely lower life expectancy than average for a person of his age. There were inconsistencies and vagaries in a body of mixed medical and actuarial expert evidence on the topic. Because of those inconsistencies and vagaries the defendant contended for an even lower life expectancy than opined for by the expert who testified. The court declined to find for an even lower life expectancy than suggested by that opinion. It rejected the notion the imprecision attending the opinion should somehow warrant an especially conservative approach in the defendant's favour. It was observed, at [49]:

> "Neither the general onus of proof borne by the plaintiff nor the imprecision in the evidence of reduced life expectancy requires life expectancy to be resolved by a deliberately conservative estimate in favour of the party who occasioned the reduced expectancy."

On the other hand, the position is much less forgiving for a plaintiff where the area of evidence is apparently capable of specific proof but little evidence is provided.

Again, using *Towers v Hevilift Ltd (No 2)* as an example, special damages were sought for the plaintiff's yard and home maintenance. Barely any documentary evidence of those expenses was adduced, despite paid mowing and cleaning services having been provided. There had not quite been a complete failure of proof, but the force of the evidence was undermined by its imprecision. This should have been an easily quantifiable loss. There should have been evidence which it was within the plaintiff's capacity to produce. The

court accordingly took a deliberately conservative approach in estimating the loss, observing at [117]:

> "If that … results in under-compensation, a plaintiff who has failed to provide better evidence has no ground to complain."

Quantum statements

Having just referred to a quantum statement it is timely to consider that form of evidence and the manner and wisdom of its use.

I became a judge on 12 September 2011. About a fortnight later, in *Hunt v Lemura & Anor (No 1)* [2011] QSC 426, the first civil trial heard by me as judge, a recently appointed silk from Rockhampton, Graeme Crow SC, as his Honour then was, objected to the tender of the plaintiff's quantum statement. In giving my decision, I complained of an absence of reported precedent. I was however conscious of the weight of northern history, observing:

> "It is tolerably well known that at least since an era when Sir George Kneipp was the Northern Judge, the resident judges from Rockhampton north have generally allowed the tender of so-called quantum statements in personal injuries trials."

So it was, as a two-week-old Far Northern Judge, I was presented with the choice of abiding or abandoning acceptance of a device of proof long favoured by lawyers and judges north of the Tropic of Capricorn. I let the quantum statement in.

My reasons justifying the receipt of the quantum statement as an exhibit, were principally founded upon s 92(1)(a) *Evidence Act 1977* (Qld), which provides:

> "**92 Admissibility of documentary evidence as to facts in issue**
> (1) In any proceeding (not being a criminal proceeding) <u>where direct oral evidence of a fact would be admissible</u>, any statement contained in a document intending to establish that fact shall, subject to this part, be admissible as evidence of that fact if–
> (a) the maker of the statement <u>had personal knowledge</u> of the matters dealt with by the statement, is called as a witness in the proceeding; …" (emphasis added)

Note the requirements that the facts tending to be established by the statement's content must be facts which the author had personal knowledge of <u>and</u> would be admissible if given as direct oral evidence. Put simply, a quantum statement should only contain evidence the plaintiff can give in evidence-in-chief. This requirement has a forensic significance to which I will return.

Its legal significance in *Hunt v Lemura* was that the quantum statement there went beyond content permitted in evidence-in-chief. It sought to justify the quantum of the heads of damage sought, including calculations based on ranges and assumptions. Such content is not evidence. It belongs in closing submissions.

There were some time management considerations which favoured letting the lot in and disregarding the inadmissible content and I did so. In taking that pragmatic course I had regard to the *Uniform Civil Procedure Rules*. Specifically, I relied on r 5, that generic forgiver of procedural sin, and r 394, "Dispensing with the rules of evidence". Do not despair if you are unaware of r 394, "Dispensing with the rules of evidence". That Kangaroo Court rule was repealed the following year.

Many years on it ought not be assumed I would still let in a quantum statement containing such non-evidentiary content. I reiterate, submissions on quantum are not evidence. They have no place in a plaintiff's quantum statement tendered under s 92.

Other arguments against accepting the statement in *Hunt v Lemura* were that it was leading "par excellence" and likely to be a statement by the lawyer who took it. The leading complaint seemed neutralised by the terms of s 92 and the latter complaint went to weight. Section 102 specifically deals with the estimation of the weight to be given to the statement and in that process allows regard to circumstances bearing upon the statement's accuracy.

To promote accuracy when taking a quantum statement, indeed any witness statement or affidavit, it is of elementary importance that you strive to use the actual words of the witness. It does more than guard against error. It makes the document more persuasive. If it reads like it is "from the mouth" of the lay witness, rather than the lawyer or para-legal who took it, the judge will be more willing to give weight to its content.

To this I add a related piece of elementary advice. Have the witness speak directly of the facts the witness can testify to. In *Zavodny v Couper & Anor* [2020] QSC 42 at [206] the quantum statement took the curious course of the plaintiff generically adopting facts told to the experts rather than the drafter having the plaintiff actually communicate the facts first hand. It was an arguably inadmissible approach but more importantly it detracted from the weight of the statement.

You should not assume all judges readily give weight to the content of a written statement of a witness – particularly of a witness who could just as easily give the evidence orally. For example, Justice Andrews, a former Chief Justice of Queensland, is reputed to have said of a statement being tendered under s 92, "Well you can tender it I suppose, but it should be accompanied by a hefty paper weight, its weight being so slight".

Quantum statement v Evidence-in-chief. Which is better?

This returns us to the forensic significance of the legal requirement that the quantum statement should only contain evidence the plaintiff can give in evidence-in-chief. If the plaintiff will, as is usually the case, be giving oral evidence anyway, what is the point in adducing all or part of the evidence-in-chief via the plaintiff's quantum statement? What purpose is served? Why is giving the plaintiff's testimony in the written form of the quantum statement preferable to the witness giving the testimony orally in the witness box?

The answer depends on the nature of the evidence to be adduced, the forecast competency of the witness in the witness box and the nature of the case.

As to the nature of the evidence to be adduced, there is no need to take an all-or-nothing approach. It may be that some heads of damage lend themselves to inclusion in the quantum statement while others are better dealt with by oral evidence-in-chief.

The heads of damage most apt to inclusion in a quantum statement are those which involve proof via tedious repetitive facts and figures and approximations based on those facts and figures. Of course, witnesses can refresh their memory from records of such content in the witness box, in order to identify the foundations for their approximations of loss. But that is a time-consuming process for adducing evidence which is likely to be uncontentious.

For that reason, quantum statements are sensible vehicles for the proof of losses such as past income, medical fees, medication costs and the cost and duration of care and support. Evidence of that kind will generally be based on a mix of records and estimations. It will likely be mundane and uncontroversial, as long as the foundations for such estimations are clearly identified.

Conversely, evidence which is more contentious and heavily dependent on the court's view of the witness's reliability, will likely be better suited to being adduced orally than in a statement. Such evidence will likely be given more weight and have a better prospect of acceptance by the judge, if given orally. The same applies to evidence of importance, such as descriptions of the personal impact of injury, which are likely to carry more pathos if given orally. Putting it another way, evidence of matters in issue or matters of descriptive importance will likely be more persuasive if given in person rather than via a written statement.

They will also be easier for the judge to comprehend. Being hit with a thick quantum statement to read at the outset of the trial is not conducive to the judge's prompt understanding of the facts it contains. Much better understanding and more timely judging flows from the progressively paced, accumulating narrative of oral evidence.

There may of course be exceptional circumstances. It may be obvious that your plaintiff, because of disposition or incapacity, will be very difficult to extract information from orally in the witness box. There may be other reasons why the plaintiff will be an unavoidably poor oral historian. In that event it may be safer, however unpersuasive, to adduce the plaintiff's evidence, even about important and contentious matters, via a quantum statement. That will not prevent the plaintiff from being exposed as a poor witness in cross-examination, but it will at least protect against a failure to come up to proof, however unconvincing that proof may be.

I emphasise such a course should not be the norm. A little effort invested in properly preparing witnesses to testify in court will generally equip most witnesses with the competency to come up to proof.

Another variable influencing which areas are better canvassed in a quantum statement than in oral evidence-in-chief is the nature of the case. Let it be assumed the trial is about liability as well as quantum. Let it be assumed the reliability of the plaintiff as a witness is in issue. In such a case it may be tactically wiser to let your witness gain the judge's ear. Long before cross-examination starts the judge will have heard directly from the plaintiff's mouth of the devastating life-altering consequences of the defendant's alleged

breach of duty. It is a forensic advantage squandered by smothering all that pathos in a written statement.

There can of course be no fixed forensic rules. Considerations vary from case to case. However, I counsel against the unthinking deployment of a quantum statement. Ask yourself what evidentiary and persuasive purposes its component parts are intended to serve. Weigh whether those purposes are better served via a written statement or via evidence in chief, always bearing in mind that we judges invariably prefer to hear from the plaintiff.

A final caution about quantum statements: beware the each-way bet. I counsel against the practice of adducing evidence relevant to a head of damage in a quantum statement as well as adducing a further substantial layer of evidence about it orally. If you wish to adduce evidence from your client relevant to a particular head of damage, it is preferable that you do it thoroughly in one place or the other - in the quantum statement or in the witness box.

If you intermingle that process you force the judge to go back and forth between the quantum statement and the content of the oral evidence-in-chief in order to apprehend the evidence of relevance to that head of damage. That will annoy and distract the judge. It will impair the clarity of the evidentiary picture. It will slow the judging process. None of that is to your advantage.

Prove the evidentiary foundation for estimates of special damage

A common failing in the proof of quantum is a failure to provide an evidentiary foundation for estimates of categories of special damage which involve repetitive events and monetary receipts and outgoings that should be easy to prove and quantify.

Take gratuitous services for example. Sections 59 and 59A *Civil Liability Act 2003* (Qld) deal with damages for gratuitous services provided to, and provided by, an injured person. Beyond general application of principles derived from *Griffith v Kirkemeyer* (1977) 139 CLR 161, the sections impose a temporal threshold for the compensable provision of such services, namely, at least six hours a week for at least six months. In meeting that threshold it will not be enough for a witness to merely estimate that such services were provided for at least six hours a week for at least six months.

Such an estimate will carry little probative force unless the witness provides the court with evidence of the facts upon which the estimation is based. Without such foundational evidence the court cannot make an informed decision about the reliability of the estimation. This is not one of those areas of evidence I mentioned earlier, where the court will still make an award doing the best it can with what little is on offer. The six hours per week for at least six months threshold must be met for any damages for gratuitous services to be awarded. It is essential to provide evidence which either establishes directly through good record-keeping that the threshold was met or, alternatively, provides sufficient circumstantial evidence from which it can be logically inferred that the threshold was met. Without such evidence that component of the claim will fail.

Where there is a failure of proof regarding a head of damage like this, the most common cause is an absence of any contemporary records, such as correspondence, receipts or diary entries. Even if such records are incomplete, they provide some concrete

circumstantial foundation from which inferences can be drawn about likely regularity and duration.

I appreciate omissions in record keeping may at times, perhaps often, be the fault of the client in not following advice. But it cannot hurt to reflect upon whether you are effectively communicating what is required to your clients. Effective communication involves more than just telling the client, once, what to do. Reiterate, give the client a task checklist, enlist the informed support of the client's loved ones, follow up from time to time to check the client is preserving documentary evidence and diarising as requested and review its adequacy.

Above all, explain why. Your request will not be communicated effectively unless it is properly understood. The best aid to proper understanding is to explain why - to explain the purpose of the record preservation and diarising you are requesting.

It is important PI solicitors appreciate the process of gathering evidence is not undertaken solely for the purpose of being able to prove your case should it go to trial. Solicitors cannot conceivably provide informed advice to their clients about prospects on quantum without knowing the facts which can likely be established by evidence if the case goes to trial. Furthermore, without such knowledge, solicitors and counsel cannot conceivably give properly informed advice to their clients at settlement conferences or mediations. Moreover, their quantification of the various heads of damages, which they urge their opponents to settle for, will not persuade their opponents if they do not appear to have the evidence to back it up.

Those who ascribe to the myth that you ought not incur the time and expense of gathering evidence unless your case is going to trial, are betraying their professional role. Their unprofessional inaction in evidence-gathering and training the client up in evidence gathering is invariably compounded by the position of conflict it causes. Such solicitors will invariably be tempted to advise clients to accept objectively inappropriate offers of settlement because they failed to do enough to credibly contend for a better settlement or to be in a realistic position to press on to trial.

None of this is to suggest that it is improper to exercise pragmatic judgment about the nature and extent of evidence-gathering which is warranted. Judgment needs to be exercised in weighing what is realistically warranted, having regard to the circumstances of the case and the client's resourcing.

That said, much can be done early on, at relatively little cost, to ascertain and preserve the evidentiary trail. Examples include educating the client about record keeping, gathering documentary evidence, capturing social media posts and other transitory digital evidence, photographing the injury and the scene, commissioning medical examinations and making and maintaining contact with prospective witnesses. The point is that well targeted early attention to evidence identification and preservation involves considerably less effort than preparing evidence in full for trial, but safeguards the evidentiary fuel you will need for that purpose.

Evidentiary foundation of expert opinions

Shortcomings in evidentiary foundation also appear to plague expert evidence in personal injuries cases. All too often experts proffer the flimsiest of foundations for their opinion or rely on incomplete or stale information.

Reliance on stale information can devalue the worth of the expert's opinion. For example, where the extent of a plaintiff's recovery is in issue and your medical expert's report was authored a year before trial, it is prudent to ensure your expert is equipped with up-to-date facts, before giving evidence. Where the expert's opinion was premised upon an examination, it would be wise for the expert to conduct at least a brief supplementary examination of the client, shortly before trial.

To illustrate the point, in *Hunt v Lemura & Anor* [2011] QSC 378, the 2011 trial I earlier mentioned, the extent of the plaintiff's ongoing incapacity was in issue. At trial the only medical expert witnesses to have examined the plaintiff since 2009 were called by the defendant. Unlike the plaintiff's experts, they opined the injury had largely resolved. The quality of the evidence of the rival experts was broadly similar. That the defendant's experts' opinions were more up to date was therefore determinative. Their opinions were preferred. The plaintiff was awarded much less than she would have been had her experts' staler opinions been preferred. There may have been good reasons why in that case there had not been more recent examinations by the plaintiff's experts. But the ensuing significant impact upon the quantum of the award starkly illustrates the importance of experts founding their opinions on up-to-date information.

Care is also needed in respect of the opinions of occupational therapists about whether a plaintiff can perform the duties of a particular field of employment. In justifying their opinion they sometimes overlook critical facts and draw unsustainable inferences from inapplicable or remote secondary sources of information.

For instance, in *Zavodny v Couper & Anor* [2020] QSC 42, Mr Zavodny, a small vessel master, incurred a serious ankle injury resulting in a diminished range of movement which was obviously going to impair his capacity to perform physical tasks in the cramped, swaying confines of a vessel. Yet the defence expert occupational therapist opined he had on-going capacity for full time employment as a small vessel master. It soon emerged her opinion had not taken into account the more awkward and constrained positions in which Mr Zavodny would have to move on a vessel. It also emerged her opinion that his balance was all but normal was premised upon him standing on a surface which was static, not moving as a vessel's deck does.

The same witness also tried to assert Mr Zavodny could not have remained a vessel master even if uninjured because his visual acuity was poor and did not meet Australian Maritime Safety Authority Standards. However, overlooked and unmentioned by the expert was that those standards allow acuity to be assessed with aided vision. Mr Zavodny met those standards when wearing his glasses.

Advance scrutiny of the reasons for that witness's opinion should have exposed the deficiencies in its foundation. Their exposure in cross-examination by Mr Philp QC did not help the momentum of the defence case.

The lesson is that you should not assess the worth of your expert evidence by superficial reference to whether its conclusory opinion favours your side. You can only assess its true worth by reference to the viability of the opinion's foundation.

An absence of proper foundation is sometimes an indicator of the partisanship to which some purported experts are susceptible. But it may just be a product of ignorance about how to write an expert report.

Writing an expert report requires knowledge of its legal requirements

It is obviously important that lawyers brief their experts with accurate facts. However, it is also important to ensure your expert understands how to write an expert report for use in court.

You are the ones with legal training about the proper content of an expert report. You need to guide the process, assertively if need be. To be clear, I speak here not of ethically improper attempts to influence the opinion the expert may give, but of the guidance and information which experts, who are not trained in the law, require to write an expert report for use in a court case. The legal guidance of present relevance was given in the seminal judgment of Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 743-744 [85]; approved in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 604. That guidance, in summary, is that the expert must articulate the foundation for the opinion proffered, revealing the facts and assumed facts it is based on and the expertise and reasoning applied.

Finally on this point, do not assume past experience as an expert witness means your expert knows how to write a proper report. I have witnessed several repeat performers who consistently assert their examination proves or disproves some fact without accompanying elaboration on why they hold that view. They assert. They do not explain.

I turn now from experts to that all too rare, yet very valuable commodity in quantum cases, the lay witness.

Do not overlook the corroborative assistance of lay witnesses

In many quantum assessment cases the only witnesses other than the plaintiff are the experts. Where there is a debate about the extent of a plaintiff's recovery or the capacity of a plaintiff to work in a particular field of employment, it is surprisingly rare for many witnesses other than the plaintiff and the experts to be called. It is surprising because observational evidence of a plaintiff's functioning, at home, at work or socially, can be very powerful, very persuasive.

It is well appreciated the reliability of the evidence of a plaintiff who claims significant physical incapacity and psychological timidity may be undermined by video surveillance evidence showing the plaintiff engaging in free social interaction and uninhibited physical movements. However, in a similar vein, observational evidence which is consistent with a plaintiff's testimony will enhance the reliability of the plaintiff's evidence. Thus, the evidence of the plaintiff's family, friends and work mates of their observations of how the plaintiff has struggled since the injury event may carry great force.

Duncan McMeekin KC, the former Central Judge, captured the essence of this point in his observation to me that such witnesses provide "verisimilitude", going a long way to ensuring belief in the plaintiff's case. Corroborative lay evidence of this kind from those with real life experience who witnessed the plaintiff's difficulties, carries the underlying persuasive weight of the actual rather than the theoretical.

Take, for example, a case where the defendant's expert witness occupational therapist opines the defendant would be perfectly capable of performing his old job. In the same case the plaintiff's work mate gives evidence. He gives evidence describing various instances in which the plaintiff struggled in performing his old job when he tried to return to work post injury. All things being equal, the work mate's observational evidence will likely be more persuasive than the occupational therapist's expert evidence.

Short changing future economic loss

Future economic loss is one of the most lucrative potential heads of damage. Curiously it often receives less attention than some of the less lucrative categories. General damages, for example, require much evidentiary attention in the wade through the labyrinthine statutory world of ISVs and PIRSs for now statutorily suppressed awards. Yet awards for future economic loss often exceed general damages by hundreds of thousands of dollars. It is a head of damage warranting careful pre-trial deliberation and planning.

I wish to highlight two aspects of its proof and advocacy which carry a particular risk of under-compensation in the absence of such care.

The first is forecasting what the plaintiff's future income earning capacity would have been. The judge's assessment task in assessing future economic loss of course requires more than deciding whether, and if so to what extent, the plaintiff will be able to earn income in the future. The other side of the equation is considering what's been lost, that is, considering what the plaintiff's future income earning capacity would have been but for the injury.

In the majority of personal injuries cases, arguments as to the plaintiff's future income earning capacity urge a quantification of that loss on the premise that the plaintiff would have continued to earn in the future, what the plaintiff was earning in the past. An exception to this pattern is those cases where plaintiffs are injured at an embryonic stage of their working careers. In such cases submissions as to future income earning capacity are invariably based on rates of income higher than those the plaintiff was earning pre-injury.

It is unremarkable that similar submissions are not advanced in respect of plaintiffs injured in the latter stages of their working career. However, such submissions also seem rare in respect of adult plaintiffs who were injured at a time when they still had the majority of their working life ahead of them. It is surprising that so many injured adults are regarded as having had little prospect of higher income earning capacity as they accumulated experience and more valued skills over the passage of time.

As convenient as it may be to adopt past income earning rates in support of the assessment of future income earning capacity, it is prudent to look beyond that simple source of evidence to other evidence, such as workplace assessments, qualifications and past

progression, which raises the likelihood the plaintiff would, in the normal course, have progressed to higher remunerative levels. Adduce such evidence and the judge may very well be persuaded to infer the plaintiff's income was destined to have been even higher in the future than it was in the past.

Contingencies

Allied with that area of risk of under compensation is the level of discounting for contingencies submitted for in the assessment of future economic loss. I have the sense that in some cases plaintiffs' lawyers may be conceding too high a contingency discount. Professor Luntz in the fourth edition of *Assessment of Damages for Personal Injury and Death* at [6.4.5] was critical of the practice by which courts tend to apply a 15% deduction for contingencies and, despite stressing the importance of the individual circumstances of cases, rarely vary the 15% rate other than upwards. That criticism continued in the book's fifth edition by Luntz and Harder. There, at [7.4.8], the point was again made that the adjustment of the conventional 15% is seldom towards a lesser discount.

In *Qantas Airways Limited v Fisher* [2014] QCA 329 the trial judge applied an 8.11% discount, taking into account the fragile state of the plaintiff's spine which exhibited extensive degenerative change. On appeal, it was argued that condition warranted a greater, not lesser, discount than what was asserted to be the conventional discount of 15%. That argument was rejected as involving an incorrect assumption. In reasons with which Muir JA and Mullins J (as her Honour then was) agreed, I observed at [74]:

> "A discount for contingencies of 15 per cent is often adopted at first instance but not uniformly so. Further the factual significance of adverse and favourable vicissitudes will inevitably vary from case to case. The inevitability of that variation between cases and the court's obligation to determine each case on its own facts militates against the adoption of a pre-determined figure as a starting point for deciding the extent of contingency discounting in every case."

In those observations there was footnoted reference to a number of Queensland cases in which the discount for contingencies had been materially below 15%. In *Qantas Airways* the fragile state of the respondent's spine was not the only relevant consideration. The period of future economic consideration was only five years. The judgment explained at [77] that the degree of discounting warranted by the notable adverse contingencies - death, sickness, accident, unemployment and industrial dispute - was not as great as it would be were a longer period of future economic loss under assessment. There were relevant positive vicissitudes beyond the respondent's stoic nature. That included his long-term employment history with the appellant, his high level of pre-incident fitness and activity and the prospect of increased earning over time.

All of this leads me to remind personal injuries practitioners not to blindly apply a supposedly conventional contingency discount and instead to properly consider the circumstances of the case which are relevant to the need for and degree of discounting.

ISVs and PIRSs

Turning next to general damages, as earlier mentioned, its assessment requires a wade through the labyrinthine statutory world of ISVs and PIRSs – acronyms for injury scale value and psychiatric impairment rating scale. The assessment of general damages requires an assessment of an injury scale value on a scale of 0 to 100, calculated by reference to an array of provisions, including, in calculating a relevant ISV for mental disorders, reference to the psychiatric impairment rating scale. Neither time nor human interest permits analysis of that regime here. For this session's purposes I merely highlight two points in connection with those scales.

The first point arises from the fact the schedules, in describing ranges of ISVs and PIRSs, include various indicative criteria or examples of factors affecting the assessment. These criteria sometimes go purely to the medical state of the injury, but sometimes they involve reference to functioning in day-to-day life. For example, participation in daily activities, degree of independence, presence and extent of pain, the need for prompting to shower daily and wear clean clothes and tolerating the company of a family member or close friend.

Criteria of that kind provide an easy signal to legal representatives as to the kind of evidence they ought gather. Indeed, they sometimes present as convenient subheadings to be addressed in the taking of the plaintiff's evidence-in-chief. Such criteria also identify areas of potential evidentiary enquiry so that evidence from other sources may be gathered to address the various criteria.

The other point I wish to emphasise about this convoluted damages regime is that Judges do not deal with it as often as PI practitioners do. The regime rarely arises for consideration by Judges in applications. Judges generally only deal with it when they have a PI trial or preside in the Court of Appeal in a PI case. In my experience I seldom have cause to wade through the regime more than two or three times a year. On the other hand, PI lawyers must consider it regularly in purporting to estimate compensable loss for the purpose of advising their clients, including in the context of compulsory conferences, mediations and drafting statements of loss and damage.

This frequent exposure causes some counsel to advance submissions at trial in a way which assumes the judge requires no assistance, no reminders, in navigating the regime. Some such submissions also verge on mere assertion of the desired result without explanation of the path to it through the scales. Submissions as to why one expert's opinion about where a plaintiff falls on the scale should be preferred to a rival opinion cannot be made in isolation. They need to engage contextually with the regime's requirements.

An elementary requirement of effective advocacy is that your audience understands what you submit for and why. So, be patient with we judges. Please make submissions which assist us along the path through the damages regime in its application to the evidence in your case. That will not only aid us in comprehending the merit in your submissions. It also will promote the delivery of a more timely judgment because we can properly follow the regime as you argue and will not be left to work through it solo later on in chambers.

A concluding plea – show your work

Finally, continuing the theme of explaining your reasoning in your closing submissions, if your submissions involve mathematical calculations, please expose the calculation, not just the answer.

Some such calculations may involve the use of multipliers from calculation tables. If, in calculating the present value of future loss you apply a multiplier from such tables then your submissions should clearly identify the multiplier and, ideally, you should give the judge a copy of the table you used. Doing so makes it much easier for the judge to follow your reasoning, and, heightens the prospect it will be your reasoning which the judge favours.

In a similar vein, if you apply a particular interest rate to calculate an amount you contend for in your submissions, please include the equation by which you did so in your submissions. As mathematics teachers doubtless implored you at school, do not just show the answer, show how you arrived at it. Once again, clearly exposing your reasoning, making it easier to follow, heightens the prospect the result your reasoning supports will be accepted.

Summary

1. The imprecision inherent in estimating damages does not remove the need for evidence to support the estimation.

2. A lack of evidence of easily quantifiable loss may result in under-compensation. It may also result in no compensation where statutory thresholds are not met.

3. "Quantum statements" tendered under s 92(1)(a) *Evidence Act* should only contain evidence which would be admissible in evidence-in-chief. Save the assessment arguments for submissions.

4. Use the witness's words in the quantum statement.

5. Quantum statements may attract less weight than oral evidence, so only deploy them if they serve a purpose overriding that disadvantage.

6. Heads of damage proved via tedious repetitive facts and figures may be suited to a quantum statement.

7. Matters in issue or of descriptive importance, such as the impact of the injury, are better suited to the progressively paced, accumulating narrative of oral evidence.

8. Do not intermingle – do not address a head of damage partly in the quantum statement and partly in evidence-in-chief, do it in one or the other.

9. Much can be done early on, at relatively little cost, to ascertain and preserve the evidentiary trail.

10. Educate and train up the client and the client's loved ones in evidence-gathering and preservation. Do not just tell them what to do – explain why.

11. Where rival medical experts disagree on the rate or extent of recovery, consider a supplementary medical examination of the plaintiff closer to trial.

12. Assess the worth of your expert's opinion by reference to the viability of its foundation – it may be premised on incomplete or misunderstood facts.

13. Provide legal guidance to your expert about the necessary content for an expert report, particularly the need to fully articulate the foundations and reasons for the opinion proffered.

14. Do not overlook the corroborative assistance of evidence from lay witnesses – it can be more compelling than expert opinions.

15. Do not overlook evidence which may show the plaintiff, if uninjured, was destined to earn a higher income in the future.

16. Beware the adoption of a "standard" discount for contingencies. Advocate for a contingency discount which is apt to the adverse and favourable vicissitudes of your case.

17. Some ISVs and PIRSs contain criteria which helpfully signal the type of evidence you should gather and adduce.

18. Assist judges through the ISV and PIRS regime – they do not go to it as often as you do.

19. If your submissions involve mathematical calculations, show your work, including the multipliers and rates deployed.
