RUNNING OUT OF COMPENSATION MONEY:

WHIPPING AWAY THE SOCIAL SECURITY BLANKET?[1]

BY PRUE VINES & MATTHEW BUTT

Most Australians assume that if they run out of money they can turn to social security. However, when a person runs out of compensation that safety blanket may not be as available as expected.

This discussion focuses on NSW but applies in similar terms to other parts of Australia. The common law principles for the award of damages continue to apply, subject to the caps and limits put in place by the Civil Liability Act 2002 (NSW). The general rule is that the injured person is to be placed back in the position they would have been in had the accident not happened, so far as money will allow: *Todorovic v Waller* (1981) 150 CLR 402. This is the reason it has always been 'better' to injure a poor person than a rich person. In order to put the person back into that position various heads of damages are considered, including lost earnings and lost earning capacity, expenses incurred, future expenses, and general damages (pain and suffering, lost life-time etc). Because compensation is not intended to punish the defendant (who, after all, may not have done anything very wrong – for example, look sideways while driving) the courts try to ensure there is no element of extra compensation by deciding on the low side in many of the heads of damages. Overall, compensation is worked out on the basis that the person should be able to continue to live, more or less, as they did before, and it is calculated to last according to the life expectancy of the victim.

This seems fair enough. But many people run out of money before that life expectancy is over. Sometimes this is because the person did not use the money wisely, but there are other reasons. One is the discounts applied. The earnings component will be discounted 15-30% for the "vicissitudes of life"; and the whole lump sum will be discounted 5% for the fact that the money is being received earlier than it would had the accident not happened.

So, if your lump sum runs out you can apply for social security, right? Wrong. Or probably wrong. There are many examples of people who have run out of compensation, not necessarily because they wasted the money, but who, on application to social security found they were 'precluded'.

If this happens to you it is a nasty shock if your solicitor didn't warn you that it might happen. The Social Security Act 1991 (Cth) provides that where compensation has been awarded for lost earnings the person compensated will not be eligible for social security for a 'Lump Sum Preclusion Period' ('LSPP').

This may not be not as fair as it first seems. There are two big issues: how the LSPP is calculated, and the fact that it ignores lawyers' fees.

CALCULATION OF THE LUMP SUM PRECLUSION PERIOD

The LSPP is calculated by dividing the ‘compensation part’ (that is the earnings part) of the compensation by the ‘divisor’, as defined in the Social Security Act 1991 (Cth).

Where compensation is received by settlement, the ‘compensation part’ is 50% of the lump sum, regardless of the actual amount claimed for lost earnings. If the matter is decided by a court the ‘compensation part’ is whatever the court specifies. The divisor is set at the amount of income a single pensioner can earn in a week before the pension is lost. At present that is about $880.

Consider Joe. He was injured at work, lost a leg and the use of his right hand. In constant pain he can no longer work as an electrician or any kind of tradesman and has no other work skills. Because he is 48 it is unlikely that he will be able to work again. He can no longer play the tuba in the band he belonged to. He had been paid about $3000 per fortnight (net). His case was settled and he received a lump sum of $530,000 on the basis that he was unlikely to be able to work again and that his life expectancy would be about 65, or another 16 years. He thought of investing the remaining money but couldn’t think what to do so put most of it in a term deposit. He tried to spend a bit less than he used to but with rent, food, a holiday costing about $3000, the lawyer’s fees and significant medical expenses including on pain medication all the money had gone after 5 years.

Joe had confidently expected social security to look after him. But they calculated his LSPP on the usual basis that the compensation amount was half of $530,000 = 265,000. Divided by the divisor of 880 =301 weeks that gave 6 years. He would not be entitled for at least another year. Joe was destitute and soon after he was homeless.

Notice the difference between the court’s original calculation of how long the money would last and the social security calculation.

IS IT REASONABLE FOR THE SOCIAL SECURITY PRECLUSION PERIOD TO BE CALCULATED QUITE DIFFERENTLY FROM THE WAY THE COMPENSATION WAS CALCULATED?

LAWYERS' FEES

The second issue for the person who has run out of compensation is that the calculation of the LSPP ignores the cost of getting the compensation – that is, the lawyer's fees. This is a very big issue, particularly since the no-win- no-fee system has been allowed. The arrangement is usually that a percentage (as much as 40%) comes out of the compensation if there is a win. It turns out that Joe's no-win-no-fee agreement provided that he would pay 20% of his award to the lawyers who litigated his compensation award. This means that he got 20% less in his hand. He actually got not $530,000 but $434,000. *But when the LSPP is calculated this is ignored.* This means that the preclusion period is one year or longer because of money Joe never had.

We need to ask questions about this. Is it reasonable for the social security preclusion period to be calculated quite differently from the way the compensation was calculated? Taxpayers should not be overburdened; but this contradicts the compensation principle, which is to put the person back in the position they would have been in if the accident hadn't happened.

Damages are not awarded on the basis that the plaintiff should have to live as if they are on the pension; but the LSPP formula directly contradicts this approach; and the failure to take account of the cost of lawyer's fees exacerbates the problem. This leaves people like Joe with no options. The inadequacy of compensation, by this process is converted into an accelerator of people's fall through the social security safety net into destitution. It could happen to anyone, even you.

1 Prue Vines, Professor, Law School, UNSW and Matthew Butt, Litigation Solicitor, Welfare Rights Centre. We are currently carrying out a research project on the impact of compensation on social security rights.

IMAGE IS A DETAIL FROM "REINE DE JOI" BY TOULOUSE-LAUTREC