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How Much?! Recent Damages Awards in Common Law Damages Proceedings

A summary of recent Supreme Court and Court of Appeal findings in respect of damages awards for commonly encountered personal injuries.

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Executive summary

1. This paper looks at recent damages awards and briefly lists some options either party can take to improve the award.

Amaca Pty Ltd v King (2011) 35 VR 280

2. The importance of keeping updated with recent awards cannot be overstated. The Court of Appeal has acknowledged that "awards of damages have increased significantly" over the last 10 to 20 years. Further that "modern society may place a higher value on the loss of enjoyment of life and the compensation of pain and suffering than was the case in the past."[1]

3. The Court may refer to earlier decisions for purpose of establishing the appropriate award in certain cases per s.28HA of the *Wrongs Act 1958* (Vic).[2]

[1] At [177].
[2] But intentional torts, workers' compensation, transport accidents and others are excluded per s.28C.

4. But for those exceptions, the Court of Appeal found that appeals are not be "resolved by reference to some norm or standard supposedly to be derived from a consideration of amounts awarded in a number of other specific cases".[3]

Juries

5. Damages continue to increase over time. Of course, most cases will resolve before judgment or trial. The remainder are usually heard by juries and it is unknown how they decide quantum. Juries have been known to adopt the suggested quantum offered by one of the parties or, alternatively, to reject both parties' assessments entirely!

6. *Willett v State of Victoria* (2013) 42 VR 571 provides a good example of a capricious jury returning a result "not reasonably open" on the evidence.[4] The Court substituted an award of $250,000 for pain and suffering damages for the psychiatrically injured Plaintiff, in place of the "manifestly inadequate"[5] jury award of $108,000.[6]

7. More recent experience also speaks to the unpredictability of juries. In a recent case of *Meade v Nillumbik Australia Pty Ltd & Anor (unreported 2019 Supreme Court jury verdict – 26 September 2019),* Senior Counsel for the Plaintiff sought $450,000 in pain and suffering damages, $270,500 in respect of past loss of earnings, and $410,386 in respect of loss of earning capacity.

8. The jury arrived at an inscrutable award of $450,000 in respect of pain and suffering damages, and $303,075 in respect of both past and future loss of earnings.

[3] At [178].
[4] Per Tate and Priest JJA, [9].
[5] *Ibid.*
[6] Per Tate and Priest JJA, [81].

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9. Juries are unpredictable. Analysing how and why they arrive at the figures they come to could drive counsel mad.

Damages caps

10. It is worth noting the current statutory thresholds are as follows:

(a) Workers' compensation common law claims:

Pain and suffering - minimum $61,480 and maximum $623,950

Pecuniary loss – minimum $63,650 and maximum $1,433,140

(b) Transport accidents:

Minimum $55,840

Pain and suffering maximum - $558,760

Pecuniary loss maximum - $1,257,290

(c) Public liability:

Pain and suffering maximum – $623,950

Pecuniary loss maximum – three times the average weekly earnings per week ($3,572.10 per week).

11. These caps are revised annually and will be revised on 1 July 2020. The cap applies before any reduction for statutory compensation and contributory negligence.[7]

[7] *Francis v TR and L Cockram Pty Ltd* [1957] VR 538.

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Overview of cases

12. This paper considers the following damages awards:

Recent judicial consideration of *Malec v JC Hutton Pty Ltd*[8]

(a) *Bucic v Arnej Pty Ltd* [2019] VSC 330 – 49-year-old with an operated back injury and unoperated neck injury - $300,000 pain and suffering, and further damages for economic loss for self-employed plaintiff (Incerti (formerly Zammit) J);

(b) *Wearne v State of Victoria* [2017] VSC 25 – 54-year-old exacerbated pre-existing adjustment disorder - $210,000 pain and suffering and vicissitudes of one third (Dixon J);

(c) *Taseska v MSS Security Pty Ltd* [2016] VSC 252 – divergent medical opinion on causation but treater preferred – no discount for *Malec* – 26-year-old with damaged meniscus and severe osteoarthritis in her knee likely requiring two knee replacements in the future but also significant non-compensable injuries (J Forrest J);

Pain and suffering awards for psychiatric injuries

(d) *Gann v Hosny* [2017] VSCA 303 – 47-year-old assaulted and suffered chronic severe and debilitating post-traumatic-stress-disorder, unable to work, suicidal thoughts, self-harm - $300,000 pain and suffering (Davis J)

[8] (1990) 169 CLR 638.

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plus aggravated damages. The defendant appealed stating it was procured by fraud but that was rejected (Santamaria, Kaye and Ashley JJA);

Young plaintiffs' damages awards

(e) *Cruse v State of Victoria* [2019] VSC 574 – teenage plaintiff, major depression with anxious features and post-traumatic stress disorder with associated paranoid ideation (little treatment) - $200,000 pain and suffering in addition to $100,000 aggravated damages for unlawful assault by police and $100,000 as exemplary damages to reinforce the abuse of power (Richards J);

(f) *Hart v Beaumaris Football Club & Ors* [2016] VCC 232 – teenage plaintiff with very severe knee injury likely requiring a knee replacement - $375,000 pain and suffering and $150,000 as *Farlow* (Dyer J);

Pain and suffering awards for physical injuries

(g) *Sbaglia v Epping Cinemas Pty Limited (ACN 073 997 172)* [2019] VCC 1289 – 51-year-old requiring two hip replacements - $230,000.00 pain and suffering (Bourke J);

(h) *Damjanovic v Kah Australia Pty Ltd (trading as Bayview Eden) (ABN 51 052 003 139)* [2017] VCC 1657 – 54-year-old with unoperated neck and shoulder injury but candidate for surgeries for both - $235,000 pain and suffering (O'Neill J);

(i) *Kalos v Goodyear & Dunlop Tyres (Aust) Pty Ltd & Anor* [2016] VSC 715 – 53-year-old with full thickness tear of the supraspinatus and infraspinatus tendons treated with decompression and open repair of the rotator cuff and

also frozen shoulder manipulated under anaesthetic and also synovectomy, capsule release and subacromial bursectomy and bursal adhesiolysis - $250,000 pain and suffering (Keogh J);

(j) *Stavrakijev v Ready Workforce & Anor* [2018] VSC 690 – 37-year-old with operated partial thickness tear of his Achilles, and operated subluxation of his biceps, degenerative partial thickness tear of the supraspinatus and adhesive capsulitis - $220,000 pain and suffering (Keogh J);

(k) *Sheila Savage v Monash University* [2017] VCC 1774 – 40-year-old with operated ankle and chronic pain disorder - $275,000 pain and suffering (Saccardo J);

Loss of opportunity damages awards

(l) *Bauer Media Pty Ltd and Anor v Wilson (No 2)* (2018) 56 VR 674 – movie star's multi-million-dollar loss of opportunity award overturned on appeal for want of evidence.

13. Before turning to more recent cases, it is worth considering *Geelong Leather Pty Ltd v Delaney* [2014] VSCA 98 and *Pasqualotto v Pasqualotto* [2013] VSCA 21.

14. In *Geelong Leather*, the Court of Appeal upheld a jury verdict of $385,000 pain and suffering. (handed down seven years ago). The plaintiff was 47 years old, with a disc bulge at L4/5 treated with microdiscectomy. The plaintiff developed moderately severe L4/5 lumbar canal stenosis secondary to disc prolapse, mild bilateral facet joint impingement of both nerve roots. Some of which was age-related degeneration. The plaintiff had CT-guided facet joint injections and there was a real possibility he would require a laminectomy with or without fusion. The jury's verdict was in range, albeit

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at the higher end. Notably, the trial was seven years ago. And arguably today, the award would be higher.

15. Whilst *Geelong Leather* could arguably be used as yet another example of the unpredictability of juries (the jury at first instance arriving at a figure of $385,000 when leading counsel for the Plaintiff had sought $400,000), the verdict was upheld on appeal, and can be (and frequently has been) used by Plaintiff representatives in support of arguments that damages awards are increasing and operated back injuries ought attract awards of $300,000+.[9]

16. In *Pasqualotto,* a Supreme Court jury in 2011 awarded $400,000 for pain and suffering damages to a then 36-year-old man who sustained injury to his L3/4 disc in circumstances of pre-existing injury at L4/5 and L5/S1 requiring a double fusion procedure. The claimed injury to the L3/4 disc resulted in a further fusion at that level.

17. The major issue on appeal was whether it was open in the circumstances of that case for the jury to find no negligence in circumstances where they had found a breach of statutory duty. That question, and its disposition, then had flow on effects for the issue of contributory negligence (which the jury had placed at 70%). Importantly, there was no cross-appeal in respect of the jury's award of $400,000 for pain and suffering damages.

[9] It is worth noting that Beach JA, who wrote the leading judgment, emphasised that no case creates a precedent in terms of the amount that may be awarded for pain and suffering and loss of enjoyment of life ([57]), but that there is utility in looking generally at past cases as a guide by which an appellate court can assess the reasonableness of a jury verdict ([59]).

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18. As with *Geelong Leather, Pasqualotto* can be (and again frequently has been) used by Plaintiff's representatives to argue that operated back injuries now assess in the realm of $300,000+.

Recent judicial consideration of *Malec*[10]

***Bucic v Arnej Pty Ltd* [2019] VSC 330**

19. In this case, Incerti J (formerly, Zammit J) awarded $300,000 pain and suffering to a 61-year-old former brick cleaner with an operated back injury and an unoperated neck injury. In addition to economic loss damages.

20. The plaintiff was laying roof tiles when he suffered injury. He fell 4.5 metres from a raised scaffolding bay onto a pile of bricks. The plaintiff was 49 when he fell.

Pain and suffering

21. The plaintiff had a pre-existing degenerative back condition. It gave him significant pain and put him off work for six months, the same year he fell. He then aggravated and exacerbated his L4-5 disc injury, requiring four surgeries (L4-5 discectomy; an additional discectomy three years later; also a revision laminectomy at L4-5 and an instrumented spinal fusion two years later).

22. He also suffered from prolapse at C6-7 with pain radiating to his arm and fingers. His neck pain was ongoing and unlikely to improve in the future.

23. He also had –

    (a) right foot drop;

[10] (1990) 169 CLR 638.

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(b) right wrist injury with ongoing weakness and 'disturbed symptoms' in his right hand;

(c) fractured ribs;

(d) a collapsed lung;

(e) a major depressive disorder with anxiety; and

(f) cognitive deficits affecting his memory and concentration.

24. His pain and suffering was considered to be significant. He had a highly restricted life for almost 12 years and that was to continue. His injuries were permanent and ongoing. He was no longer able to have a social life and was left "a broken man". He had financial difficulties which led him to sell his home to his mother-in-law. The plaintiff's evidence was supported by a few family members who gave evidence.

25. In order to assess damages as to the future of hypothetical effect of physical injury or degeneration, Incerti J followed the approach in the leading case of *Malec.* There, the High Court held that:

"...questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring…the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability".[11]

26. Incerti J also repeated *Seltsam Pty Ltd v Ghaleb* that *Malec* applies as follows –

[11] At 162-3 (Deane, Gaudron and McHugh JJ).

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"(a) in the assessment of damages, the law takes account of hypothetical situations of the past, future effects of physical injury or degeneration, and the chance of future or hypothetical events occurring;

(b) the Court must form an estimate of the likelihood that the alleged hypothetical past situation would have occurred;

(c) the Court must form an estimate of the likelihood of the possibility of alleged future events occurring; and

(d) these matters require an evaluation of possibilities and are to be distinguished from events that are alleged to have actually occurred in the past, which must be proved on a balance of probabilities."[12]

27. The defendant assessed general damages as $40,000, arguing that the claimed injuries were not compensable save for fractured ribs and wrist, collapsed lung and scalp laceration. That was rejected. The plaintiff claimed general damages no less than $400,000. In the end, Incerti J awarded $300,000.

Economic loss

28. The plaintiff's economic loss was not straightforward. Despite his strong work ethic, the plaintiff's past income varied significantly. He would earn either a couple hundred dollars a year, a few thousand dollars a year, or about $46,000.

29. To calculate the loss, Incerti J averaged the three highest tax returns after the fall and noted the plaintiff's post-fall earnings showed his capacity to earn. Of course, the Court's role is to compensate loss of earning *capacity* rather than loss of earnings.

30. Her Honour also considered that:

[12] [2005] NSWCA 208.

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(a) the plaintiff worked up to seven days a week when work was available;

(b) the plaintiff continued to work even when in significant pain; and

(c) the plaintiff enjoyed his work and earning money.

Incerti J allowed 3% increases when estimating past and future.

31. Higher than the usual amount of vicissitudes was applied for past and future loss, based on *Malec* principles. 30% was used because it was *possible* the plaintiff would have stopped work due to his pre-existing back injury. *And* that it was *possible* he would have fully returned to work.

32. Future loss was assessed to age 67, despite the plaintiff's evidence that he would have worked to 70.

***Wearne v State of Victoria* [2017] VSC 25**

33. The plaintiff was a case manager for the Department of Human Services, who assisted young people in the criminal justice system. She had a breakdown after about two years of bullying and harassment from her supervisor. She was 54.

34. The plaintiff suffered from chronic adjustment disorder with anxiety and depressed mood (with melancholia). She required significant medication, and regular treatment from her doctor and psychologist. She was unable to work and suffered significant loss of enjoyment in her lifestyle. The plaintiff was fixated on how her supervisor treated her. As a result, she avoided supervision and hierarchies. The plaintiff became isolated and limited time outside her home. She suffered from panic attacks and hyperventilation, as well as difficulty concentrating and remembering things.

35. But the plaintiff enjoyed caring for her dogs and spending time with her children and grandchildren. She also continued to enjoy gardening and reading.

36. The plaintiff's trial took place eight years after her breakdown.

37. Dixon J found that there was a significant possibility that the plaintiff would not have adjusted to her role and could have had a breakdown in any event. This was based on many factors including:

(a) the plaintiff's psychological health was "patently fragile" before the incidents at work;

(b) many non-compensable stressors took a "significant toll" on her health including the deaths of her ex-husband and others; and

(c) she also genuinely thought about leaving her job beforehand.

38. However, it was also possible that the plaintiff could have had a positive change with a different job with an environment that was better suited.

39. There was a significant possibility that the plaintiff could have had the same injury had the claimed incidents not happened.

40. To reconcile these possibilities, Dixon J followed *Johnson v Box Hill Institute of TAFE*[13] and *Malec,* observing that:

"*Malec holds that the plaintiff is entitled to damages on the basis that her psychiatric illness is the direct result of the defendant's negligence, but those damages must be reduced to take account of the chance that factors, unconnected with the defendant's negligence, might have brought about the onset of a similar psychiatric illness. In*

[13] [2014] VSC 626 [453], not disturbed on appeal [2015] VSCA 245, [105].

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this context, the law takes account of hypothetical situations of the past and the future effects of the pre-existing psychological injury, and the chance of future or hypothetical events occurring."[14]

41. After weighing relevant factors, Dixon J assessed vicissitudes as one third and awarded $210,000 for pain and suffering.

Taseska v MSS Security Pty Ltd [2016] VSC 252

42. The plaintiff worked as a security officer at the airport. While sitting at the scanner, watching bags, the plaintiff tried to move a heavy bag and twisted her knee. The plaintiff damaged her meniscus and developed severe osteoarthritis in her knee. She was 26.

43. After an arthroscopy and cortisone injections failed to relieve her symptoms, a knee replacement was considered. It was postponed given her young age.

44. A knee replacement would not restore normal function, but it would help her symptoms. The Court acknowledged the procedure was onerous. It would have required five nights in hospital, a month on crutches and four months of recovery. It was anticipated that the plaintiff would require two knee replacements.

45. In the years leading to trial, the plaintiff took medication occasionally in addition to using a knee brace, hydrotherapy, physiotherapy, and a gym program. By the time of the trial, the plaintiff had had knee pain and symptoms for 15 years.

46. Her employer argued that the real cause of her ongoing knee problem was of her use of steroid medication (Prednisolone) for her unrelated liver condition. The employer

[14] At [356].

had a supportive report from an orthopaedic surgeon as well as evidence from a clinical pharmacology specialist.

47. However, Forrest J preferred the treating orthopaedic surgeon's evidence. The surgeon was firm that the plaintiff's osteoarthritis was caused by the claimed incident. The surgeon had seen the plaintiff many times and had reviewed all relevant studies.

48. Forrest J found that the steroid medication was not involved in the development of the injury. Thus, no discount was made for *Malec*.

49. Aside from her compensable injury, the plaintiff also suffered from ongoing major psychological issues as well as a significant disability of her hips. She had a total left hip replacement on her left and was likely to require one on her right. The plaintiff used two elbow crutches and a walking stick.

50. The plaintiff also claimed a psychological injury from a separate incident but that was rejected by the Court. Ultimately, J Forrest J assessed $250,000 as pain and suffering.

Pain and suffering awards for psychiatric injuries

51. *Doulis v State of Victoria* [2014] VSC 395 remains a leading case in the area of awards of damages for psychiatric injury. In *Doulis* Ginnane J awarded a then 48-year-old former teacher $300,000 in respect of psychiatric injury sustained in the course of his employment at Werribee Secondary College. The case is still used in support of arguments that severe psychiatric injuries, requiring ongoing care, and hospitalisations, ought to assess in the realm of $300,000+ for pain and suffering.

***Gann v Hosny* [2017] VSCA 303**

52. The plaintiff drove Flemington Racecourse visitors around on a shuttle bus. The defendant tried to get onto the bus when it was full. The plaintiff asked him to get off. The defendant than began repeatedly punching the plaintiff's head. The defendant was charged with unlawful assault and pleaded guilty.

53. The plaintiff also sued him for damages for his psychiatric injury. Initially for both heads but economic loss was abandoned during the trial. Trial Judge Davis J awarded the plaintiff $300,000 as pain and suffering damages and $25,000 as aggravated damages in 2012.

54. The plaintiff also received weekly payments. But he lied about his work capacity whilst in receipt of WorkCover benefits. He had not disclosed that he had worked in a number of casual positions. The plaintiff was charged with obtaining financial advantage by deception of almost $50,000. He pleaded guilty and was given a short jail sentence (wholly suspended). He was also ordered to pay costs and compensation.

55. The defendant became aware of the fraud and sought leave to appeal the damages judgment arguing it was procured by fraud and should be set aside. Leave to appeal was granted and heard by Brookes J.

56. The defendant argued the trial judge acted on the unsound basis that the plaintiff was a witness of truth. The defendant further argued that the medical evidence was unreliable. The plaintiff and his medical experts were not called to give evidence.

57. Brookes J dismissed the defendant's appeal, finding that he had failed to prove the damages judgment was procured by fraud. Further, the evidence relied upon by the defendant was not "fresh" evidence.

58. The defendant sought leave to appeal that decision to the Court of Appeal. Leave was rejected (by Santamaria, Kaye, and Ashley JJA).

59. The defendant failed in the appeal largely because there was no significant difference between the plaintiff's evidence about work at the damages trial and his guilty plea. If there was any difference, the defendant failed to prove the plaintiff's evidence about his work capacity (in his damages trial) was fraudulent. If it was inaccurate, the defendant failed to prove that inaccuracy was material to the damages' assessment. Further, the defendant failed to prove he discovered something new and material after the trial – which made the damages award a product of fraud.

60. The alleged inaccuracy about work was perhaps one day per week for 18 months of about four-and-a-half years. Kaye JA found it was a minor part of the whole period.

61. It was less significant than the plaintiff's other consequences. The trial judge found the effects of the assault were devastating. He suffered from chronic severe and debilitating PTSD. He was 47 when he was assaulted.

62. He lost his home, becoming homeless, he lost his family, marriage and earning capacity. He was unable to work for over two-and-a-half years. He was unable to work as an attendant and bus driver as he previously enjoyed. He was suicidal and self-harmed. His diabetes was compromised. He had panic attacks, binge drinks and smokes.

63. It was not proven that the medical evidence was dependent on or affected by the alleged inaccuracy.

Young plaintiffs' damages awards

***Cruse v State of Victoria* [2019] VSC 574**

64. The plaintiff had just watched a movie and was asleep in bed when he was awoken by his parents' screams and loud banging which sounded like someone was breaking in. A man dressed in armour with a black mask and assault rifle approached the plaintiff. It was a police officer. The plaintiff was a person of interest in a police investigation into a plan to kill police officers and others on ANZAC Day.

65. The plaintiff was arrested unlawfully. The police never suspected on reasonable grounds that the plaintiff did or would commit the charged terrorism offence. The plaintiff was never charged.

66. During the raid, the police viciously battered and assaulted the plaintiff. He was handcuffed behind his back and then hit on his face so hard he started bleeding. The police moved the plaintiff to another room and slammed him on the fridge and pushed him to the floor. As the plaintiff lay on the floor, the police repeatedly hit him on his face, head, neck and chest. An officer grabbed him by the hair and leaned into the plaintiff's ear, stating "there was more to come". The plaintiff thought he was going to die. An officer grabbed and twisted his wrist, warning him, "Don't say a fucking word". The plaintiff was left bloodied, bruised and concussed. He was 19. The plaintiff was later diagnosed with post-traumatic stress disorder and major depression. The plaintiff sued the State of Victoria for damages.

67. The plaintiff had nasty and painful physical injuries. But they healed quickly without permanent damage. He suffered concussion and a cut on his face as well as bruising

on his face, head, neck and upper body. He had swelling at the base of his skull and on his forehead.

68. The plaintiff had untreated major depression with anxious features and post-traumatic stress disorder with associated paranoid ideation. His depressive symptoms became worse over time and prognosis was guarded.

69. Since the raid, the plaintiff had lost all his friends and became isolated. He had a constant low mood, and persistent suicidal thoughts. He was paranoid about the police and home security. He was unable to give his wife and daughter as much time and affection as he used to. He thought about the assault every day. For a period, he had flashbacks and dreams about the assault. The only thing the plaintiff enjoyed was spending time with his daughter. His injury interrupted his studies, but he was able to work through a Diploma of Community Services.

70. Four years had passed by the time of trial. The plaintiff had no treatment until shortly before the trial. It was recommended that the plaintiff take anti-depressants and see a psychiatrist. Richards J considered the possibility the plaintiff would improve once he had proper treatment.

71. The defendant argued that compensation should be reduced for non-compensable stressors, such as the plaintiff's childhood difficulties, deaths of friends, and significant family history of substance abuse. These arguments were rejected.

72. Richards J awarded $200,000 pain and suffering.

73. The plaintiff was also awarded $100,000 as aggravated damages, based on the circumstances of the attack, the State of Victoria's ongoing denial of the attack, and the fact that the arrest was unlawful.

74. The plaintiff was also awarded $100,000 as exemplary damages. Richards J acknowledged it was an exceptional remedy but was necessary to reinforce to the State of Victoria and Victoria Police "the enormity of the abuse of power" that had occurred. Richards J also noted that the police should have given careful consideration to taking the plaintiff into custody, particularly as the plaintiff was indigenous. Finally, the plaintiff received $20,000 for future medical expenses.

Hart v Beaumaris Football Club & Ors **[2016] VCC 232**

75. The plaintiff was playing in a junior football match in Beaumaris. He began running at full speed towards the ball. He leapt into the air to mark the football. As he came down, his boot was caught in the wire fence and he crashed to the ground injuring his knee. The plaintiff was 17. He sued the football club and the league for damages.

76. The plaintiff's injury was very severe. His surgeon said his knee was "wiped-out". The plaintiff had very significant internal nerve damage and his nerve was severed. He developed foot drop and required a prosthetic to hold his foot in position. His anterior and posterior cruciate ligaments were surgically repaired. A total knee replacement was a realistic prospect in the future.

77. The plaintiff had a very substantial impediment to his ability to lead a normal life. The plaintiff was previously very active and enjoyed football, surfing and skiing. He had attempted to snowboard once after the incident. The plaintiff was unable to run.

78. Both defendants suggested $300,000 pain and suffering. Whereas the plaintiff sought $400,000, which Dyer J thought to be at the upper end of the range.

79. The plaintiff was awarded $375,000. Dyer J noted the plaintiff's young age, and complicated treatment (including development of an infection requiring skin grafting) as well as the high likelihood of a knee replacement.

80. The parties had agreed the amount of damages for past medical expenses, past loss of earnings, and gratuitous care costs.

81. The plaintiff's future loss of earnings was uncertain. The medical evidence suggested that his knee would deteriorate, but the plaintiff was able to complete his carpentry apprenticeship and had taken over his father's hedge trimming business. While the plaintiff was precluded from various physical activities, he conceded that he would like to move to a more managerial role.

82. The plaintiff sought three years total loss (about $300,000 before vicissitudes). One defendant suggested allowance of between one year to 18 months. The other defendant pointed to the gaps in the evidence, such as missing business overheads and income sharing arrangements for the businesses the plaintiff worked in. The plaintiff also did not know what his total gross income was.

83. Dyer J awarded $150,000 as a *Farlow*[15] allowance. His Honour accepted that there was a high likelihood the plaintiff would be off work for between two to several months for his knee replacement. The timeframe depended on whether he worked in a physical or managerial role. His Honour also took into account that there was a significant risk the plaintiff may have difficulties maintaining his work rate as his injury deteriorates.

[15] *Victorian Stevedoring Pty Ltd v Farlow* [1963] VR 594.

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Pain and suffering awards for physical injuries

***Sbaglia v Epping Cinemas Pty Limited (ACN 073 997 172)* [2019] VCC 1289**

84. The plaintiff was injured at the cinema as she walked to the counter to buy tickets with her husband. She slipped on popcorn and fell on the floor, injuring her hip. The plaintiff sued the occupier and operator of the cinema.

85. When she fell, the plaintiff was 51. She had a displaced transcervical fracture of the neck of the left femur treated with hip replacement surgery. Bourke J found the plaintiff had a relatively good result from that surgery, but it had a major impact on her life. The plaintiff was likely to have another total hip replacement in the future. The plaintiff had required significant rehabilitation following the surgery and had suffered complications including DVT and gluteal tendinopathy and trochanteric bursitis.

86. The plaintiff had ongoing pain (which would continue for many years), scarring and difficulty sleeping. She could no longer freely enjoy gardening and could not do heavier housework. The plaintiff was no longer able to play tennis nor watch her daughter play high level basketball (due to difficulty sitting).

87. The defendant assessed pain and suffering as $150,000, arguing that the plaintiff's *viva voce* evidence of almost constant pain was inconsistent with reports to doctors and treatment. The plaintiff sought $300,000 stating she was young to have a hip replacement (at 53), and she would require another one in the future (as early as at age 62). Ultimately, Bourke J awarded $230,000 pain and suffering.

88. The plaintiff was injured cleaning hotel rooms full-time over seven years. The plaintiff would usually clean 17 rooms a day, which included vacuuming, making the beds and removing rubbish (sometimes even confetti!) Bizarrely, she was not given a mop to clean the bathroom floor and had to get on her knees and rub the floor with a rag.

89. The plaintiff had injuries to her neck, non-dominant shoulder and arm as well as other less serious injuries. She was 54.

90. Specifically, the plaintiff aggravated pre-existing asymptomatic degeneration of her cervical spine and facet joint arthritis. Her nerve roots were compromised at C5-6 with referred pain to her non-dominant arm and hand. The plaintiff had rotator cuff tendonitis and subacromial bursitis with a SLAP tear of her non-dominant shoulder. There was pre-existing asymptomatic degeneration of her shoulder.

91. The plaintiff was a candidate for a C5-6 discectomy and shoulder surgery but neither had occurred by the date of trial. Instead, the plaintiff had medication, injections and physiotherapy.

92. The plaintiff also lost her cleaning job as a result. She had found her job rewarding and had made friendships. She was restricted in heavier chores and her sleep was affected.

93. The plaintiff had relatively constant pain in the neck and shoulder, as well as symptoms in her arm and more frequent headaches. It was possible that her pain could be relieved in the future with a pain rehabilitation course. Otherwise, her symptoms were indefinite.

94. The plaintiff also developed carpal tunnel, anxiety and depression, but those were not considered to be significant.

95. It was accepted that the plaintiff had pre-existing asymptomatic degeneration in her neck and shoulder that was aggravated by work. So, the defendant argued that the plaintiff would have eventually suffered symptoms in any event. This argument was rejected for want of medical evidence.

96. O'Neill J awarded $235,000 pain and suffering (in addition to economic loss).

***Kalos v Goodyear & Dunlop Tyres (Aust) Pty Ltd & Anor* [2016] VSC 715**

97. The plaintiff worked in a call centre and was injured when she tripped on a metal plate protruding from the carpet.

98. She was 53. She had a full thickness tear of the supraspinatus and infraspinatus tendons. It was traumatic and severe. The plaintiff had surgery by way of decompression and open repair of the rotator cuff. She had intense pain following surgery requiring Endone and Oxycontin, later substituting it for Panadeine Forte. She was in a harness for about two months and required physiotherapy and hydrotherapy.

99. She developed frozen shoulder which was manipulated under anaesthetic. The surgeon described it as quite a brutal procedure. Her frozen shoulder returned, and she had synovectomy, capsule release and subacromial bursectomy and bursal adhesiolysis. Her surgeon tried to manipulate the shoulder, but she continued to have stiffness due to scarring and fibrosis of the muscles.

100. Despite multiple surgeries, the plaintiff had severe pain as well as restricted movement and dysfunction of her shoulder. The plaintiff continued extensive ongoing treatment with regular medication and exercise.

101. She was unfit for her previous job. The plaintiff did try to study disability care but had to stop after two days, because she was unable to write fast enough. The plaintiff required help with her personal care for the first year and was still unable to do some domestic activities years later.

102. She also had some anxiety and depression requiring anti-depressant medication, Effexor and later Cymbalta.

103. One defendant assessed pain and suffering at no more than $150,000. The plaintiff sought $300,000. Keogh J assessed damages at $250,000.

Stavrakijev v Ready Workforce & Anor **[2018] VSC 690**

104. The plaintiff was injured when he slipped and fell down five metal stairs, landing on his right side. The plaintiff was an offsider in labouring.

105. He was 37. He had a partial thickness tear of his Achilles tendon with tendinosis and aggravation of pre-existing degeneration. He required surgery and largely recovered well. He had mild symptoms including some stiffness and swelling in the morning and after standing for a long time.

106. He also injured his shoulder by way of subluxation of his biceps, degenerative partial thickness tear of the supraspinatus and adhesive capsulitis. He had manipulation of the shoulder, capsular release and his biceps tendon was reattached. He also received hydrodilatation injections.

107. His shoulder was aggravated when he used crutches following his Achilles' surgery. Ultimately, his shoulder made a good recovery. He had mild symptoms with partly restricted lifting, pulling and over-head movements.

108. He also aggravated mild degeneration of his lower back. This was aggravated when he used crutches after his Achilles surgery. He had back pain at times and some referred pain to his leg which restricted sitting, standing and lifting.

109. Physically, the plaintiff could work full-time with restrictions. However, his employability was substantially limited because of his non-English speaking background. He only had labouring experience, and he lacked IT skills.

110. Psychiatrically, the plaintiff could not work due to his moderately severe depressive disorder. He required anti-depressants and psychological treatment. Fortunately, his condition was likely to improve with different treatment.

111. The on-hire company assessed pain and suffering as $100,000 to $125,000. The labour hire company said no more than $150,000. The plaintiff said $350,000.

112. Keogh J awarded $220,000, finding that the plaintiff had an incapacitating depressive injury which would probably improve in the future. Otherwise, the plaintiff had good results from surgeries to his Achilles and shoulder. He would have ongoing mild symptoms as well as intermittent low back ache. Practically speaking, his employment was substantially limited from a physical perspective as well.

Sheila Savage v Monash University **[2017] VCC 1774**

113. The plaintiff worked at Monash University. She parked her car on campus and began walking to the building where she worked. She stepped in a puddle and her ankle

rolled on the uneven ground. The plaintiff sued the university and her employer for general damages only.

114. The plaintiff was 40. Initially, she had a minor strain of her ankle. Her symptoms continued and she had an arthroscopy about a year after the incident. Her condition continued to deteriorate. She developed chronic pain disorder requiring rehabilitation and medication but without any real benefit.

115. The plaintiff gave evidence that every day was a challenge. The plaintiff had constant pain in winter. Her pain was so excruciating that she did not want to leave her home. Her ankle swelled in warm weather which made it difficult to move. Her walking was generally extremely limited. She required a walking stick and Cam walker.

116. The plaintiff took Panadeine Forte (eight tablets a day), used Norspan patches weekly and Panadol Osteo when needed. She developed lower back pain, which varied. The plaintiff also gave evidence that she had put on 50 kilograms.

117. The plaintiff was able to perform tasks of daily living and personal hygiene, but showers were extremely painful. The water on her foot felt like "someone throwing nails". She was unable to cook or do chores. Her condition was also aggravated when her bed sheets touched her foot. To avoid that, she slept differently. Her sleep was also poor.

118. The plaintiff also felt negative, depressed, anxious and forgetful.

119. She was saddened that she could not work or garden. She was unable to engage in any physical activity with her 13-year-old son, save for driving him to school.

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120. The plaintiff's doctor opined that the plaintiff had neuropathic pain and resultant depression and anxiety with a very poor prognosis. It was unlikely the plaintiff's condition would improve as seven years had passed.

121. Saccardo J awarded $275,000 pain and suffering. There was no discount for contributory negligence.

Loss of opportunity damages awards

***Bauer Media Pty Ltd and Anor v Wilson (No 2)* (2018) 56 VR 674**

122. The plaintiff (Rebel Wilson) was a well-known actress who sued the publisher of Woman's Day and similar online publications for defamation. The damages assessment in this defamation case has relevance to personal injury cases. The High Court has long acknowledged the relationship, noting that the law is not "more jealous of a [person's] reputation than of his life and limb".[16]

Procedural history

123. In *Wilson*, the jury found that there were many defamatory publications. Dixon J found that Ms Wilson had been branded as "a serial liar who had fabricated almost every aspect of her back story". The defamatory publications suggested Rebel Wilson had lied about her age, name, her parents' jobs and where she grew up. They also said she lied about going to Zimbabwe for a year, being in a cage with a leopard, being in a shoot-out and contracting malaria in Africa. The publications went even further,

[16] *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211, 221; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 58.

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conveying that the plaintiff was so untrustworthy that nothing she said about herself could be taken as true unless it was independently verified.

124. Ms Wilson sought general damages, aggravated damages and special damages.

125. At first instance, Dixon J also assessed general and aggravated damages at $650,000. His Honour was also satisfied that the defamatory publications caused the loss of a chance of new film roles. That loss of chance was assessed at $3,917,472![17]

126. The defendants appealed the damages award to the Court of Appeal. In a joint judgment, Tate, Beach and Ashley JJA upheld the appeal in part. The court reduced the original general damages assessed by $50,000 to $600,000. The court overturned the $3.9 million special damages award, finding that Ms Wilson had not made out her claim and had no entitlement to any special damages.

127. Ms Wilson sought leave to appeal to the High Court but was refused.[18]

General damages

128. The Court of Appeal reduced the original general damages assessed by $50,000 to $600,000. The court found that the trial judge made many findings that the defendants seriously aggravated the plaintiff's injury, but some of the material inferences were wrong. The appellate court went on to re-assess aggravated damages.

129. The court found the following factors were aggravating –

[17] *Wilson v Bauer Media Pty Ltd* [2017] VSC 521.

[18] [2018] HCATrans 238.

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(a) the defendants' failure to properly investigate defamatory allegations from a source asking for anonymity and payment;

(b) publishing matters they knew were false;

(c) publishing false matters to maximise its own business and as part of a campaign to take down Ms Wilson;

(d) failing to call a witness to explain the decision to publish the print article;

(e) motived by malice in the first online article;

(f) sending insulting and harassing messages to Ms Wilson's family;

(g) pursuing a justification defence;

(h) failure to apologise; and

(i) failure to correct from time of the publication.

130. As to general damages, the court endorsed what was said at first instance –

"*It was a sustained attack over three consecutive days and across four distinct titles, both in print and online media timed to coincide with and capitalise on the pinnacle of her career to date, the launch of Pitch Perfect 2, in which she had a starring role. Ms Wilson was devastated and shattered. She suffered emotionally and physically. I have accepted both the plaintiff's evidence and the evidence of her family and friends about her personal distress and the injury to her feelings. Her hurt was substantially aggravated both by the circumstances of publication and by the continuing conduct of Bauer Media up to the verdict*."[19]

[19] At [258].

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131. The court assessed general and aggravated damages combined as $600,000.

Loss of chance

132. At first instance, Dixon J was satisfied the defamatory publications caused the loss of a chance to be cast in new films with the salary at $5 million or more. That loss of chance was assessed at $3,917,472.[20]

133. The Court of Appeal overturned that award, ultimately finding that Ms Wilson had not made out her claim. To make out her claim, Ms Wilson needed to prove:

(a) the valuable opportunity existed but was lost;

(b) the defamatory articles published in Australia caused that loss of opportunity via a grapevine effect to the United States; and

(c) there was a loss of opportunity to earn US$15 million from being cast in three films either as lead or co-lead.

134. The court found there was potentially significant evidence that the plaintiff did not lead. The plaintiff did not call her main publicist, any of her seven agents in the United States, nor her publicity team (save one). The witness called did not know about the defamatory articles.

135. The plaintiff ought to have called some of her agents or publicists to give evidence about the currency of the articles in influential circles, rather than seeking the court infer the grapevine effect without any evidence.

[20] *Wilson v Bauer Media Pty Ltd* [2017] VSC 521.

136. Further, the plaintiff's agent did not identify any role (available in the claimed period) for which the plaintiff was suited, the anticipated salary, whether the film went forward and who was cast.

137. The trial judge also overstated the amount of Ms Wilson's pre-incident income, in reliance upon particulars of special damages drafted by her lawyers which were higher and at odds with the evidence at trial. The basic salary claimed by the plaintiff in her loss of opportunity claim far exceeded the basic salary she had received in the past. Further, after the publications, the plaintiff was engaged for three new movies and finalised contracts for a fourth movie, amongst other career successes.

138. Similarly, in the dismissed special leave application, Keane J noted there was no evidence from any witness who made decisions about production that the defamation "impinged on their consciousness".[21]

Andrews damages

139. The Court of Appeal also found that the plaintiff's alternative claim for *Andrews* damages failed for the same reasons that the special damages' claim failed. *Andrews* damages are increased general damages to compensate for the exposure to potential financial loss (in some cases).

Options to improve damages awards

140. Both plaintiffs and defendants have some options available to them to improve the damages outcome for their client. Options include:

[21] [2018] HCATrans 238.

(a) settling outside of court;

(b) agreeing the amount of quantum (for both or one head of damages) and litigating the balance;

(c) considering whether it is more advantageous to have the matter heard as a cause or jury and perhaps, make that application (even as late as during the middle of trial);

(d) considering the effect *Malec* will have on damages and adducing evidence that pre-existing or supervening conditions would or would not have caused considerable consequences for the plaintiff following the compensable injury (depending on whether you are acting for a plaintiff or defendant); and

(e) seeking leave to appeal the quantum award.

141. Defendants could consider joining third parties to share contribution.

142. Defendants should also double-check public liability matters to see if they are actually WorkCover matters. If so, the plaintiff needs to go through the serious injury gateway. The damages payable by defendants may be smaller in WorkCover matters –

(a) the plaintiff may not get a serious injury certificate for both heads;

(b) in any case, the economic loss statutory maximum is smaller;

(c) the plaintiff cannot claim gratuitous care; and

(d) WorkCover may not seek statutory recovery of the statutory benefits at all or recovery might be limited to the past.

143. Matters commenced as public liability matters which may be WorkCover matters include the plaintiffs who were injured while on their lunchbreak; travelling from their office to another venue for a meeting; whilst buying things for work; and/or travelling home from a work function.

144. Both parties should try to settle the claim. If that fails, it is open to parties to agree to amount of quantum (for both or one head of damages) and litigate the balance.

145. If the parties cannot agree on the mode of trial, one party can apply to the Court seeking it be heard as a cause. The test requires the court to consider whether "the proceeding should not in all the circumstances be tried before a jury".[22] A Court may direct this at any stage of a proceeding. However, juries are regarded "as capable of dealing with issues of legal complexity as well as difficult issues of fact".[23]

146. Alternatively, if a party is aggrieved by the damages' award at first instance, an option would be to seek leave to appeal (if available). The test generally applied is whether the applicant has an "exceptionally strong case" where "the evidence so preponderates against the verdict as to show that it was unreasonable and unjust".[24]

147. Appellate Courts will not disturb jury verdicts lightly. For this reason, parties seldom appeal damages verdicts.

148. The Appellate Court will have regard to the advantage that the trial judge or jury had in hearing and seeing the witnesses give evidence. The Appellate Court will assume

[22] Rule 47.02(3).
[23] Gunns Ltd & Ors v Marr & Ors (No 5) [2009] VSC 284. See Svajcer v Woolworths Ltd (Ruling) [2015] VSC 543 as an example as a Court directing the matter be heard as a cause.
[24] *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33, 42 (Mason CJ, Deane, Toohey and McHugh JJ).

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the jury took a view of the evidence most favourable to the respondent consistent with the verdict it returned.[25]

Reminder about the general principles

149. To conclude, a brief reminder about the general principles of pain and suffering damages. Assessment involves consideration of a range of matters, including:

(a) age;

(b) injuries;

(c) treatment;

(d) length of recovery;

(e) prognosis;

(f) nature and frequency of pain;

(g) limitations at work;

(h) limitations in activities of daily living; and

(i) retained capacity.

150. No case sets a precedent for cases to follow and each case will be decided according to its unique facts. That being said, this broad survey of recent damages awards appears to us to indicate a continued conservative approach by the judiciary to awards of general damages, notwithstanding the Court of Appeal's 2011 comments in *Amaca v King*.

[25] *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211, 222 (Dawson J), 227–8 (Toohey J) and 239 (McHugh J).

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