When Lump Sum Compensation Runs Out: Personal Responsibility or Legal System Failure?

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Abstract

In most cases where a person receives lump sum damages for personal injury, it is assumed that the money will be enough to put them back in the position they would have been if the injury had not occurred (indeed, that is the aim of the law of compensation). However, in many cases people run out of compensation earlier than expected. Where such people seek social security, they are often thought to be 'double dipping', having misspent their damages, and they may be denied payment. There is little empirical data on what has happened when people run out of their lump sum damages, including on the extent to which they have recklessly misspent, on what factors have contributed to the dissipation of the funds and on whether these are factors personal to the claimant or are indeed institutional or legal system factors. Drawing on data derived from cases where the Welfare Rights Centre of New South Wales acted for people subject to a social security 'lump sum preclusion period', this article maps out the approaches of tort law and social security law to lump sum damages. The article seeks to establish a picture of the circumstances associated with a person finding themselves in this situation and concludes with some suggestions about how to reduce its occurrence.

I What Happens When the Damages Run Out?

When damages are awarded for personal injury, the principle of restitutio in integrum applies. That is, the aim is to put the person back into the position they would have been in if the accident or wrong had never happened. What happens when a claimant's lump sum compensation runs out prematurely?

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In situations like these, you might think that a claimant who has no other means of support could, as a last resort, fall back on the social security system.[1] But things are not so straightforward. In most cases where a claimant receives lump sum damages for personal injury, social security law imposes a period of time — a lump sum preclusion period ('LSPP') — during which the claimant is ineligible for the main forms of income support under social security law. This LSPP can only be shortened in limited circumstances. Accordingly, there is a real risk that a person who does not manage their lump sum effectively, runs out of money and is without other means may find that they cannot rely on the safety net normally available under our social security system.[2] The consequences can be devastating. Such a claimant may have to depend on friends and family (which may cause further hardship) or charitable sources for food, shelter and other basic necessities.

It is critical to understand the experiences of claimants who prematurely dissipate lump sum damages, and the magnitude of this problem. This information is an important reflection of the performance of our systems of compensating for personal injury, and their interaction with other sources of support. Despite this, there is very little data available on the long-term outcomes and experiences of compensation claimants,[3] particularly the cohort of claimants who prematurely dissipate their damages.

It may be that the majority of people who receive lump sum damages after injury (particularly those with less severe injury and fewer ongoing care and support needs) manage relatively well. Many such claimants may manage their money appropriately so as to provide them with sufficient income in the longer term, or until they are able to return to work. Some who do not manage their money well may have support (such as a partner who works and is not prevented from doing so by the need to care for them long term). Some people who run out of money may never approach Centrelink,[4] which administers social security payments, even though they have no other reliable means of support, and instead rely on charity or friends and family. A number, however, will make application to Centrelink for payments, at which point their claim will be denied on the basis that they are required to serve a preclusion period, unless they can persuade Centrelink or a tribunal to shorten it.

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1 *Social Security Act 1991* (Cth) ('*SSA*'); *Social Security (Administration) Act 1999* (Cth). See Peter Sutherland and Allan Anforth, *Social Security and Family Assistance Law* (Federation Press, 3rd ed, 2013), the leading reference work in this field; and Australian Government, *Guide to Social Security Law* (3 July 2017) <http://guides.dss.gov.au/guide-social-security-law/>, which contains official policy guiding the administration of social security legislation.

2 Senate Estimates (Community Affairs Legislation Committee), Parliament of Australia, *Lump Sum Compensation Preclusion Payments*, 29 March 2012, Question Reference Number HSW 19, <http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/clacctte/estimates/add1112/DHS/index>; Senate Estimates (Community Affairs Legislation Committee), Parliament of Australia, *Compensation Preclusion Periods*, 12 December 2014, Question Reference Number HS 166, <http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/clacctte/estimates/sup1415/DHS/index>.

3 Genevieve M Grant et al, 'Relationship between Stressfulness of Claiming for Injury Compensation and Long-Term Recovery: A Prospective Cohort Study' (2014) 71(4) *JAMA Psychiatry* 446, 451.

4 Centrelink is a program within the Australian Government Department of Human Services (along with Medicare and the Child Support Agency).

An LSPP is triggered by receipt of a lump sum payment of compensation.[5] The *Social Security Act 1991* (Cth) sets out a formula for calculating the LSPP. The formula for calculating the length of the period in weeks is:[6]

$$\frac{\text{Compensation part of the lump sum}}{\text{Income cut-out amount}}$$

The 'compensation part of the lump sum' refers to the part of the lump sum that is, or is deemed to be, the amount received for lost income or lost earning capacity.[7] The income cut-out point is set at the maximum amount of weekly income a single person can receive and remain eligible for the pension.[8]

We do not know what proportion of people challenge Centrelink decisions that they are not entitled to support. Evidence from large, population-level studies suggests that disadvantaged people are more likely to have lower legal capability and to take no action in response to legal problems than other members of the community.[9] It is likely that only a small proportion of claimants challenge Centrelink's decisions, through its formal internal review mechanisms (seeking to have the preclusion period reduced or waived) and the relevant tribunal processes. Neither Centrelink nor the administrative tribunals that review Centrelink decisions routinely publish data about the application of preclusion periods, nor the exercise of the discretion to waive them.[10] Our freedom-of-information request seeking access to this information was rejected on the grounds that the information did not exist, and the relevant government department could not use an 'ordinarily available computer system' to produce the data requested.[11] The limited amount of data made available through the process of the Australian Parliament's Senate Estimates (Community Affairs Legislation Committee) indicates that in 2013–14, 5096 compensation preclusion decisions were made, and 89% involved a preclusion period of five years or less.[12] In the same period, there were 692 Centrelink internal

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5 *SSA* ss 17(2), 1170.

6 Ibid s 1170(4).

7 Ibid s 17(3)(b).

8 Ibid ss 17(1) (definition of 'income cut-out amount'), (8).

9 Hugh M McDonald and Zhigang Wei, 'How People Solve Legal Problems: Level of Disadvantage and Legal Capability' (Law and Justice Foundation of New South Wales, Justice Issues Paper 23, March 2016) 2.

10 The annual reports of the Australian Government Department of Human Services and the Australian Administrative Appeals Tribunal ('AAT') do not sufficiently differentiate categories of social security reviews and appeals. See, eg, AAT, *2015–16 Annual Report*, 32–4 <http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201516/AAT-Annual-Report-2015-16.pdf>; Department of Human Services, *2015-16 Annual Report* 116–17 <https://www.humanservices.gov.au/sites/default/files/8802-1610-annualreport2015-16.pdf>. Challenges to Centrelink's decisions occur first through internal review, after which further review may be sought at the AAT. Until 1 July 2015, such reviews were first dealt with by the Social Security Appeals Tribunal ('SSAT'). On that date, the SSAT merged with the AAT and there are now two levels of review through the AAT for applicants challenging Centrelink decisions: an initial review in the Social Services and Child Support Division, followed by a second review in the General Division of the AAT. There is no publicly available information about the total number or characteristics of SSAT or AAT first review of decisions related to compensation preclusion periods.

11 Letter from Australian Government Department of Human Services to G Grant, 2 June 2014.

12 Senate Estimates (Community Affairs Legislation Committee), Parliament of Australia, *Compensation Preclusion Periods*, 12 December 2014, Question Reference Number HS 166, <http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/clacctte/estimates/sup1415/DHS/index>.

reviews of compensation preclusion matters with 22% (n=151) being set aside or varied at that stage. The Australian Administrative Appeals Tribunal ('AAT') reviewed 172 decisions, and 36% of these (n=62) were set aside or varied. At the AAT level, 35 matters were disposed of (by consent or determination), with 66% (n=23) set aside or varied.[13]

Recent research has shed further light on the experiences of those who dissipate prematurely by examining AAT decisions to develop a profile of the claimants whose appeals progressed to this stage from 2004 to 2014 (n=248).[14] This research demonstrated that in the AAT cases, 69% of the claimants were male, 61% were workers' compensation claimants and 78% had received damages in an amount less than $500 000.[15] Within four years of the resolution of their damages claim, 84% of claimants had dissipated their compensation, and a similar proportion were serving a preclusion period of two years or more (79%).[16] While illuminating, this research has limitations: it focuses on the subset of claimants who have dissipated their damages and have participated in an appeal that has proceeded to determination by the Tribunal. There are good reasons to think that such claimants may be unusual, particularly given that 70% of them were self-represented.[17]

To address these difficulties, this article presents findings from our empirical analysis of case files from a specialist community legal centre that assists claimants who received lump sum damages, spent the money and subsequently found themselves precluded from social security. These claimants sought assistance from the legal centre to challenge Centrelink's decisions denying their social security claims in the Social Security Appeals Tribunal ('SSAT'; as it then was)[18] and the AAT. Drawing on these case files, we identify the characteristics and trajectories of this group of people, who found themselves in the vulnerable and, in our society, rare situation of having no access to income or social security. We consider a range of factors that might contribute to this problem, including the sufficiency of damages, how the law of compensation interacts with social security law, the cost of legal services, and the capacity claimants have to manage lump sums.

II Study Setting and Data

To investigate the characteristics and trajectory of lump sum compensation recipients who are precluded from claiming social security, we undertook a file review study of LSPP matters conducted by a leading welfare rights community legal centre, the Welfare Rights Centre of New South Wales ('WRC').

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13 Ibid.

14 Genevieve Grant et al, 'When Lump Sums Run Out: Disputes at the Borderlines of Tort Law, Injury Compensation and Social Security' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 301, 306–10.

15 Ibid 307.

16 Ibid 309.

17 Ibid 308.

18 See above n 10.

A *The Welfare Rights Centre of New South Wales*

The WRC is a specialist community legal centre located in Sydney, which provides state-wide legal assistance on welfare-related legal matters to residents of New South Wales ('NSW'). In most cases a person seeking legal advice makes contact with the WRC by telephone. Once initial information has been taken and advice provided, the WRC determines whether it can assist further, based on organisational guidelines and the merit of the case. In some cases, the WRC may provide some additional assistance ('minor assistance files'), in others it may act for the person on an ongoing basis ('major files'). The WRC assists clients with challenging a decision in internal reviews, through to tribunal and court reviews and appeals.

Although decisions to impose or decline to waive an LSPP are subject to review, the appeals in relation to these matters typically come about when an applicant lodges a claim for a social security decision, and then appeals after a Centrelink officer decides to reject the claim because the LSPP is operating. A claim is necessary for a claimant to be eligible for a social security payment,[19] so the advantage of this approach is that the claimant may be eligible for arrears if their appeal is successful and waiver of the LSPP is backdated. In the cases in our study, the claimants sought advice when their claim for a social security payment had been rejected. In these circumstances, it is then for the claimant to challenge the decision and mount an argument that there are special circumstances in their case that justify ending the LSPP early. If the claimant does not access their appeal rights, the original decision will stand and they remain ineligible for a social security payment.

The typical trajectory of these matters involves a claimant who received lump sum compensation for personal injury, usually in the workplace or in a road traffic collision, but later ran out of money before the expiry of their preclusion period and lacked other means of support. Typically, they had been unsuccessful in returning to work following the injury and, as a result, approached Centrelink seeking help. When Centrelink rejected their application for income support because they were still subject to a LSPP, the claimant sought legal assistance from the WRC to appeal Centrelink's decision.[20]

B *Study Cases and Data Collection*

Cases for the study were identified through a search of the WRC's computerised case management system. A search was undertaken using the relevant matter code for compensation preclusion cases commenced in the system between 1 January 2012 and 31 December 2014. This search identified both initial, one-off advices and minor and major cases. On review, we decided to focus on the major cases because

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19 *Social Security (Administration) Act 1999* (Cth) s 11.

20 Centrelink decisions about whether to grant an income support payment to a person subject to an LSPP may be appealed: *Social Security (Administration) Act 1999* (Cth), pts 4 (internal review of decisions), 4A (review by the AAT). There are several levels of appeal, both internal and external to a tribunal. Each level involves 'merits review'. Most importantly, this means that the decision-maker on review takes a fresh look at the law, policy and facts and new evidence can be supplied to establish the person's past and present circumstances in an effort to persuade them to make a different decision.

the WRC had undertaken substantive work in these matters and, as a result, they provided consistent and detailed data for the study. Major cases typically involved internal review or tribunal matters where WRC staff had made a merit-based assessment that there was a reasonable prospect of success (despite the strictness with which preclusion periods are generally enforced) and the matter should be pursued. The work undertaken by the WRC in preparing these cases generated a large amount of detailed data about the claimant and their past and present circumstances, making the cases the most appropriate data for our study.

Data were collected from the WRC files over a period of two years. A data collection schedule was developed and used to collect key data from the hard copy case files. The case files varied in size and content, but typically consisted of file notes, instructions, copies of Centrelink's administrative decisions, the claimant's financial records and bank statements (including details of major purchases), correspondence and documents relation to the personal injury claim, medical reports and records, and statements from friends and family (particularly pertaining to loans made by the claimant). The study was approved by the University of New South Wales Human Research Ethics Committee.[21]

III Findings

Table 1 presents the number of advices provided and minor and major cases opened by the WRC in relation to compensation preclusion disputes between 2009 and 2014.

Table 1: Number of LSPP matters dealt with by the WRC, 2009–14

Year	Advices	Minor case	Major case	Total
2009	86	17	14	117
2010	98	18	15	131
2011	88	11	15	114
2012	91	21	23	135
2013	88	12	23	123
2014	107	30	23	160
Total	**558**	**109**	**113**	**780**

Of the 69 major cases opened between 2012 and 2014, 58 files were available for analysis. These clients' cases were the source of the data analysed and presented in the following tables.

Table 2 presents the demographic and claim characteristics of the WRC clients. All of the clients were aged 30 years or more at first contact with the WRC, and their mean age was 49 years — well short of the notional retirement age of 65 years. The majority of the clients reported that secondary schooling was their

[21] Approval no HC13176.

highest level of education (71%). Only 29% reported having a post-school qualification, far less than the 64.6% of Australians aged 25–64 years in 2014 who reported having such a qualification.[22]

Table 2: Characteristics of claimants and claims (n=58)

Claimant gender	
Male	45 (78%)
Female	13 (22%)
Education (highest level attempted)*	
Primary	2 (4%)
Secondary	37 (67%)
Technical	6 (11%)
Tertiary	10 (18%)
Claimant age at contact with WRC	
30–39 years	9 (16%)
40–49 years	17 (30%)
50–59 years	22 (39%)
60 years and over	8 (14%)
Compensation claim type	
Workers' compensation	39 (67%)
Motor accident compensation	15 (26%)
Unknown	4 (7%)

* Note: Education data missing for n=3; age data missing for n=2.

As Table 3 indicates, the number of years between the time the plaintiff received compensation and their initial approach to the WRC (typically at around the time they ran out of money) varied. Thirty per cent of the clients had run out of their compensation within one year of receiving it. A further 32% ran out within two to three years and approached the WRC for help; 18% within four to five years and 21% had a period of six years or more between receiving compensation and approaching the WRC.

Table 3: Number of years between compensation receipt and WRC contact

No of years	n (%)
Up to 1 year	17 (30%)
2–3 years	18 (32%)
4–5 years	10 (18%)
6 years or more	12 (21%)

[22] Australian Bureau of Statistics, *6227.0 – Education and Work, Australia, May 2014* (12 December 2014) Table 1.11 Non-school qualification, persons aged 20–64 years, 2014 <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6227.0May%202014?OpenDocument>.

In Table 4 we present a comparison of the duration of the LSPP for claimants in our WRC sample with evidence from two other key datasets: the analysis of decided AAT cases and the data provided through the Senate Estimates process about the number of LSPP decisions made by Centrelink in 2013–14.

Table 4: Duration of preclusion period — WRC cases, AAT decisions and all CPPs, 2013–14

Preclusion period length	**WRC cases 2012–14 (n=58)**	**AAT LSPP decisions 2004–14 (n=221)[23]**	**Centrelink LSPP decisions, 2013–14 (n=5096)[24]**
< 6 months	0	1.8%	26.6%
> 6–9 months	1.7%	5%	13.5%
> 9–12 months	0	2.7%	10.5%
> 1–2 years	5.2%	11.8%	14.5%
> 2–5 years	36.2%	38.9%	24.3%
> 5–10 years	37.9%	28.5%	9.1%
> 10–20 years	15.5%	7.7%	1.4%
> 20 years	3.5%	3.6%	0.2%

The median LSPP duration among WRC clients was 279 weeks (5 years 5 months; range: 31–1200 weeks), and 74% had preclusion periods between 2 and 10 years. Comparing the WRC clients, the AAT decided cases and the broader body of Centrelink LSPP decisions indicates that there is evidence of a greater prevalence of preclusion periods of more than two years and of more than five years in both the WRC and AAT case samples than in the broader body of LSPP decisions ($p<0.0001$ in each instance).

Table 5 presents the recorded gross amount of lump sum damages involved in WRC clients' personal injury claims. This figure represents the amount of the claimants' damages, typically before the recovery of Medicare or Centrelink repayments and payment of legal costs. The median gross compensation was $469 250 (range: $142 480 to $1.5 million). The median amount of claimant legal costs (the recorded plaintiff lawyer fees and disbursements) was $75 000 (range: $5880 to $490 432). Calculated as a proportion of the gross compensation, legal costs ranged from 12% to 40%, with a mean of 19%. In Table 5, we present the average legal costs for bands of gross compensation, indicating the proportion of claimants in each band. Note that most of these claims did not involve very large sums of personal injury damages. A small minority of cases (9%) involved awards for very serious injury that exceeded $1 million.

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[23] Grant et al, above n 14, 309.

[24] Senate Estimates (Community Affairs Legislation Committee), Parliament of Australia, *Compensation Preclusion Periods*, 12 December 2014, Question Reference Number HS 166, <http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/clacctte/estimates/sup1415/DHS/index>.

Table 5: Gross compensation received and average legal costs

Gross compensation	Proportion of claimants	Average legal costs
$100–249 000	11 (19%)	$43 467
$250–499 000	20 (35%)	$73 765
$500–749 000	12 (21%)	$109 810
$750 000–1 m	10 (17%)	$116 246
More than $1m	5 (9%)	$201 255

Note: Legal costs data missing for n=11.

In Table 6, we see that in 31% of the WRC cases (n=18), clients referred to gambling as having played a substantial part in their early dissipation of the damages, while 79% (46 clients) referred to mental health problems as part of their presentation.

Table 6: Presence of mental health issues and gambling

	WRC cases 2012–14 (n=58)
Gambling only	1 (2%)
Mental health only	29 (50%)
Gambling and mental health	17 (29%)
Neither gambling nor mental health	11 (19%)

Of those reporting a mental health problem, 29 did not mention gambling and the remaining 17 reported both mental health and gambling problems. (This meant 37% of those with a mental health problem also reported gambling problems). Four people had actually gambled away the majority of their funds. Eleven clients did not refer to gambling or mental health issues at all. These findings are principally based on self-reported, non-clinical data and no conclusion can be drawn about the level of pre-existing gambling or mental health problems experienced by the clients. To some degree, the prevalence of these problems among the WRC clients is reflective of the evidence base identifying the significant impacts injury and its knock-on effects (on work, family and relationships) can have on a person's mental health.[25] Additionally,

[25] Meaghan L O'Donnell et al, 'Psychiatric Morbidity Following Injury' (2004) 161(3) *American Journal of Psychiatry* 507; Richard A Bryant et al, 'The Psychiatric Sequelae of Traumatic Injury' (2010) 167(3) *American Journal of Psychiatry* 312; Richard A Bryant et al, 'Trajectory of Post-Traumatic Stress Following Traumatic Injury: 6 Year Follow-up' (2015) 206(5) *British Journal of Psychiatry* 417; (DOI: 10.1192/bjp.bp.114.145516); Stephanie Schweininger et al, 'The Temporal Relationship Between Mental Health and Disability after Injury' (2015) 32(1) *Depression and* Anxiety 64; Belinda J Gabbe et al, 'Financial and Employment Impacts of Serious Injury: A Qualitative Study' (2014) 45(9) *Injury* 1445.

however, evidence suggests that injury does not affect the community randomly, and that some community members may be more likely than others to experience serious injury.[26] Accordingly, some claimants may be experiencing a form of magnified vulnerability both to, and in the wake of, serious injury, which may make them particularly ill-equipped for the task of managing damages during their preclusion from social security. Some of the WRC clients appear to fit into this group.

In many cases, WRC investigated how the client spent the compensation funds, as this may be relevant to the decision to shorten the LSPP. For 36 matters, we were able to identify the nature of the client's expenditure from information on the file. Clients frequently reported using their damages to buy a house (n=20) or pay off a mortgage (n=4). In many of the cases where the client had bought a house, they had been in relatively low paying jobs where they may not otherwise have had the means to buy a house, which may explain why few people in the sample had a pre-existing mortgage to pay off. In some cases, the client had later sold the house when unable to support themselves, but then spent of the sale proceeds before approaching WRC.

Twelve clients reported purchasing cars, the majority of which were second-hand. Twelve clients reported having loaned to friends money that was not paid back, or giving money to family members including for medical bills. For example, one client ('Client A') received a lump sum settlement of $550 000, which was reduced to $280 000 after deductions for past compensation payments and then $215 000 in hand after he paid his legal costs. He subsequently gave $80 000 to his family and loaned $83 700 to friends. There was evidence on file that Client A had poor mental health and decision-making capacity. 'Client B' received a lump sum of $312 000, which was reduced to $270 000 after legal fees were paid. Client B loaned $50 000 to a step-son, gave his daughter $30 000 for medical treatment and gave each of his five other children $15 000. Client B subsequently became homeless and lived with each child in turn.

IV Discussion

It is challenging to determine how best to deal with the problem of claimants who prematurely dissipate their lump sum compensation. Given that the assessment of damages is intended to put the plaintiff back in the position they would have been in had the injury not happened (restitutio in integrum), if the compensation is calculated correctly and properly managed, it should not run out ahead of time. How do we account for the experiences of the WRC clients? Is it simply a matter of poor management? In the discussion that follows, we consider aspects of the tort and social security systems, including how compensation is calculated, how social security calculates the LSPP, the treatment of legal fees and whether compensation is indeed sufficient for the purposes for which it is intended. We call these 'legal system factors'. We distinguish these from 'client or personal factors', which include the ability of clients to manage lump sums, their personal and social characteristics and any special vulnerabilities that could be ascertained.

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[26] Meaghan L O'Donnell et al, 'Prior Trauma and Psychiatric History as Risk Factors for Intentional and Unintentional Injury in Australia' (2009) 66(2) *Journal of Trauma: Injury, Infection and Critical Care* 470.

A *Legal System Factors*

1 *The Calculation of Damages Results in Undercompensation*

Every year a significant number of people run out of the compensation that was paid to them. The regimes under which compensation is paid include torts at common law, under the Civil Liability Acts,[27] workers' compensation[28] and motor accidents legislation.[29] The amount the plaintiff receives is shaped in a range of ways, including by caps and thresholds, discounts and systematic undercompensation under the Civil Liability Acts and motor accident schemes, and by caps on economic loss and prohibitions against recovery for non-economic losses in workers' compensation. In the discussion that follows, we emphasise the legal arrangements in NSW, the setting for our study.

(a) *Personal Injury Damages*

Damages rarely actually meet the requirement that they should put the plaintiff back in the position they would have been in if the accident had not happened, even in monetary terms.[30] Even before the Civil Liability Acts regime came in, courts were so concerned not to overcompensate that they undercompensated. An examination of the assessment of damages by the courts shows that the process systematically reduces the sum available to the plaintiff from the amount that would represent restitutio in integrum.

The basic common law principles are those in *Todorovic v Waller*.[31] These are that: the plaintiff should receive restitutio in integrum (be put back in the position he or she would have been in if the accident had not happened, so far as money will allow); the money is given in a lump sum; and the money is given once and for all. The once-and-for-all principle means that what the plaintiff does with it afterwards

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27 The Civil Liability Acts are as follows: *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Personal Injuries (Civil Claims) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Personal Injuries Proceedings Act 2002* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

28 The workers' compensation legislation is as follows: *Safety, Rehabilitation and Compensation Act 1988* (Cth); *Seafarers Rehabilitation and Compensation Act 1992* (Cth); *Military Rehabilitation and Compensation Act 2004* (Cth); *Workers Compensation Act 1951* (ACT); *Workers Compensation Act 1987* (NSW); *Workplace Injury Management and Workers Compensation Act 1998* (NSW); *Return to Work Act 2015* (NT); *Workers' Compensation and Rehabilitation Act 2003* (Qld); *Return to Work Act 2014* (SA); *Workers Rehabilitation and Compensation Act 1988* (Tas); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Workers' Compensation and Injury Management Act 1981* (WA).

29 The current road traffic injury compensation legislation is as follows: *Road Transport (Third-Party Insurance) Act 2008* (ACT); *Motor Accidents Compensation Act 1999* (NSW); *Motor Accidents (Compensation) Act 1979* (NT); *Motor Accident Insurance Act 1994* (Qld); *Motor Vehicles Act 1959* (SA); *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas); *Transport Accident Act 1986* (Vic); *Motor Vehicle (Third Party Insurance) Act 1943* (WA). In this article, we will concentrate mostly on the NSW provisions.

30 Bill Madden and Tina Cockburn, 'Full Compensation No Longer Sacrosanct: Reflections on the Past and Future Economic Loss 'Cap' for High Earners' (2012) 20(2) *Torts Law Journal* 90, 91.

31 (1981) 150 CLR 402.

is no business of the courts, and there cannot be further recourse.[32] When a judge assesses damages, he or she places them under the various heads of damage;[33] in NSW these are divided mainly into economic and non-economic loss. The damages are assessed at the time of verdict.[34] Because it may be several years between the time of the injury and the time of trial, damages may need to be assessed in three time periods — damages for the period up to the time of the verdict, damages for future losses up to the end of current life expectancy, and damages for the period of lost life where the original life expectancy was longer than the current life expectancy. This latter amount is usually relatively small.[35]

Damages are awarded for economic losses (costs incurred), lost earnings up to the date of trial and for the lost earning capacity from the date of trial to the end of working life if permanent damage has been suffered, or until the person can return to work. The common law would allow these to be assessed on the basis of what the person actually earned or would be capable of earning, but under the Civil Liability Acts these damages are capped at three times average weekly earnings ('AWE') in most jurisdictions.[36] We use NSW as the example. In NSW, AWE in 2014 was approximately $65 000, so the maximum damages payable per year was $190 000. This may be seen as reasonable in terms of need and distribution of wealth, but in terms of restitutio in integrum it often is not. For example, a medical practitioner earning $200 000 per annum will receive less than they had been earning, clearly not being put back in the position they would have been in had the injury not occurred.

In order to ensure that there is no overcompensation, the courts carefully disregard expenses (for example, for uniforms and travel costs) that will not be needed during the period the injured person is unable to work. 'The question is not what are the ideal requirements but what are the reasonable requirements of the respondent.' [37] The court may, as it did in *Sharman v Evans*[38] decide the person must be compensated to spend their life in hospital, rather than at home as they wish, because it is cheaper. (The fact that Ms Sharman was then free to live at home simply meant that, for the purposes of the lump sum rule, she would run out of money faster.) Lost superannuation is limited to the minimum amount an employer must pay for an employee.[39]

It is common for a severely injured person to require nursing and personal care. Often these services are provided gratuitously by a family member, at least until the date of settlement, because the family is unable to pay for nursing care. Some family members may have to stop working in order to do this. At common

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32 Ibid 412.

33 *Teubner v Humble* (1963) 108 CLR 491, 505–7; *CSR Ltd v Eddy* (2005) 226 CLR 1, 15–17 [28]–[31].

34 *Johnson v Perez* (1988) 166 CLR 351, 356, 358, 373, 387.

35 Generally a 'conventional sum', which is quite small, is given: Harold Luntz, *Assessment of Damages for Personal Injury and Death* (LexisNexis Butterworths, 4th ed, 2002) 242 [3.4.2]. See, eg, *Skelton v Collins* (1966) 115 CLR 94; *Sharman v Evans* (1977) 138 CLR 563.

36 See, eg, *Civil Law (Wrongs) Act 2002* (ACT) s 98; *Civil Liability Act 2002* (NSW) ss 12–13; *Personal Injury (Liabilities and Damages) Act 2003* (NT) ss 20–21; *Civil Liability Act 2003* (Qld) s 54; *Civil Liability Act 2002* (Tas) s 26; *Civil Liability Act 2002* (WA) s 11.

37 *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649, 661 (Barwick CJ).

38 (1977) 138 CLR 563.

39 *Civil Liability Act 2002* (NSW) s 15C.

law, damages for gratuitous services were awarded and paid for at the market value of those services.[40] The gratuitous services that the plaintiff used to perform for other family members was another head of damages. Both of these are now capped and can only be awarded if there is the need for them for at least six hours per week and for at least six months. The rate of payment of these damages is now average weekly earnings,[41] which may effectively force the person providing the gratuitous services to continue to provide them.[42]

Once the amount payable for lost earnings and economic expenses (excluding past lost earnings and expenses) has been determined, it is discounted to reflect the present value of money. In NSW at present, the statutory rate of discount is 5%,[43] despite the fact that for several years inflation has been between 1 and 2%.[44] This discount is based on the assumption that the lump sum 'may be invested and, by using the interest [which is assumed to be 5%] and part of the capital each year, the plaintiff is enabled to meet each item of expenditure as it arises'.[45] And there is a further discount applied for the vicissitudes of life. This is supposed to reflect the court's assessment of the individual plaintiff's employment history and various other factors. This varies, but is usually 15% in NSW.[46] This is applied as a discount despite the fact that good things, as well as bad things, can happen to people.[47] To understand the impact of the discounting process, consider an amount of $500 per week for 20 years awarded for lost earning capacity. This yields a sum of $520 000. Applying the discount for present value of 5% (note that this is negative compound interest) to that sum reduces it to $331 150 using actuarial tables. Then, applying the standard discount of 15% for vicissitudes of life (negative simple interest) leaves the plaintiff with a lump sum of $283 177.[48] The final amount is, therefore, almost half of what was originally worked out as compensatory (keeping in mind that there was already a very strong push to ensure that there was no overcompensation).

All jurisdictions in Australia impose statutory limits on damages for non-economic loss (pain and suffering, loss of amenities of life, lost life expectancy). Under the *Civil Liability Act 2002* (NSW), to receive damages for non-economic loss the plaintiff's injury must be at least 15% of that of 'the most severe case' with

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40 *Van Gervan v Fenton* (1992) 175 CLR 327, 341–2.

41 *Civil Liability Act 2002 (*NSW) ss 15, 15B. See, eg, *Roads and Traffic Authority v McGregor* (2005) 44 MVR 261; *Allianz Australia Insurance Ltd v Ward* (2010) 79 NSWLR 657.

42 Graycar points out that gratuitous services are more likely to be performed by women and to be discounted as 'real' work: Regina Graycar, 'Love's Labour's Cost: The High Court Decision in *Van Gervan v Fenton'* (1993) 1(2) *Torts Law Journal* 122; Regina Graycar, 'Women's Work: Who Cares?' (1992) 14(1) *Sydney Law Review* 86.

43 A similar discount rate applies in every jurisdiction: see *Civil Liability Act 2002* (NSW) s 14; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 22; *Civil Liability Act 2003* (Qld) s 57; *Civil Liability Act 1936* (SA) s 55; *Civil Liability Act 2002* (Tas) s 28A; *Wrongs Act 1958* (Vic) s 28I; *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 5.

44 The inflation rate as at July 2017 is 1.9%. *Australia Inflation Rate* (2017) Trading Economics <https://tradingeconomics.com/australia/inflation-cpi>.

45 Luntz, above n 35, 356 [6.1.2].

46 *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485, 497–8.

47 For discussion on the difficulties of applying the discounts, see *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354, 373–375 [80]–[81] (Campbell JA).

48 Carolyn Sappideen, Prue Vines and Penelope Watson, *Torts: Commentary and Materials* (Lawbook, 12th ed, 2016), 596 [12.175].

a sliding scale up to 100%.[49] A most severe case would be, for example, quadriplegia, which can be awarded the maximum amount of $605 000[50] (adjusted by regulation each year). Tasmania and Western Australia also have a threshold, but theirs is given in a monetary amount,[51] rather than as a percentage of a most extreme loss. Maximum amounts are set by NSW, Northern Territory and Victoria.[52]

(b) *Workers' Compensation*

Workers' compensation legislation differs in each jurisdiction[53] and also changes frequently. The general pattern, however, is for workers' compensation to be paid on a regular basis with the object of rehabilitation, and it is only when injury is severe and permanent that lump sum compensation will be awarded.[54]

In NSW, the legislation in force is the *Workers Compensation Act 1987* (NSW).[55] This abolished an employee's entitlement to damages for an injury in respect of which the employer was liable to pay workers compensation.[56] Common law rights were partially restored by the *Workers Compensation (Benefits) Amendment Act 1989* (NSW). Since then, common law rights have had varying thresholds and entitlements. A 15% threshold for permanent impairment was introduced by the *Workers Compensation Legislation Further Amendment Act 2001* (NSW) and continues to apply.[57] Compensation for non-economic loss in the context of common law claims was abolished.[58] Where the claim is not a common law claim, statutory compensation for permanent impairment may be awarded if the physical injury exceeds a threshold of 10% whole person impairment;[59] for psychological/ psychiatric injury, the threshold is 15% whole person impairment.[60]

Workers' compensation is based mostly on weekly payments (limited by the *Workers Compensation Act 1987 (NSW)* s 34 to a maximum weekly compensation amount of $1838.70, adjusted). The sum can be commuted to a lump sum if weekly payments have been paid for at least six months, there is a permanent impairment of at least 15%, at least two years has passed since the first claim and all the rehabilitation processes have been fully used.[61] Ultimately, those who receive lump sum awards for workers' compensation will in almost all cases receive less than

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49 *Civil Liability Act 2002* (NSW) s 16.

50 This is the 2016 amount: Attorney General, *Civil Liability (Non-economic Loss) Amendment Order 2016* (NSW) s 3.

51 *Civil Liability Act 2002* (Tas) s 27; *Civil Liability Act 2002* (WA) s 9.

52 *Civil Liability Act 2002* (NSW) s 17; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) ss 27–8; *Wrongs Act 1958* (Vic) s 28G. No limit is set by the ACT legislation.

53 See above n 28.

54 See, eg, *Workers Compensation Act 1987* (NSW) s 87EA; *Return to Work Act 2014* (SA) ss 56, 58; *Workers' Compensation and Injury Management Act 1981* (WA) ss 31A–31K. In Queensland, the worker can get a lump sum compensation payment even if the injury has not stabilised: *Workers' Compensation and Rehabilitation Act 2003* (Qld) ss 171–6.

55 The latest amendment is the *Regulatory and Other Legislation (Amendments and Repeals) Act 2016* (NSW).

56 *Workers Compensation Act 1987 (NSW)* ss 149–150 (as originally enacted).

57 Ibid s 151H.

58 Ibid s 151G.

59 Ibid s 66.

60 Ibid s 65A.

61 *Workers Compensation Act 1987* (NSW) s 87EA.

those who receive other sources of common law compensation because there is no provision for non-economic awards in the workers' compensation jurisdiction as it stands in NSW.

(c) *Motor Accidents Compensation*

Compensation under the *Motor Accidents Compensation Act 1999* (NSW) follows the pattern of the *Civil Liability Act 2002* (NSW) with some exceptions. Economic loss is capped similarly to the way it is dealt with in the *Civil Liability Act 2002* (NSW). The court is to disregard any amount above the cap, which is currently $4777 per week.[62] Where future prospects are considered, the court must establish the percentage possibility that the events might have occurred but for the injury.[63] The discount rate for damages for future economic loss is 5% unless changed by regulation.[64] Non-economic loss is also capped (currently at $521 000)[65] and no damages for non-economic loss may be awarded unless the injured person has greater than a 10% degree of permanent impairment and this cannot include consequential psychiatric harm.[66] This is assessed by a medical assessor.[67] This sounds relatively easy, but separate impairment percentages are not simply added together — they are combined according to a 'Combined Values Chart' that is likely to reduce the combination.

(d) *Systematic Reduction in Compensation*

The systematic reduction of compensation demonstrated in this short survey of the law of damages at least raises a question about the adequacy of the damages awards made. In our study cases, the median amount was a little over $400 000 (or about $350 000 after payment of legal costs). As most of these cases were settled, there was no formal determination of the period of incapacity as a basis for the damages agreed. In some, however, the severe and permanent nature of the injury made it likely that the claimant was unlikely to return to work. Further, in many of these cases the claimant was found to be eligible for the disability support pension under social security legislation — income support for people with a physical, psychiatric or intellectual condition that stops them from working. To be eligible a person must be unable to work for, or be retrained for work of, more than 15 hours per week at or above the minimum wage within the next two years because of their condition.[68] Legally, a person may have some work capacity. Statistically, however, only a minority of disability support pensioners (less than 10%) work and a majority of those who leave the payment at any point in time do so to go onto the age pension

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62 *Motor Accidents Compensation Act 1999* (NSW) ss 125, 146; *Motor Accidents Compensation (Determination of Loss) Order 2009* (NSW) reg 3.
63 *Motor Accidents Compensation Act 1999* (NSW) s 126.
64 Ibid s 127.
65 Ibid ss 134, 146; *Motor Accidents Compensation (Determination of Loss) Order 2009* (NSW) reg 4.
66 *Motor Accidents Compensation Act 1999 (NSW)* ss 131, 133.
67 Ibid ss 57–65.
68 *SSA* s 94.

or through death.[69] This may reflect other health problems or factors than the original injury.

To give context to these amounts consider the following example: Client AE sustained serious and permanent injuries to his arms, hands and shoulders at work in 2003. The injuries led to Client AE having permanently limited capacity in both arms and reduced ability to self-care. He also developed serious substance abuse problems. A Centrelink assessment done when he claimed the disability support pension during the LSPP awarded him 30 points for loss of use of his arms and 30 points for substance abuse, when only 20 points in total is needed to qualify for the disability support pension. He was assessed as having a work capacity permanently reduced below 15 hours per week.

Client AE had worked all his life since leaving school at 14 in labouring jobs and had a continuous work history. He was illiterate. At the time of the injury he was 39 years old; that is, he had about 26 years potential working life left. It took 10 years to settle his worker's compensation claim. He received a total of $399 500. This was made up of two interim payments: $107 000 paid four years earlier and the $292 500 as a final payment. He was subject to a 225 week preclusion period.

He spent almost all the money buying and repairing a house in a small country town for himself and his wife, who was his carer. There was a claim of possible poor advice from Centrelink officers, but also about Client AE's cognitive impairment from substance abuse. That is, AE was very unlikely to be able to manage his funds because of his cognitive impairment. In terms of whether the problem is one of personal responsibility or the fault of the legal system AE's inability to manage his funds might be a personal responsibility factor, particularly if his cognitive impairment was self-inflicted by substance abuse. AE's appeal to the AAT was settled, with an agreement made that his LSPP was reduced by about 2.5 years, ending a few months after the date of settlement.

There is no simple way to assess the adequacy of the amounts in these cases. In some, by the time Centrelink came to assess the person's work capacity clearly other conditions had intervened (such as a mental health problem that had developed). This means that the inability to work may not be fully attributable to the original injury.

However, it seems unlikely that any person who is so severely and permanently injured will be able to live for 10–15 years on a lump sum payment of less than $400 000. Rates of interest for the past 15 years have been often less than 5%,[70] which means that were the funds invested they would be very unlikely to yield a return even approaching the previous income. The reality is that in most cases the money is not invested unless it is invested in a house and the claimant simply runs out of funds to support his or her basic costs of living.

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[69] For the most recent snapshot, see Australian Government, *Disability Support Pension Payment Trends and Profile Reports* (18 January 2017) <https://data.gov.au/dataset/dss-payment-trends-and-profile-reports/resource/b6c50479-ffce-4d12-9fe2-afef7b2282c7?inner_span=True>.

[70] Interest rates set by the Reserve Bank for December of the year were: 1.5% (2016); 2.00% (2015); 2.5% (2014); 2.5% (2013); 3% (2012). Reserve Bank of Australia, *Cash Rate* (2 August 2017) <http://www.rba.gov.au/statistics/cash-rate/>.

2 *Accessing Social Security Payments if the Compensation Runs Out*

Many people think that, in the worst case, the social security system will be there if they need it. But this is not necessarily the case for someone who does not manage a lump sum award of damages well. In most cases, where a person receives lump sum compensation for personal injury, they are subject to a LSPP during which they cannot receive most payments under social security law, including the main income support payments for someone with no other source of income.[71] Although there is a discretion to shorten (or even not apply) this period,[72] the preclusion period is usually strictly enforced meaning that people who run out of their compensation money before the end of the preclusion period may be unable to access social security.

The rationale for the imposition of preclusion periods is that the individual should not receive income support under both the applicable compensation scheme and the social security scheme. In the case law in this area, this policy is often referred to as the prevention of double-dipping.[73]

An LSPP is triggered by receipt of a lump sum payment of compensation.[74] Compensation is defined for the purpose of the *Social Security Act 1991* (Cth) as a payment of compensation or damages (including by way of settlement for a claim for compensation or damages) 'that is made wholly or partly in respect of lost earnings or lost capacity to earn resulting from personal injury'.[75]

The *Social Security Act 1991* (Cth) sets out a formula for calculating the LSPP applicable to a person, including its start date and length.[76] The start date of the preclusion period varies, depending on whether the plaintiff has received regular compensation payments before they receive a lump sum. A plaintiff may receive regular compensation payments before receiving a lump sum, such as weekly payments under workers' compensation schemes. Where this occurs, the LSPP begins from the date the regular ('periodic') compensation payments end.

In other cases, a plaintiff does not receive any compensation payments prior to receiving the lump sum. In many of these cases, the plaintiff receives a social security payment. Where this occurs, the period starts from the date the person's inability to work began, in most cases the date of injury.[77] If the person was receiving social security payments following their injury, this means that they have in fact received those payments during the preclusion period and they are liable to repay that amount as a debt (called a 'compensation charge') to the Commonwealth.[78]

As noted above in Part I, the formula for calculating the length of the period in weeks is the compensation part of the lump sum divided by the income cut-out

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71 *SSA* ss 1169–70.
72 Ibid s 1184K.
73 *Gifford v Secretary, Department of Social Services* [2014] AATA 873 (21 November 2014) [16].
74 *SSA* s 1170(1).
75 Ibid s 17(2).
76 Ibid s 1170.
77 Ibid s 1170(3).
78 Ibid s 1178.

amount.[79] The compensation part of the lump sum is a reference to the part of the lump sum that is, or is deemed to be, the amount received for lost income or lost earning capacity. The *SSA* determines this differently depending on whether the amount was determined by settlement (or consent judgment) or court judgment.[80] Court judgments typically specify which parts of the damages are for lost income or lost earning capacity. In the case of settlements or consent judgments, 50% of the total lump sum is deemed to be for economic loss and therefore the compensation part of the award.[81] This '50% rule' is applied to the total sum agreed between the parties, irrespective of whether any components are separately identified by the parties in their settlement. An amount agreed for medical costs is included in the lump sum for this purpose, for example.[82] Similarly, if the plaintiff's claim is settled for an amount including legal costs (which the plaintiff therefore pays from the lump sum), whether those costs are specified or not, the 50% rule is applied to the total settlement sum, not the net amount actually received by the plaintiff after paying their lawyers.[83] The rationale for the 50% rule is said to be to prevent manipulation of the heads of loss by the parties to settlements to obtain a social security advantage (that is, minimising the length of the preclusion period by agreeing on a global sum and purporting to attribute most of that figure to non-economic heads of loss).[84]

Like all deeming provisions in the law, the effect of the 50% rule is arbitrary. It can potentially be advantageous to a plaintiff who settles their compensation claim in circumstances where more than half the award, if the matter had proceeded to court, was likely to have been for economic loss. It can also be disadvantageous to a plaintiff most of whose payment was not, in reality, for economic loss (for example, a plaintiff with very high past and future medical costs). In practice, the 50% rule is the main determinant of the length of the preclusion period as the majority of personal injury cases settle.

The income cut-out point is set at the amount of weekly income a single person can receive and remain eligible for the pension. Due to indexation arrangements that increase the rate of the pension over time, the amount of weekly income a single person can receive and remain eligible for the pension also increases. However, the income cut-out point is fixed at the date the person settled their compensation claim.[85]

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79 Ibid s 1170(4).

80 Ibid s 17(3).

81 Ibid.

82 *Secretary, Department of Social Security v a'Beckett* (1990) 26 FCR 349, 360–62.

83 *Secretary, Department of Social Security v a'Beckett* (1990) 26 FCR 349, 351; *Secretary, Department of Social Security v Hulls* (1991) 22 ALD 570, 578–80; but see *Gifford v Secretary, Department of Social Services* [2014] AATA 873 (21 November 2014), which accepted this approach but exercised the discretion to waive the period and specified that the amount equivalent to the legal costs was to be disregarded.

84 *Secretary, Department of Social Security v Banks* (1990) 23 FCR 416, 424. Where the parties settle the matter without resolving the issue of costs, then government policy is not to count any amount later agreed for costs in the lump sum for the purposes of calculating the preclusion period: see Australian Government, above n 1, 4.13.2.30.

85 Eligibility for the pension is subject to an income test that changes due to indexation arrangements. The income cut-out point that applied at the date of settlement is used. See *SSA* ss 17(1) (definition of 'income cut-out amount'), 17(8), 1064.

The length of the preclusion period is determined on the assumption that a person will live off the amount of money they receive for economic loss (whether determined by the application of the 50% rule or a court judgment) as though living on an income just at the point where a person becomes ineligible for the pension, and not as though maintaining their previous lifestyle. This is clearly quite a different way of considering the amount from that ostensibly used by the tort law damages regime.

There is a statutory obligation on compensation payers (in practice, insurers), to advise Centrelink if they become liable to pay compensation and also to pay any compensation charge directly to the Commonwealth, via Centrelink.[86] In practice, when a person's compensation claim is finalised by payment of lump sum compensation (including an amount for lost earnings or earning capacity), the insurer advises Centrelink of the details of the payment. A Centrelink officer calculates the preclusion period and advises the insurer of any compensation charge to be paid. The insurer then pays over any compensation charge before paying the balance of the sum to the person. Centrelink also writes at this time to the person advising them of the start and end dates of the preclusion period and explaining its effect. As our results show, there is no evidence that dissipation occurs as a result of clients' lack of knowledge of the LSPP.

Section 1184K of the *Social Security Act 1991* (Cth) confers a discretionary power on the Department to disregard some or all of the compensation a claimant received if the decision-maker is satisfied that there are 'special circumstances' that justify doing so. The effect of such a decision is to shorten, or end early, the preclusion period. In practice, the exercise of the discretion is normally sought by people in the situation of the WRC's clients — that is, in hardship and without other means of support and seeking the immediate end of the LSPP, so that they can receive a social security payment. The 'special circumstances' hurdle is significant. Standard ways of running out of money, or the simple fact of severe hardship, are not normally to be regarded as sufficient to access social security income support through this gateway.

The discretion is to be exercised where strict enforcement of the preclusion period would, in the circumstances of the case, be unjust, unreasonable or inappropriate. What is unjust, unreasonable or inappropriate is to be determined in light of the purposes of the legislative scheme, which include the purpose of barring 'double dipping'.[87] There is a tension between this principle and the cases that talk about special circumstances being those that are unusual or uncommon.[88] This

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86 *SSA* ss 1182–4.

87 *Secretary, Department of Social Security v Hulls* (1991) 22 ALD 570, 573.

88 *Re Beadle and Director-General of Social Security* (1984) 6 ALD 1, 3; *Beadle v Director-General of Social Security* (1985) 7 ALD 670, 673–4; *Dranichnikov v Centrelink* (2003) 75 ALD 134, 148. The weight of authority is that the word 'exceptional' sets the bar too high: *Ryde v Department of Family and Community Services* [2005] FCA 866 (28 June 2005) [25]–[26]; *Angelakos v Secretary, Department of Employment and Workplace Relations* (2007) 100 ALD 9, 18; *Randall v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 922 (21 December 2011) [30]*; Fischer v Deparment of Families, Housing, Community Services and Indigenous Affairs* (2010) 185 FCR 52, 65 [80]; *Shinwari v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2009] AATA 317 (6 May 2009) [17]. It is sufficient if there is something that takes the matter out of the usual ordinary case: *Haidar and Secretary Department of Social Security* (1998) 52 ALD 255, 264, citing the earlier cases of *Groth v*

tension is little explored in the decided cases but arises from the fact that something may be unjust or unreasonable without being unusual or uncommon.

The meaning of 'special circumstances' has been said to be broad in terms of content.[89] Special circumstances are considered in the context of the client's situation and many factors may be relevant. These will include the financial circumstances of the client and how they spent their money. However, such circumstances must be 'markedly different from the usual run of cases' and have 'a particular quality of unusualness that permits them to be described as special'.[90] This is very difficult when homelessness and financial hardship, as well as illiteracy and illness,[91] are common. In practice, it is very hard to have the discretion exercised. To qualify as special circumstances, financial hardship needs to be 'truly exceptional',[92] and mere hardship or the risk or reality of homelessness are often insufficient to persuade a decision-maker, whether within Centrelink or an external tribunal, to waive the preclusion period and permit the person to access income support through the social security system.[93]

Secretary, Department of Social Security (1995) 40 ALD 541, 545 and *Secretary, Department of Social Security v Ellis* (1997) 46 ALD 1, 5.

89 *Secretary, Department of Social Security v Hales* (1998) FCR 154, 162.

90 *Re Beadle and Director-General of Social Security* (1984) 6 ALD 1, 3.

91 'Ignorance, illiteracy and isolation' were said in *Beadle v Director-General of Social Security* not to be special circumstances: (1985) 7 ALD 670, 674.

92 See, eg, *Re Napolitano and Secretary, Department of Social Security*, where it was held that the hardship did not meet the standard because the receipts of the applicant were greater than the invalid pension: (1994) 36 ALD 187. In *Re Secretary, Department of Family and Community Services v Gillard* the tribunal refused to find special circumstances because the respondent had not taken reasonable steps such as getting a replacement co-tenant to share costs and also said that a mobile phone 'is not exactly a necessary item': [2002] AATA 156 (11 March 2002) [62]. However, special circumstances were found where the applicant was completely destitute, homeless and engaging in crime: *Re Taylor v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2009] AATA 264 (22 April 2009)*;* and also where the compensation had been completely gambled away and the applicant had no income or assets or capacity to work: *Re O'Neill v Department of Education, Employment and Workplace Relations* [2009] AATA 619 (21 August 2009).

93 Some cases have held that the unfairness of the operation of the LSPP rules themselves may amount to special circumstances: see, eg, *Kirkbright v Secretary, Department of Family and Community Services* (2000) 106 FCR 281, 286, 288; *Secretary, Department of Social Security v Smith* (1991) 30 FCR 56, 63*; Kertland v Secretary, Department of Family and Community Services* (1999) 95 FCR 64, 73. Other cases have held the opposite: see, eg, *Re Secretary, Department of Social Security and Smallacombe* (1991) 23 ALD 141, 144; *Re Secretary, Department of Social Security and Liebelt* [1992] AATA 256 (25 August 1992) [17], *Groth v Secretary, Department of Social Security* (1995) 40 ALD 541, 545.

3 *Settlement, Compensation and Legal Costs*

The vast majority of cases of personal injury settle.[94] This is important, first, because generally amounts of money awarded on settlement are less than those awarded by the legal process of assessing damages. In our WRC sample, the vast majority of the cases (53 out of 58) involved a settlement. In virtually all personal injury cases, as Genn observed, there is

> a peculiar imbalance between the opposing sides. Plaintiffs have varied backgrounds and histories, no experience of personal injury litigation, and ill-informed expectations of the outcome of their action. Defendants have common characteristics, endless experience of personal injury litigation, and clear expectations of the outcome of claims.[95]

This imbalance creates a particular vulnerability that may be significant in considering the dissipation of lump sum compensation. This vulnerability may have been exacerbated for the clients attending the WRC who were also less well-educated than the general population, and therefore possibly less likely to be able to understand the process of settlement; and so more likely to accept a low amount of compensation. Many clients reported that they had been told by the lawyer in early meetings that they were likely to get a certain sum in damages and then the matter was settled for a great deal less. Of course, there was usually no record available of what the client stated had been said to them, so there is no way of verifying this.

A second consequence of settlement is the deeming of 50% of the lump sum as the amount used to determine the LSPP, as outlined above in Part IVA(2). When settlement occurs, in most cases there is no record of the heads of damages to which the sums refer. However, even where it is known, this may not be regarded as 'special circumstances' sufficient to change the LSPP.[96] The deeming of 50% of the lump sum as the amount used to determine the LSPP can be unfair, particularly where a small amount of the damages has been given for economic loss. In some cases, this has been regarded as unfair enough to amount to 'special circumstances'[97] and, in other cases, it has not.[98]

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94 Hazel Genn, *Hard Bargaining*: *Out of Court Settlement in Personal Injury Actions* (Oxford University Press, 1987) 1; Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1(3) *Journal of Empirical Legal Studies* 459, 466–7.

95 Genn, above n 94, 8.

96 See, eg, *Re Fowles and Secretary, Department of Social Security* where even though it was clear that award for economic loss was significantly less than 50%, the Tribunal refused to alter the 50% rule: (1995) 38 ALD 152.

97 *Re Secretary, Department of Social Security and Beel* (1995) 38 ALD 736, 739; *Re Atherden and Secretary, Department of Employment and Workplace Relations* [2007] AATA 1860 (12 October 2007) [63]; *Re Secretary, Department of Employment and Workplace Relations and Donald* (2006) 92 ALD 791, 794; *Re Secretary, Department of Family and Community Services and Kelava* (2003) 76 ALD 239, 245. Note that the Federal Court of Australia held in *Secretary, Department of Social Security* that it is appropriate to use the discretion where the 50% rule creates unfairness: (1991) 30 FCR 56.

98 *Re Fowles and Secretary, Department of Social Security* (1995) 38 ALD 152; *SDSS and McFetrish* [1998] AATA 367.

One of the major hurdles to access to justice is cost.[99] It is clear from our analysis that legal costs make a large incursion into the compensation claimants have in hand, but this is often not taken into account in the assessment of special circumstances. In all the cases in the WRC sample, the claimant reported that they had a conditional costs agreement (often called a 'no win no fee' agreement).[100] Clients enter into such costs agreement with their lawyer on the proviso that they do not have to pay legal fees unless they win the case. In the 40 WRC cases in which the data were available in our study, the median legal costs paid by the claimants was $75 000, which amount to 19% of the mean gross lump sum received (range: 12–40%).

It is not possible to assess the complexity or magnitude of the work performed by each of the claimant's solicitors on their common law damages claim. However, when understood as a proportion of the claimant's settlement (which is purportedly carefully calculated to provide for the claimant), the amount of that money going on legal fees seems quite high. This is important given that the courts do not allow for legal fees in their compensation assessment, and the award of costs does not relieve the plaintiff of legal fees. It might be asked whether contingent costs agreements create an inappropriate incentive for the lawyer to settle at a low figure as the longer contested litigation continues the greater the risk the lawyer has of non-recovery of their fees. Clients may not always be capable of assessing the appropriateness of settlement offers and their lawyer's advice.

The deeming of the economic loss component of a settlement as 50% applies even if legal costs are to be paid from this sum and are never available to support the person. Thus where the median amount of legal costs was $75 000, 50% of this amount or $37 500 would be included in the amount deemed to have been received as economic loss. To give a sense of how much longer the preclusion period was made by this, assume that in a settlement in mid-2015 a lump sum of $415 875 was agreed between the parties on a costs-inclusive basis. The plaintiff is charged $75 000 in legal costs. The single pensioner income cut-out point as at 1 July 2015 was $941.20. This means the number of *extra* weeks served as a result of including legal costs in the lump sum is:

$$75\,000 \div 2 \div 941.50 = 40 \text{ weeks.}$$

Put another way, the preclusion period is 220 weeks, but would be 180 weeks if the period were calculated on the lump sum net of legal costs.

The potential unfairness of this to a plaintiff has been considered in cases where a tribunal is considering exercising the discretion to shorten the preclusion period. In *Re Fuller and Secretary, Department of Family and Community Services*,[101] Centrelink advised that where a settlement is reached inclusive of costs, the whole sum is used as the basis of LSPP determination — whether or not the costs

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99 See Australian Government Productivity Commission, *Access to Justice Arrangements*, Report No 72 (2014), vol 1, 74.

100 The *Legal Profession Uniform Law 2014* (NSW) allows conditional cost agreements with the possibility of an uplift of no more than 25% if the client wins: ss 182–3. Fees calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates are prohibited: s 183.

101 (2004) 83 ALD 152, 158 [15] ('*Fuller*').

have been specified. However, if the matter is settled on the basis that costs are to be determined later, the costs will not be part of the sum used. This inconsistency, still reflected in official policy, was criticised. The cases have gone both ways. In some cases, including the costs has been seen as unfair and a factor supporting waiver of the LSPP.[102] In others, it has been expressly rejected as a basis for the exercise of the discretion.[103]

4 *Incongruence between Damages Rules and Social Security Rules*

Overall, what we see is a continuing incongruence between the rules for the award of damages and the rules for social security. This is chiefly created by the denominator of the formula to calculate the LSPP being the income cut-out amount that is much smaller than the pre-injury average weekly earnings of the plaintiff or claimant were likely to be. Damages are awarded, at least ostensibly, on the basis that the victim is to be put back into the position he or she was in before the accident happened. This means that they need to be given the amount of money that would allow them to live more or less as they did before, to the extent that money can do that. The basis of social security is, ostensibly, a needs-based safety net, and it is based on a subsistence needs model, which is quite different from the rules for compensation.

Social security is not intended to put a person back into the position they had been in before they had access to social security, and because social security is funded by the public purse, it is reasonable to ensure that it is not wasted. The policy against double compensation is sound. However, if we are to continue to award damages in lump sums for tortious harms in the way that we do, it would seem appropriate that the legal framework results in a fairly calculated preclusion period. This would suggest that the formula used to determine the LSPP should have a denominator that is closer to the assumptions made in the determination of compensation. Perhaps it could be an earnings-based formula, rather than the income cut-out amount. This would reduce the incongruence between the rule that the person will be put back in the position they would have been in if the accident had not happened and the position of people such as those in our study.

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[102] See, eg, *Fuller* (2004) 83 ALD 152, 158, 163 [27], where waiver of the LSPP was treated as a matter of fairness and coming within the meaning of hardship. In *Re Panetta and Secretary, Department of Families, Housing, Community Service and Indigenous Affairs*, the Tribunal said that this unequal treatment was of itself sufficient to justify the exercise of the discretion: [2009] AATA 996 (24 December 2009) [20]–[23]. More recently, in *Gifford v Secretary, Department of Social Services* the Tribunal, following *Fuller*, held that legal costs that were clearly not a payment 'wholly or partly in respect of lost earnings or lost capacity to earn resulting from personal injury' and therefore not compensation, should not be included in the amount used to calculate the LSPP: [2014] AATA 873 (21 November 2014) [32].

[103] *Re Sard and Secretary, Department of Families, Housing, Community Service and Indigenous Affairs* [2011] AATA 106 (17 February 2011) [46]–[47]. There the Tribunal referred to *Fuller* (2004) 83 ALD 152, but said that as the legal costs were a relatively small proportion of the overall settlement (and the applicant had also been advantaged by the 50% rule as he had in fact received more than half his settlement for economic loss), this was not unfair so as to warrant a conclusion there were special circumstances in this case.

Another perceived incongruity is the fact that people who run out of compensation are treated differently from other applicants in relation to dealing with their principal private residence (which is otherwise always an exempt asset for all social security payments including any payment for sickness, injury or unemployment). This will be discussed further below.

At the same time, we need to pay serious attention to the way systematic undercompensation by the tort system and workers' compensation has become starker, especially since the Civil Liability Act caps and limits came into play. Until the 20th century, a tort suit generally shifted the damage from the plaintiff to the defendant. This could be catastrophic for the defendant's financial state, so liability insurance became more and more common. But today, despite the existence of insurance, which should have eased the concern of defendants, the plaintiff is being systematically undercompensated. There are good reasons to think that legal system factors are important in creating the premature dissipation of lump sum compensation.

B *Personal Responsibility or Client Factors*

1 *Irresponsible Use of Assets Because of Inability to Manage or Wilful Misuse of Funds?*

The most notable reason people ran out of funds was because of an inability to manage the funds. Prima facie, this is a personal responsibility or client factor. This might be because they are vulnerable in the first place through lack of capacity or some other matter, or because the compensation process has actually harmed them.[104] In our sample, a substantial number of clients reported that they had been diagnosed with a mental illness after their injury (although it may have existed before). The group as a whole was less educated and therefore may be less likely to have the ability to manage finances than the general population. Several clients lacked cognitive capacity before the injury, others developed capacity problems after the injury. It was rare to find that the cognitive capacity issue was caused by the tortious injury itself.

In *Gray v Richards*,[105] the High Court of Australia considered the need to award the costs of managing a lump sum to a plaintiff where the tortious injury had caused the inability to manage. As a result of the respondent's negligence, Ms Gray had suffered brain damage in a car accident when she was 10 years old. She was left with a significant intellectual impairment, leaving her incapable of managing financial matters and requiring constant care. The joint judgment of French CJ, Hayne, Bell, Gageler and Keane JJ began with the familiar principles in *Todorovic v Waller*.[106] First, the damages should put the plaintiff back in the position she would have been in if she had not sustained the injuries. Second, that damages are recovered

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[104] For an analysis of the literature considering adverse health outcomes from compensation processes see Genevieve Grant and David M Studdert, 'Poisoned Chalice? A Critical Analysis of the Evidence Linking Personal Injury Compensation Processes with Adverse Health Outcomes' (2009) 33(3) *Melbourne University Law Review* 865.

[105] (2014) 253 CLR 660.

[106] (1981) 150 CLR 402.

once and forever, and awarded as a lump sum, and third, that the 'court has no concern with the manner in which the plaintiff uses the sum awarded to him'.[107] This third principle had been refined in *Nominal Defendant v Gardikiotis*[108] and *Willett v Futcher*[109] to recognise that when the wrong has directly caused the inability to manage, this is to be seen as a compensable consequence of the injury. The High Court confirmed this in *Gray v Richards*.[110]

But where, as in most cases, the tort does not directly cause the plaintiff's inability to manage their financial affairs, the general principle set down in *Todorovic v Waller* applies; namely, that the 'court has no concern with the manner in which the plaintiff uses the sum awarded to him'.[111] It is not usual to award the costs of managing a lump sum in a personal injury compensation claim. Whether this principle reflects an assumption that the ordinary plaintiff who receives a lump sum can manage their money or not, there is certainly no reason to think that this is correct. Managing a lump sum appropriately may require a considerable amount of judgment and knowledge. It may require a person to assess different investment options or, where it is unclear what the extent of their injury is or when they might recover from it, to predict when they might be able to return to work and have another income source. At the very least, one must be able to assess the credentials of a financial manager, but in normal damages cases no allowance is made for the payment of a financial manager.

Both behavioural economists' findings[112] and recent alarming evidence about the training and competence of financial managers in Australia[113] suggest that competence in managing money is uncommon, especially if the situation is an unusual one, as is receipt of a lump sum of compensation.[114] Financial literacy is a precursor to the ability to manage funds. It can be defined as 'the ability to make informed judgments and to take effective decisions regarding the use and

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107 Ibid 412.

108 (1996) 186 CLR 49, 52, 54, 57.

109 (2005) 221 CLR 627, 643 [51].

110 (2014) 253 CLR 660, 665–6.

111 (1981) 150 CLR 402, 412.

112 Behavioural economics evolved out of social psychology to challenge economic theory's assumptions about the rational economic man. It is most famous for its use of 'nudge' theory and work on heuristics in decision-making as in Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' in Daniel Kahneman, Paul Slovic and Amos Tversky (eds), *Judgment under Uncertainty: Heuristics and Biases* (Cambridge University Press, 1982) 3. This is pertinent because behavioural economics and psychology have been particularly useful in demonstrating the extent to which biases affect future predictions which is, of course, the essence of financial planning.

113 'Completion of an eight-day diploma known as RG 146 is all it takes to qualify as a financial planner': Adele Ferguson and Ben Butler, 'Cheating Rife in Financial Planning', *The Sydney Morning Herald* (online), 16 August 2014 <http://www.smh.com.au/business/banking-and-finance/cheating-rife-in-financial-planning-20140815-104gkn.html>. The Australian Government responded to concerns by passing the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth).

114 Paul Ali et al, 'The Financial Literacy of Young Australians: An Empirical Study and Implications for Consumer Protection and ASIC's National Financial Literacy Strategy' (2014) 32(5) *Company and Securities Law Journal* 334; Andrew C Worthington, 'Financial Literacy and Financial Literacy Programmes in Australia' (2013) 18(3) *Journal of Financial Services Marketing, Supply Special Issue: Financial Product Complexity and the Limits* 227.

management of money'.[115] The ANZ Financial Literacy survey, which has been carried out every three years since 2003, is a self-reported assessment of five elements: keeping track of finances; planning ahead; choosing financial products; staying informed; and financial control.[116] The 2014 survey showed that people under 35 years of age and blue collar workers were the least likely to say they kept a close eye on expenses;[117] 55% of respondents said they had not used any source of financial education materials in the past 12 months,[118] and 35% of those who had sought financial advice in the past 12 months had got it from friends or family.[119] Forty-four per cent of respondents never compared their bank accounts with other bank accounts when they opened a new account.[120] Nineteen per cent of the respondents did not read their superannuation statements and of this group 25% of respondents did not read them because they were too difficult to understand.[121] Of the 20% of respondents who had consulted a financial planner, 39% did not consider whether the financial planner had any conflict of interest.[122]

Overall, the survey suggested that low financial literacy is most likely to be encountered in people who are aged under 25 years, have no formal post-secondary education, are employed in lower blue-collar occupations and have relatively low levels of income and assets.[123] Our sample was not so young, but had little post-secondary education and was often blue-collar. One factor that apparently increases risk tolerance is wealth — the existence of wealth alone (which a lump sum may well represent) may increase people's willingness to make risky choices.[124]

It is not the purpose of this article to discuss financial literacy beyond noting that this evidence suggests that Australians who recover lump sum damages may not, in fact, have the financial literacy required to actually manage a large sum of money. Similarly, the behavioural economics literature may also cast light on the challenges the people in our study had in managing their lump sums. The work on heuristics and bias by Tversky and Kahneman[125] highlights the ways in which people use shortcuts to think about complex decisions. The findings in our small sample confirm this. This is a significant issue because of the prevalence of lump sum damages for compensation, despite the availability of structured settlements under s 22 of the *Civil Liability Act 2002* (NSW).[126]

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115 ANZ, *ANZ Survey of Adult Financial Literacy in Australia 2014* (May 2015), 6.
116 Ibid 5.
117 Ibid 38.
118 Ibid 44.
119 Ibid 4.
120 Ibid 49.
121 Ibid 72–3.
122 Ibid 63.
123 Ibid 1–2.
124 Don Bellante and Carol A Green, 'Relative Risk Aversion among the Elderly' (2004) 13(3) *Review of Financial Economics* 269; Martin Halek and Joseph G Eisenhauer, 'Demography of Risk Aversion' (2001) 68(1) *Journal of Risk and Insurance* 1; Terrance A Hallahan, Robert W Faff and Michael D McKenzie, 'An Empirical Investigation of Personal Financial Risk Tolerance' (2004) 13(1) *Financial Services Review* 57.
125 Tversky and Kahneman, above n 112.
126 Equivalents to s 22 exist in *Personal Injuries (Liabilities and Damages) Act 2003* (NT) ss 31–32; *Personal Injuries (Civil Claims) Act 2003* (NT) s 12; *Supreme Court Act 1935* (SA) s 30BA; *District Court Act 1991* (SA) s 38A; *Civil Liability Act 2002* (Tas) s 8; *Wrongs Act 1958* (Vic) s 28M; *Civil*

In our sample, there was some evidence of a lack of sophistication in expenditure. In no case was there any investment beyond purchase of a house or business. This is perhaps partly because the sums being considered were not so large that they necessarily opened up a wide array of investment options. However, people with better financial literacy than these clients may still have invested more wisely and achieved some return on at least part of their money, or have been able to budget or downscale living standards in order to 'survive' to the end of the preclusion period. Some clients seem to have naively made loans to other family members or friends, which were unlikely to be returned. A small percentage clearly spent substantial sums on gambling or holidays, but most expenditure was aimed at trying to re-establish a life that had been derailed by the injury.

Vulnerable people — those lacking high intelligence or education, and those with mental illness, for example — may be more likely to have trouble managing expenditure. As illustrated by the experiences of claimants in our sample and a broader body of literature, serious injury is often followed by loss of employment, mental health problems, addiction (including drugs and gambling) and relationship breakdown.[127] Claimants experiencing these difficulties seem to be the people for whom a lump sum compensation payment is most risky. The decision-making of claimants in the study sample may have been affected by a range of such circumstances. Sometimes these predate the injury — for example, limited experience with financial planning as a consequence of low pre-injury income, or limited formal schooling, or pre-existing cognitive impairment. Others had met with a further range of post-injury misfortunes — a business collapse, loss of job, or a marriage breakdown leading to a property settlement that may also have contributed to the dissipation of their funds.

Similar insight is provided by the published AAT decisions in special circumstances cases.[128] Mr Vecchi, for example, had the reading comprehension of a 6-year-old and the listening comprehension skills of a 7-year-old.[129] This pre-dated his injury. He said he did not understand the settlement process he went through and followed the advice he was given to settle. However, the Tribunal held that even if Mr Vecchi was not properly advised about the settlement or did not understand this would not give rise to special circumstances.[130] Evidence was accepted that Mr Vecchi had been abused as a child and, before the accident, managed the after-effects of this trauma by physical activity. This was no longer possible after the accident. He bought a house almost immediately after he received his lump sum in an attempt to feel secure. Unfortunately, the house could not be let and was largely unusable. There was evidence that if he was made to sell it this would affect his mental state even more. The circumstances of his abuse and the fact that his accident

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Liability Act 2002 (WA) s 14. One question that our study has raised is why there is so little take-up of the possibility of structured settlement, given the risks of lump sums. It has been argued that the tax issue was solved as long ago as 2002 when the *Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002* (Cth) was passed: Dominic Villa, *Annotated Civil Liability Act 2002 (NSW)* (Lawbook, 2nd ed, 2013) 333 [2.22.040]. However, it continues to be fairly unwieldy.

127 See, eg, Bryant et al, 'The Psychiatric Sequelae of Traumatic Injury', above n 25.

128 Grant et al, above n 14, 306–10.

129 *Re Secretary, Department of Families, Housing, Community Services and Indigenous Affairs and Vecchi* (2012) 128 ALD 447, 455 [54]–[55].

130 Ibid 456 [58].

made it impossible for him to continue his way of managing, along with his low level of comprehension, were taken by the Tribunal to be special circumstances and his LSPP was altered.[131]

For others, the problems flow from the injury. In *Gray v Richards*,[132] the Court recognised this because the injury caused a cognitive deficit. However, it is very common for a person injured to develop a mental health problem (such as depression or an addiction including gambling) as a reaction to the loss of self-worth created by the inability to work and compounded by factors such as the loss of financial and emotional support due to relationship breakdown or heavy reliance on pain medication.

Gambling was a significant issue for many of our clients. The treatment of gambling by the Tribunal in this context is variable. It seems that a distinction is made between a choice to gamble and an addiction to gambling. Where the Tribunal decides that a choice has been made they are unlikely to find special circumstances,[133] but where an addiction is found, it is more likely the applicant will get relief.[134] A WRC client, Ms K, began to suffer from depression and anxiety after her injury as a result of ongoing pain and an inability to work. Her gambling on poker machines at a nearby club became more extreme and she gambled over $100 000 in a 12-month period. Her appeal to have her LSPP shortened failed at the SSAT. The Tribunal found that there was insufficient evidence that she had a mental health problem with addiction. The Tribunal did not accept her evidence that she had been too ashamed to see a gambling counsellor before she ran out of money. The Tribunal also rejected an argument that the level of gambling disclosed in her bank statements, which showed large withdrawals from ATMs at the club, showed an addiction. Naturally, where the Tribunal can characterise the spending as 'extravagant', 'wasteful' or 'reckless', special circumstances are very unlikely to be found.[135]

2 *The Home Ownership Issue*

The question of whether a person's circumstances are special if they have used the money to purchase an asset, usually a house, or pay down a mortgage, or instead whether the person should have to consider whether to sell the asset and live off the proceeds is one of the most problematic issues in this jurisdiction. In the WRC case sample, expenditure on housing was the most common way of using the lump sum among people who had run out of compensation. This might well be regarded as a matter of personal choice or indeed of extravagance in that this is often a major asset,

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131 Ibid 459–61 [79]–[81], [91].

132 (2014) 253 CLR 660.

133 *Re Davis and Secretary, Department of Family and Community Services* (1999) 56 ALD 793, 795 — behaviour was 'grossly irresponsible'; *Re Stavrakis and Secretary, Department of Family and Community Services* (2003) 73 ALD 432, 436–37; *Re Shinwari and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2009] AATA 317 (6 May 2009) [20]–[21] (applicant gambled $38 000 in a very short time, but not regarded as addicted).

134 *Re Secretary, Department of Family and Community Services and Pearce* (2003) 78 ALD 771, 773 (accepted without medical evidence); *Re Males and Secretary, Department of Family and Community Services* (1999) 57 ALD 793, 795 ('out of control').

135 *Re Davis and Secretary, Department of Family and Community Services* (1999) 56 ALD 793, 795; *Re QHBN and Secretary, Department of Social Services* [2015] AATA 614 (19 August 2015); *Re Rankin and Secretary, Department of Family and Community Services* [1999] AATA 496 (9 July 1999).

but there are many benefits to the purchase of a house or paying off a mortgage, especially for a person with an ongoing injury or disability. These include a sense of security, a stable base and continuing security of tenure in retirement.

Under social security legislation a person's principal home is an exempt asset for benefits apart from pensions, no matter what its value.[136] It was noted in *Re Nikolov and Secretary, Department of Social Security* that '[t]he Social Security Act in other sections treats the family home separately and does not require forced sale to provide income'.[137] However, in the context of being a person who received compensation for personal injury, expenditure on such an asset is likely to be regarded with disfavour and substantially reduce the likelihood that a LSPP will be reduced. This may be reasonable on the basis that claiming financial hardship when one owns a significant asset purchased with compensation funds is not consistent with the policy against double compensation. Where the applicant has used their lump sum to purchase a house, Centrelink generally takes the view that this is not reasonable and will not reduce the LSPP. However, Centrelink recognises an exception where the home has been modified to accommodate the person's disability.[138] The tribunals have varied in their approach to this. Very often, they have also taken the view that the purchase of a house prevents waiver of the LSPP.[139] To some extent, this seems to be dependent on how modest the house is and, of course, where it is not the principal private residence, there is no basis for a finding of special circumstances.[140] In a number of cases, the AAT has made a finding of special circumstances, despite purchase of a home. The circumstances of those cases have varied, but generally what has been required is evidence of some very significant detriment if the individual were to sell the house to support themselves during the balance of the LSPP.

The tendency of Centrelink to see waiver of the LSPP after paying off of mortgages or purchase of a house as 'double dipping' is worth addressing. Where a person has a mortgage that might take 25 years to pay off, early paying off may reduce dramatically the amount of interest paid over all. Such a mortgage payment is almost a culturally prescribed process — the owning of one's own home in Australia is so culturally sought after, that to regard this as a form of double compensation seems almost perverse. Another relevant consideration is that the lump sum is already reduced for the present value of money. Paying off a mortgage early is simply the corollary of the fact that the lump sum is calculated on the present value of money. This should not be regarded as double dipping for this reason alone.

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136 *SSA* s 1118(1)(a) provides that '[t]he value of any right or interest in the person's principal home that is a right or interest that gives the person reasonable security of tenure in the home' is to be disregarded.

137 [1991] AATA 259 (7 November 1991) [26].

138 Australian Government, *Factors to Consider When Determining Special Circumstance Provisions* (3 July 2017) Guide to Social Security Law <http://guides.dss.gov.au/guide-social-security-law/4/13/4/20>.

139 *Re Secretary, Department of Families, Housing, Community Services and Indigenous Affairs and Waters* [2011] AATA 666 (27 September 2011) [16]–[17], [20]–[23]; *Re Shaw and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2012] AATA 214 (16 April 2012) [4], [24]–25].

140 *Re Secretary, Department of Social Security and Bolton* (1989) 18 ALD 464, 465–6.

There seems to be a tension, between the principle against double compensation and the natural desire of a person who has suffered a serious injury for security. In these circumstances, buying a house or paying off a mortgage can seem the 'right' thing to do. In some cases in our study, the client expressed surprise that their decision might now count against their appeal.

Presumably the fear behind the view that a person with a compensation lump sum should not pay off a house is that they will use the whole of the lump sum on a property and then require social security to support them. Consideration of what the lump sum represented is important here. Wages received (that is, what is regarded as the 50% used for determination of the LSPP) would have been used, in the case of a person who did not own their own home, partly to pay for rent. The lump sum means that amount is being received in one piece and so it may make sense for accommodation to be dealt with by buying a house. The proper proportion of the house's purchase price might be considered in light of how much of wages was being used for rent and multiplying that by the number of years the lump sum was supposed to last for — a similar process could show what a reasonable mortgage payoff would be. Another way to consider this is that in settlements, if the deemed amount of economic loss in the form of 'lost earnings or lost capacity to earn' as s 17(3) specifies[141] is 50%, then if the person has spent 50% or less on the home/mortgage, they are not spending any of the money that was awarded to replace lost wages. Allowing special circumstances on this basis might be regarded as less problematic and would have the advantage of not appearing to deal with compensation recipients in a completely different way from other social security claimants as is the current situation.

3 *Vulnerability*

The clients in our sample were vulnerable in many ways. They were unable to work or unemployed, less educated than the norm, affected by mental illness and so forth. Many who were married or partnered had their relationship break down. They were more likely to be unable to manage a lump sum because of a lack of financial literacy. It does not seem unreasonable to suggest that vulnerable people may be more likely to be undercompensated, especially by settlement. The effect of settlement on damages is usually to reduce them from what the court might have awarded, on the basis that litigation has not been needed. It is possible that these people were less able to judge what was a sufficient amount of money to support them throughout their lives and, therefore, they may have been more likely to accept an inadequate sum.

V Approaching the Problem Differently

A constructive approach to a complex problem requires multiple prongs. We suggest from this preliminary study that the intertwining of the legal system and client factors needs to be considered in attempting to reduce the problem of lump sum compensation running out. We make some small suggestions for beginning to tackle this problem.

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[141] *SSA* s 17(3)(b).

For example, it seems that part of the problem here is systematic undercompensation associated with caps on damages, courts' concern not to punish defendants and the discounting of damages. The discount for the value of money currently set at 5% in NSW (and more elsewhere) seems excessive in an environment where interest rates are running at approximately 1.2%. The discounting for vicissitudes of life, often at 15%, also seems excessive. These could be altered in the interests of fairness.

When settlements are made, the sums are reduced even further on the basis that money is not wasted in litigation. All this adds up to significant and real undercompensation created by the legal system itself. Settlement amounts are affected by the known outcomes for matters that go to trial. This means that the systematic undercompensation by the courts feeds into the settlement outcomes for the vast majority of cases that are resolved in that way.

Lawyers need to be aware of the tendency to undercompensate and resist it. Are settlements being made on the basis of incorrect or over-optimistic views of the impact of the injury on future employment? In some of the WRC sample cases, the amount of compensation appears to have been premised on the person returning to work, when this seems unlikely due to the severity of the injuries and the individual's age and work history.

To a system that appears to be systematically undercompensating, we add the fact that settlement is typically on a costs-inclusive basis due to 'no win no fee' arrangements, so that the lawyer's fees become part of the sum used to calculate the LSPP, thus making it longer still until the person can claim social security. Social security law could exclude legal costs from the lump sum for the purpose of the LSPP calculation. This does not seem to add to the risk of overbilling by lawyers, as the plaintiff is still better off to have a larger lump sum than earlier access to social security.

These problems are exacerbated by personal factors including the lack of financial literacy of most claimants. This points to the risk of delivering compensation in the form of a lump sums. Despite the advantages of lump sums for autonomy and the ability to start a new life, they may result in adverse outcomes for some recipients. The rates of failure of small business are a case in point.[142] This suggests a range of options worth exploring to reduce the risk, including measures that might improve claimant's financial literacy or provide them with better quality information about options for managing their compensation.

One option, for example, is to encourage expanded use of structured settlements, where the compensation is used to purchase an annuity, rather than received as a lump sum. We need to temper this conclusion by acknowledging that the sample group that we have been considering may well be the most vulnerable group, and that not all claimants are so vulnerable. However, it is interesting to note that in the United Kingdom in recent years, there has been a dramatic shift to periodical payment orders, with judges now allowed to order that even against the

[142] The percentage of small businesses that survived from 2007 to 2011 in NSW was 59.8%: Australian Government Department of Industry, Innovation, Science, Research and Tertiary Education, *Australian Small Business: Key Statistics and Analysis*, (2012) 51.

wishes of the parties.[143] An Australian review of the tax exemption for structured settlements in 2007 indicated that structured settlements had not been taken up for a range of reasons to do with the annuity market and the lack of attractiveness caused by issues such as the inability to bequeath residual capital.[144]

Serious injury is associated with a number of factors that can impact on a person's ability to manage their finances and successfully recover from their injuries and return to work. This includes mental health problems that may arise out of the stresses of the compensation process and/or be pre-existing. Despite the worthy aim of avoiding double compensation, the treatment of claimants' decisions to spend their compensation on housing requires further consideration in order to maximise the possibility that individuals who have suffered a serious injury have the opportunity to have stable housing.

A major issue in relation to the LSPP is that the denominator of the equation used to calculate it is based on the social security income test, rather than an earnings-based formula such as average weekly earnings measures. Given that compensation has been given on the basis of a particular sum per week, there is a reasonable argument that the LSPP for people who have received compensation for personal injury should be calculated on that basis, rather than the current one. Along with the treatment of legal and other cases, this issue needs further consideration to ensure that the calculation of the LSPP is done in a fair manner. This would help to reduce the disjuncture between damages law and social security law.

VI Conclusion

Through exploration of the lived experience of claimants who have received lump sum damages and prematurely spent that money, this article has sought to shed light on the possibility that some personal injury claimants are, in fact, being undercompensated. Additionally, some claimants in receipt of lump sum damages evidently face significant difficulty in managing the funds, often in the most challenging circumstances. In some cases, they may then face a strict set of rules that may prevent them accessing social security, even though they may have little, if any, alternative viable source of support.

We acknowledge that neither our study nor the earlier research establishes the proportion of persons subject to a preclusion period who encounter financial difficulty. It is unclear how representative of this group of people the cases discussed here are. Notwithstanding those limitations, we believe that this study increases our understanding of the circumstances of people who fail to manage their money through the preclusion period and the measures that might help to avoid this happening. Compensation dissipation is a complex problem, but we argue that there

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143 Richard Lewis, 'Structural Factors Affecting the Number and Cost of Personal Injury Claims in the Tort System' in Eoin Quill and Raymond J Friel (eds) *Damages and Compensation Culture* (Hart Publishing, 2016) 37, 51.

144 Alan Cameron, *Review of the Income Tax Exemption for Structured Settlements* (20 March 2008) The Treasury, vii <http://archive.treasury.gov.au/contentitem.asp?ContentID=1355&NavID=>.

are a number of possible ways to improve the current approach and claimant, system and community outcomes.

If we are to continue to award damages in lump sums for tortious harms, it seems that the least we can do is see that the legal settings are fair and that practical supports are there to help claimants, who often have permanent disabilities, to manage their funds. There is also the need for more research to understand the experiences of compensation recipients, especially those who do not manage their compensation effectively. The incongruence between the rule that the person will be put back in the position they would have been in if the accident had not happened and the position of some of the people in our study is extraordinary. Our findings indicate that the dissipation of compensation is not merely a matter of a lack of financial management skills, but reflects a range of vulnerabilities that may be more prevalent among the cohort who sustain personal injuries. Further, financial management cannot make up for the fact that money is simply insufficient to restore a plaintiff to their pre-injury position. To that problem is added a complete disjuncture between the approach of social security law and the approach of personal injury law, creating a situation where there is a particularly disadvantaged group of people when it comes to approaching social security.