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# State of the nation

A guide to different procedural rules, limitation periods, assessment of damages and recent cases for personal injury claims in each Australian state

2023-24

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# State of the nation

## A guide to personal injury claims in Australia – updated for 2023-24

**Assessments of damages in personal injury claims and the apportionment of damages in property damage/ economic loss claims in Australia are governed by different State legislation and regimes.**

Whether it's the *Civil Law (Wrongs) Act 2002 (ACT)* in the Australian Capital Territory, *Civil Liability Act 2002* in New South Wales, the *Wrongs Act 1958* in Victoria, the *Personal Injuries Proceedings Act 2002 (Qld) (PIPA)* in Queensland, or the *Civil Liability Act 2002 (WA)*, each different regime brings characteristics which are unique to each State and important in the context of driving a strategy for each claim.

This guide provides a detailed comparison of key damages criteria, including applicable legislation and procedural rules, limitation periods, thresholds and methods of assessment by each Australian State. We also include key recent cases relevant to damages awards in each jurisdiction.

We aim to demystify the jurisdictional idiosyncrasies of managing personal injury litigation to assist insurers, brokers and their respective clients to understand the unique challenges presented by managing claims in the various States.

For more information on the specific requirements of each State regime, or if you have any questions on the content covered in this guide, please contact one of W+K's General Liability Partners listed at the end.



**Belinda Henningham**

Partner, Head of General Liability

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# Australian Capital Territory

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## PROCEDURAL RULES AND KEY DATES

*The Civil Law (Wrongs) Act 2002* (ACT) (the Wrongs Act) provides a comprehensive set of pre-litigation procedures for personal injury claims arising from alleged negligence.

With the exception of motor vehicle accident claims (which have their own pre-litigation procedure) and claims arising from alleged child abuse, section 51 of the Wrongs Act requires the claimant to give the respondent written notice of the claim within the earlier of the following:

- 9 months of the accident giving rise to the personal injury, or the day symptoms of the injury first appeared; or
- 4 months of the claimant instructing a lawyer to advise on seeking damages for the personal injury or the day the respondent is identified.

Notice of claims arising from alleged child abuse need only be given a 'reasonable' time before the commencement of proceedings.

### Step 1

The *Wrongs Act* and its corresponding Regulations set out the information required to be provided in the claimant's notice of claim.

Among other things, the claimant must provide an authority which enables the respondent (or its insurer) access to records and sources of information relevant to the claim. This is critical to a respondent's ability to commence its quantum investigations and it is important to therefore ensure this authority is provided.

### Step 2

Following receipt of the claimant's notice of claim, respondents have 1 month to raise any issues about the claimant's compliance with the requirements of section 51, after which time the notice of claim will be deemed to be compliant and the respondent will have no recourse to seek that the claimant rectify non-compliance. It is therefore important that close and careful attention be given to the contents of the notice of claim at the earliest opportunity (even if a legal representative has yet to be appointed).

### Step 3

Within 1 month of receipt of a complying notice of claim, a respondent must notify a claimant whether it is properly a respondent to the claim. If a respondent cannot determine whether it is a proper respondent, it must tell the claimant what further information it needs to make that determination. If the respondent does not consider itself a proper respondent to the claim, then it must tell the respondent that, and provide the claimant with any information which may help the claimant identify the proper respondent.

### Step 4

Having received a complying notice of claim, the respondent then has 6 months under the *Wrongs Act* to investigate the claim and advise the claimant whether liability is admitted or denied. In that same timeframe, the respondent is also required to have made a fair and reasonable estimate of damages and to seek to resolve the claim with the claimant.

To assist the parties to be able to properly consider the matter, Part 5.3 of the *Wrongs Act* provides for the exchange of information and documents between the parties relevant to matters in issue. This disclosure obligation extends to investigative reports, medical reports and reports relevant to the claimant's rehabilitation. The general rule is that documents must be disclosed within 1 month of receipt.

While the *Wrongs Act* seeks to mandate pre-litigation steps, it is not uncommon for claimants to commence court proceedings notwithstanding non-compliance with these requirements. That non-compliance will not be sufficient to warrant a permanent stay of proceedings and it is therefore incumbent upon respondents to raise any non-compliance with the court and seek adjustments to the standard court timetable to allow time for investigations to occur.

Once proceedings are on foot, both the Magistrates and Supreme Courts in the ACT have practice directions which provide a framework for the progress of litigated claims from the initiation of proceedings to final hearing. In short, both courts require parties to work towards having matters finalised within 12 months of the initiation of proceedings.

## LIMITATION PERIODS

The general rule for personal injury claims is that they are not maintainable if commenced more than 3 years after the day the claimant was injured, or after the claimant knows they have suffered an injury and that injury is related to someone else's act or omission.

However, there are exceptions, as follows:

- There is no limitation period if the cause of action substantially arises from sexual abuse to which the claimant was subjected when they were a child.
- Compensation to relatives' claims must be brought within 6 years following the relevant wrongful act or three years immediately following the day of death of the person injured in that act (whichever is later).
- The limitation period in relation to claims arising from motor vehicle accidents turns on the scheme which was in place at the time of the accident.

## ASSESSMENT OF DAMAGES

### Non-economic loss / General damages

Except in the case of motor vehicle accident claims (where non-economic loss is now limited to damages for loss of quality of life), non-economic loss is awarded to compensate claimants for pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement. There is no cap on non-economic loss in the ACT and general damages are assessed at large by reference to earlier comparable cases.

### Past and future out-of-pocket expenses

Claimants are entitled to recovery of out-of-pocket expenses incurred as a consequence of their injuries arising from a compensable incident. These include medical, hospital and travel expenses. Any amount paid by Medicare, private health insurers or workers compensation insurers are also recoverable where those entities will seek reimbursement from the claimant from any judgment or settlement. Anticipated future treatment expenses are also recoverable, the assessment of which is usually guided by expert medical evidence.

### Past and future economic loss

Claimants are entitled to be compensated for their loss of earning capacity causally related to injuries arising from compensable incidents. In its simplest form, this is calculated as the difference between what the claimant was earning on a net basis prior and after the incident.

Where a claimant has been in receipt of incapacity payments from a workers compensation insurer, this amount is recoverable by the claimant but will form part of a payback to the workers compensation insurer following judgment or settlement.

Awards for the future are generally calculated up to usual retirement age (eg. 67) but may extend beyond that age if the claimant can establish an intention to work beyond then but for their injuries. Where a mathematical calculation can be made for future loss, the multiplier tables are utilised and discounted at 3%.

Lost superannuation is also recoverable by reference to the relevant superannuation guarantee at the time.

### Fox v Wood damages

This is the income tax component of any incapacity payments made by the workers compensation insurer. The allowance for this head of damage enables the workers compensation insurer to be reimbursed for the totality of the payments it has made even though the claimant does not receive the benefit of that portion of the incapacity payment.

### Past and future domestic assistance and care

Claimants are entitled to recover an amount for domestic assistance and care (whether gratuitous or paid) which they have required as a consequence of their injuries arising from a compensable incident. This also includes assistance with domestic responsibilities which the claimant would otherwise have undertaken for the benefit of others (such as their children).

Gratuitous domestic assistance and care provided in the past is typically compensated at a rate of \$50 per hour.

The claimant's need for domestic assistance and care in the future is usually guided by expert evidence and occupational therapists who have expertise in this field and are also often able to provide an assessment of the likely commercial cost of provision of the domestic assistance and care needs of the claimant.

### Other notes

Interest is allowable on the past component of all heads of damage, including general damages.

Future losses are usually calculated at a weekly rate and then discounted using the 3% table of multipliers. Discounts can also be applied for the vicissitudes of life, typically by 15% but this figure will be adjusted depending on the claimant's personal circumstances.

## INJURED WORKERS

The *Workers Compensation Act 1951* (ACT) establishes the workers compensation scheme in the ACT providing for incapacity payments and treatment expenses to workers who sustain injury during the course of their employment on a no-fault basis. Unlike other jurisdictions, there is no restriction on the duration a worker can receive workers compensation benefits, though there is scope for workers to agree to accept a lump sum payment in commutation of their ongoing entitlements.

Workers are not restricted from bringing a concurrent or subsequent common law claim against their employer and/or any other negligent person or entity. Those claims and any entitlement to damages are governed by the *Wrongs Act*.

If an employer does not hold workers compensation insurance, a worker can bring their claim (including any common law claim) against the statutory Default Insurance Fund. However, if there is any other person or entity from whom the worker can recover damages, the Default Insurance Fund will have no liability. Should the Default Insurance Fund be required to make payment to the worker (including in respect of any common law claim), it can seek to recover those payments at a rate of three times from the uninsured employer.

### Australian Government employees

The workers compensation scheme for employees of Australian Government agencies and statutory authorities is governed by the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the SRC Act). The SRC Act provides a similar entitlement to incapacity payments and treatment expenses to Australian Government workers injured in the course of their employment. The scheme is managed by Comcare.

While employees can elect to bring a common law claim against their employer, damages are restricted to non-economic loss and are capped. However, these restrictions do not apply for claims against negligent third parties.

## RECENT CASES AT A GLANCE

Case	Date	Plaintiff details (at time of incident)	Cause of action	Injuries	General damages	Total damages
<i>Meas (by his litigation guardian Adcock) v Tipping</i> [2023] ACTSC 187	19.07.2023	Male, 21	Negligence – Motor vehicle accident	<b>Left leg and brain injury</b> – The plaintiff was involved in motor vehicle accident when he was 10 months old. Upon collision, the plaintiff was ejected from the baby capsule in which he was secured and suffered various bone fractures and frontal lobe damage. The plaintiff brought action for subsequent and future impact to life when he was 21 years old.	\$450,000	\$6,085,323.21
<i>Hauraki v Steinhoff Asia Pacific Limited trading as Freedom Furniture</i> [2021] ACTSC 54	12.04.2021	Male, 35	Negligence – Workplace accident	<b>Chronic pain and psychiatric injury</b> – Workplace accident at furniture store warehouse. Plaintiff was loading a trolley when a nearby dining table was knocked over, hitting the plaintiff on the shoulder. Plaintiff had previously complained about overcrowding of stock to employer. Court found no reduction in damages for psychiatric injuries despite plaintiff's history of mental illness.	\$350,000	\$5,624,298.00
<i>Benning v Richardson</i> [2021] ACTSC 34	11.03.2021	Female	Negligence – Motor vehicle accident	<b>Injuries to chest, abdomen, neck and back</b> – The plaintiff was an intoxicated passenger in a vehicle driven by an intoxicated driver, and suffered injuries when that vehicle was involved in an accident. The defendant claimed that the breach of duty did not cause the relevant injuries because the accident was the result of the plaintiff "taking hold of the steering wheel and turning it sharply to the left". Here, the court found in favour of the plaintiff, but also recognised a 35% contributory negligence reduction due to the plaintiff's knowledge of the defendant's intoxication upon entering the vehicle.	\$160,000	\$297,979.30
<i>Ivers v Mehdi</i> [2020] ACTSC 112	12.05.2020	Female, 59	Negligence – Plaintiff witnessed motor vehicle accident	<b>Psychological injury</b> – Plaintiff claimed damages for a psychological injury occasioned when she saw a motor vehicle strike a pedestrian in a shopping centre carpark. Court held that the defendant owed the plaintiff a duty of care not to cause her mental harm by reversing their vehicle without reasonable care.	\$100,000	\$176,312.43
<i>Kempster v Healthscope Operations Pty Ltd</i> [2019] ACTSC 248	06.09.2019	Female, 57	Medical negligence	<b>Nerve damage</b> – Plaintiff claimed damages for negligent administration of heparin injection, which she alleged caused significant nerve damage post-surgery. Court found there was no alternative cause for the plaintiff's injury despite the defendant's assertion to the contrary, and that the defendant failed to follow standard procedure in administering the injection.	\$95,000	\$259,706.66
<i>Kilani v Aluabaid</i> [2021] ACTSC 90	14.05.2021	Male, 37	Negligence – Motor vehicle accident	<b>Lower back and shoulder injury</b> – Plaintiff's vehicle struck by another vehicle that had been stolen from the defendant the previous day.	\$80,000	\$181,500

<i>Glover v Fuller</i>	31.01.2023	Male, 20	Negligence – Water sports accident	<b>Back injury</b> – Plaintiff was riding a floatation device towed by a boat on a lake, which was being driven by the defendant, the plaintiff's aunt's partner. The plaintiff fell off the floatation device and suffered a back injury. The defendant was found to have breached his duty of care to the plaintiff, by driving the boat faster than usual, and steering in a 'zig-zag' pattern.	\$28,000	\$92,585	
<i>Kone Elevators Pty Ltd v Shipton, Massouras, Pattinson, Soesman [2021] ACTCA 33</i>	5.11.2021	Female, 50	Negligence	Plaintiffs were passengers in a lift which suddenly stopped on two occasions when travelling at speed.	<b>Neck</b> – C6/7 disc herniation and nerve root compromise with pre-existing disc injury. Surgery was required otherwise she could have become a quadriplegic.	\$140,000	\$1,913,960.17
		Female, 44			<b>Left shoulder and hip, right wrist</b> – soft tissue injury to the left shoulder and hip, right wrist fracture.	\$35,000	\$58,232.95
		Female, 43			<b>Neck and shoulder</b> – Neck trauma which has developed into cervical spondylosis (aggravation of a pre-existing injury), shoulder injury secondary to the neck trauma.		\$115,526.37
		Female, 28			<b>Neck, shoulder and back</b> – Musculoligamentous injury to neck and both shoulders with possible rotator cuff injuries, and exacerbation of previous mechanical lumbar back pain.	\$20,000	\$24,194.35
<i>Poole v Zagar [2021] ACTSC 140</i>	12.07.2021	Female, 29	MVA	<b>Neck, lower back and psychological injury</b> – Plaintiff's car was struck from behind by another car.	\$90,000	\$157,277.54	
<i>Costa v Goudappel &amp; Anor [2021] ACTMC7</i>	20.05.2021	Female, 67	MVA	<b>Left shoulder</b> – Plaintiff was a passenger in a car involved in collision with another vehicle. Plaintiff had underlying arthritic condition to her left shoulder and chronic pain.	\$20,000	\$31,122.25	

# New South Wales

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## PROCEDURAL RULES AND KEY DATES

There are no regulated or mandated pre-litigation steps for general liability (personal injury) claims in NSW (this statement does not apply to personal injury claims arising from motor vehicle accidents or employment).

A request for 'preliminary discovery' under the *Uniform Civil Procedure Rules 2005* (NSW)(**UCPR**) however, can be made. This is usually done by way of letter to a potential respondent requesting documents enabling a claimant to decide:

- if they should commence court proceedings; and/or
- who to sue.

If a request for preliminary discovery is not appropriately responded to, a claimant may:

- file an application in court requesting the potential tortfeasor to provide the requested documents – this can have costs consequences; or
- simply commence proceedings in Court.

## LIMITATION PERIODS

The timeframe for commencing court proceedings is regulated predominantly by the *Limitation Act 1969* (NSW)(**Limitation Act**).

Where the injury or death occurs on or after 6 December 2002, the limitation period is ordinarily 3 years from when the cause of action is 'discoverable' by the claimant: (ss50C and 50D of the *Limitations Act*).

For injuries occurring in the course of employment, the timeframe for commencing court proceedings against the injured worker's employer is ordinarily 3 years from the date of the injury (s151D of the *Workers Compensation Act 1987* (NSW)(**WCA**)).

Actions arising from death or personal injury due to child abuse or dust inhalation have no limitation period.

### Product liability

There are similar provisions under the *Consumer and Competition Act 2010* (Cth) (**CCA**), which is federal legislation, concerning concepts such as discoverability and the 3 year post-discoverability limitation period (ss87F to 87K).

## ASSESSMENT OF DAMAGES

The assessment of damages for personal injury liability claims in NSW is predominantly governed by the *Civil Liability Act 2002* (NSW) (**CLA**) or the Federal **CCA**, whichever applies.

If there is a degree of uncertainty as to whether or when an 'economic loss' will arise in future (or whether the loss will entirely be related to the injuries), the court may impose a percentage discount on the award of damages for expenses, assistance and income loss to account for that uncertainty. This is called a discount for the 'vicissitudes of life'; the standard discount is considered to be 15% but it may be less or more depending on each case (s13 of **CLA**; *Avopiling Pty Ltd v Bosevski* [2018] NSWCA 146).

Multiplier tables are used for future calculations, discounted at 5%.

## HEADS OF DAMAGES

### Non-economic loss

Damages for non-economic loss seeks to compensate for pain and suffering, loss of enjoyment of life, scarring and/or loss of life expectancy.

Non-economic loss is assessed by the court, with reference to comparable cases from the past, as a percentage of "a most extreme case" and is based on the way the claimant's injuries have affected them personally.

The CLA and CCA both prohibit awards for any injuries falling under 15% of a most extreme case and provide for differing monetary awards (at the time of judgment) corresponding with each percentage from 15% upwards as indexed each year (ss16 to 17A of the CLA; ss87L to 87T of the CCA).

## ECONOMIC LOSS

### Past and future out-of-pocket expenses

These seek to compensate for expenses reasonably incurred by the claimant to the date of judgment due to their injuries (eg. medical, hospital and travel etc.) as well as any expenses they will likely incur in future.

Amounts paid by Medicare and private health insurers are recoverable.

The future assessment will usually be guided by the expert medical evidence.

### Past and future gratuitous and commercial domestic care and assistance

These payments seek to compensate:

- the claimant's family or friends for unpaid assistance provided or likely to be provided to the claimant based on average weekly earnings in NSW. This is known as "gratuitous" assistance. Both the CLA and the CCA prohibit awards of damages in this regard unless the assistance has been maintained or will be maintained at a minimum of 6 hours per week and for at least 6 consecutive months (s15 of the CLA; s87W of the CCA);

- the claimant's dependants to whom the claimant was providing gratuitous assistance, which was likely to continue but for the injuries. A similar threshold applies (ie. a minimum of 6 hours per week and for at least 6 consecutive months but for the injuries (s15B of the CLA; s87X of the CCA)); and
- the claimant directly for any expenses reasonably incurred or likely to be incurred in paying for professional assistance (which is calculated at a higher rate). This is known as 'commercial assistance'. There is no minimum hourly or monthly threshold for this award, but in terms of the future the claimant must be able to prove that gratuitous assistance will not reasonably be available to them in order to justify a court order for ongoing commercial assistance (*Miller v Galderisi* [2009] NSWCA 353).

The assessment will generally be guided by the opinions of Occupational Therapists who have expertise in this field (*Sampco Pty Ltd v Wruth* [2015] NSWCA 117).

### Past and future loss of income

These payments seek to compensate injured claimants for lost earnings from business or employment, depending on their residual income capacity.

The assessment, which is subject to differing statutory maximums under the **CLA** and the **CCA**, will generally be guided by expert medical evidence and the level of pre and post-injury earnings shown from tax and other income records.

Awards for the future may be up to the statutory retirement age (ie. 67) or an older age if the claimant establishes they had an intention to work beyond.

Loss of superannuation is also compensable, usually at around 11% of the past net loss and around 14% of the future net loss.

Multiplier tables are used for future calculations, discounted at 5%.

### Fox v Wood damages

This is the taxable amount paid by an injured worker on wages paid under the Workers Compensation scheme, and is recoverable if the Workers Compensation insurer is entitled to recover the gross amount paid to the worker (s151Z of the WCA).

## INJURED WORKERS

Injured workers in NSW have access to a statutory scheme governed by the **WCA** and *Workplace Injury Management and Workers Compensation Act 1998* (NSW)(**WIM Act**). The scheme allows periodic payments for medical expenses incurred, lost wages and a one-off lump sum compensation depending on the percentage of the worker's Whole Person Impairment (**WPI**), provided the injured worker's WPI is assessed at greater than 10% (ie. 11% or higher).

If an injured worker attains an undisputed 15% WPI or more, they are entitled to recover modified common law damages from their employer arising from negligence. This is called a Work Injury Damages (**WID**) claim (s151H WCA).

Section 151Z of the WCA enables the Workers Compensation insurer to recover the statutory benefits it has paid from any negligent third party. The following can happen:

- the employer (via the Workers Compensation insurer) can commence independent 151Z proceedings for recovery against the non-employer tortfeasor, even if the injured worker did not make a claim against the non-employer tortfeasor. The employer will need to prove the non-employer tortfeasor was negligent and

the notional assessment of damages to the injured worker is equal to or exceeds the indemnity sought to be recovered;

- if the injured worker has attained 15% WPI or more, the employer may be joined to any proceedings commenced against the non-employer tortfeasor. Subject to all defendants being found to have a primary liability to the injured worker, the Court may apportion liability (and damages) between the employer and the other defendants, noting an injured workers entitlement to damages against their employer is restricted to modified common law damages (eg. economic loss damages, s151G WCA); and
- if the injured worker has not attained 15% WPI and has not sued the employer but has made a claim against the non-employer tortfeasor nonetheless, the non-employer tortfeasor's liability for damages may be reduced to reflect the percentage share of the absent employer's responsibility (s151Z(2) WCA).

In circumstances where the injured worker is entitled to pursue WID proceedings against their employer (ie. the 15% WPI threshold is satisfied) and does take proceedings against the employer, the extent to which the employer can recover the workers compensation payments pursuant to s151Z may be reduced (see *South West Helicopters Pty Ltd v Stephenson* [2017] NSWCA 312; *Synergy Scaffolding Services Pty Ltd v Alelaimat* [2023] NSWCA 213).

## RECENT CASES AT A GLANCE

Case	Plaintiff details	Cause of action	Injuries	NEL award	Total damages
<i>Antaw v Valks</i> [2023] NSWSC 310	61 year old male	MVA/Public liability – occupier’s liability	<b>Severe traumatic brain injury</b> – Plaintiff thrown from the handlebars whilst riding a motorcycle at Defendant’s farm.	\$352,500 (50%)	\$1,037,523.83
<i>Ali Khan Babayi v Eden Park Fruits Pty Ltd</i> [2023] NSWSC 473	51 year old male	Public liability/Workers compensation	<b>Dislocated right elbow + fractured right radial head</b> – Plaintiff injured while pruning apple trees.	\$24,500 (20%)	\$100,217.28
<i>Van Haren v Van Ryn</i> [2023] NSWSC 776	27 year old male	Historical sexual abuse	<b>Pure mental harm + assault and battery</b>	\$500,000 (NEL damages assessed at common law not under s16 of the CLA)	\$1,416,829.85
<i>De Vries v JNC Group Australia Pty Limited (No.)</i> [2023] NSWSC 777	40 year old male	Public liability/Workers compensation	<b>Lower back injury</b> – Plaintiff operating a heavy high-pressure hose, cleaning out pits in the course of his employment.	\$246,500 (35%)	\$1,682,391.42
<i>Furner v Jackson</i> [2023] NSWSC 914	54 year old female	Public liability – occupier’s liability	<b>Neck</b> – Plaintiff tripped and fell on Defendants’ driveway during an open for inspection of the Defendants’ property which was listed for sale.	\$317,500 (45%)	\$1,509,512
<i>Grahan Cleary v Health Care Corporation Pty Ltd t/as Wollongong Private Hospital</i> [2023] NSWDC 263	53 year old male	Medical negligence	<b>Lower back + both legs</b> – nerve damage occasioned during surgical procedure to revise damage caused in prior lumbar fusion.	\$246,500 (35%)	\$583,711
<i>Torok v Allianz Australia Insurance Ltd</i> [2023] NSWDDT 2	83 year old male	Dust disease	<b>Mesothelioma</b> – Plaintiff exposed to asbestos in the course of his employment of Cockatoo Island	\$420,000 (NEL damages assessed at common law not under s16 of the CLA)	\$457,500

# Queensland

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## PROCEDURAL RULES AND KEY DATES

A comprehensive pre-litigation procedure for personal injury claims is set out in the *Personal Injuries Proceedings Act 2002* (Qld) (**PIPA**). Civil claims for damages, including whether there has been a breach of duty and certain restrictions on recoverable damages, are governed by the *Civil Liability Act 2003* (Qld) (**CLA**).

Complying with PIPA is compulsory before commencing litigated proceedings for personal injury claims in Queensland, with some limited exceptions. The purpose of PIPA is to promote the early resolution of claims without the need to proceed to litigation.

PIPA provides the following key steps and timeframes:

### Section 9

A claimant must serve a **Part 1 Notice of Claim (Notice)** within 9 months of the injury or 1 month after first consulting a lawyer. A Notice can be served outside this time with a reasonable excuse for delay. Delay is not difficult for the claimant to overcome, absent prejudice to the respondent.

### Sections 10 and 11

A respondent must confirm whether or not it is a **proper respondent** and identify any other parties that are proper respondents within 1 month of receiving the Notice.

Acknowledgement by a respondent that it is a proper respondent is not an admission of liability, only that it is the correct party to sue.

### Sections 16 and 17

Any **contribution / indemnity claim** from a respondent is to be served by the later of 3 months of receipt of a complying Notice or 7 days after a respondent identifies someone else as a contributor.

Contributors who are served with a contribution notice are to provide their response within 1 month after receiving a contribution notice.

### Section 20

A respondent must provide written notice to the claimant stating **whether liability is admitted or denied** within 6 months of receiving a compliant Notice.

### Sections 22 and 27

The parties must **make full disclosure** of all documents "*about the circumstances of, or reasons for, the incident*" or relevant to the claimant's injuries and loss.

### Sections 36 and 39

Before litigation is commenced the parties must participate in a **compulsory settlement conference**. Any party may call a compulsory conference at an agreed time and place.

If the claim does not resolve under PIPA, each party must make a **mandatory final offer (MFO)**, which must be considered by the court in respect of costs if the party achieves an outcome at trial better than its MFO.

Regarding disclosure required under PIPA, **legal professional privilege is abrogated** for certain classes of documents including investigation and medical reports (section 30(2), CLA). They must be disclosed even if privileged. Evidence suggestive of fraud can also be withheld, but only after applying to the court ex parte for an order (section 30(3), CLA).

If a claim fails to settle during the pre-litigation process, the claimant must **file proceedings** within 60 days after the conclusion of the compulsory conference. The *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) will then apply to the proceeding.

PIPA does not apply to:

- personal injury within the meaning of the Motor Accident Insurance Act 1994 and in relation to which that Act applies;
- injury within the meaning of the *Workers Compensation and Rehabilitation Act 2003* (Qld) (**WCRA**) and in relation to which that Act applies (ie. where the respondent to the claim is the claimant's employer); or
- dust diseases.

The CLA essentially codified the common law as it related to negligence. It introduced defences of obvious risk, inherent risk and risks of dangerous recreational activities, but these have rarely been upheld by the courts. A defence of voluntary assumption of risk has been maintained in the CLA.

## HEADS OF DAMAGES

The CLA also reverses the onus of proof regarding breach of duty in institutional abuse cases (ie. once the claimant proves the abuse took place). The institution must prove it took all reasonable steps to prevent the abuse (sections 33D and 33E, CLA).

### Property damage and other non-injury claims

Claims for property damage and economic loss are governed by the CLA and can be litigated pursuant to the UCPR without any pre-court process.

The CLA enshrined a system of proportionate liability for these claims which does not apply to personal injury claims (liability remains joint and several for personal injury).

## ASSESSMENT OF DAMAGES

There are several statutory restrictions and rules regarding the assessment of damages for personal injury claims in Queensland.

However, the underlying fundamental principle of damages assessment remains: **damages are assessed to place the claimant in the position they would have been but for the harm suffered.**

### General damages/pain and suffering

Queensland has no threshold for general damages.

Damages are assessed by assigning an 'Injury Scale Value' of 0-100 to the claimant's dominant injury, together with any uplift justified by additional injuries sustained: schedule 4 to the *Civil Liability Regulation 2014* (Qld). The final ISV equates to an indexed sum of money (the current maximum as at 1 July 2023 is \$436,100).

If the WCRA applies to a claim – ie. if the claimant's employer is also a respondent to the claim – the CLA and restrictions on general damages will not apply to non-employer defendants. General damages are assessed at common law based on prior similar decisions of the courts and are typically 20%-100% higher, though the difference varies significantly depending on injury type and severity.

### Past and future special damages

These are direct expenses for treatment, rehabilitation and medication.

Past expenses are assessed by reference to evidence of expenses (receipts, and charge notices from Medicare Australia, WorkCover Queensland and private health insurers).

Future expenses are assessed by reference to medico-legal expert recommendations.

### Past and future economic loss

This loss relates to direct and anticipated loss of earnings from employment due to the injuries sustained.

Past loss is evidenced through tax returns and payslips, by comparing earnings pre and post-injury and ensuring any reduction in earnings is supported by medical evidence regarding the effect of the injuries sustained.

Future loss is evidenced by either:

- a calculation of mathematically calculable future lost earnings (ie. the claimant has and will continue to lose a fixed sum per week due to their injuries); or
- a global allowance based on the general diminution of the claimant's earning capacity anticipated in the future based on the nature of the claimant's employment, their age and the anticipated effects of the injury as supported by the medico-legal expert evidence or other treating medical evidence.

Damages will also include interest on past and future loss of superannuation (presently 9.5%-10.5% on past and 11%-12% on future).

### Past and future gratuitous or paid commercial care and assistance

Section 59 of the CLA applies a threshold for gratuitous care claims: the claimant must have experienced a need for care and assistance related to their injury of at least 6 hours/week for more than 6 months to recover any damages for care.

Once the threshold is met, all care requirements supported by the medico-legal evidence are recoverable.

If the WCRA applies to a claim (ie. if the claimant's employer is also a respondent to the claim) the CLA and restrictions on care will not apply to non-employer respondents. Care will be recovered 'from the ground up'.

The section 59 threshold does not technically apply to claims for paid commercial care and assistance, but the courts have been disinclined to make substantial commercial care awards – past or future – without substantial evidence of past paid care being incurred by the claimant prior to trial. That might differ for a claimant who had no access to friends or family for assistance.

Gratuitous care is typically compensated at between \$30-\$40/hour. Paid commercial care and assistance is based on the evidence in a particular claim but is typically higher at between \$45-\$75/hour depending on the nature of the assistance.

### Interest

Interest is not recoverable on general damages or gratuitous services provided to the claimant (section 60, CLA).

### Fox v Wood damages

Recoverable where WorkCover Queensland has paid tax to the ATO on behalf of the claimant during the statutory workers' compensation claim. Those tax amounts are refundable to WorkCover if the claimant succeeds in their claim against the employer or a non-employer respondent, so they are recoverable in the claim.

### Exemplary, punitive or aggravated damages

These damages cannot be awarded in a claim for personal injuries (section 52, CLA).

That restriction does not apply to:

- intentional torts and unlawful sexual assault (section 52(2), CLA); or
- dust disease claims (the entire CLA is excluded by section 5(1)(c)).

<sup>1</sup> This is to offset the benefit the claimant could obtain by investing the lump sum amounts now and earning interest on the money before they actually require the amounts to pay for treatment or care, or to use as weekly income.

## OTHER NOTES

### Present value of future losses

Future losses are usually calculated at a weekly rate and then discounted for present value of the future loss by using the 5% table of multipliers. This generally applies to future special damages, future economic loss, future care, and any other compensation for future losses.

### Vicissitudes of life/contingencies

Future economic loss and care are typically discounted by a minimum of 15% for contingencies or the vicissitudes of life. This is a recognition by the court that some other factor in the future could have prevented the claimant from earning an income or rendered the claimant in need of gratuitous care and assistance even if the subject injury had not occurred (ie. the claimant might have contracted a disease or some other injury that would have stopped them working or rendered them infirm).

The rate of discount may vary based on the claimant's personal circumstances (ie. a prior degenerative medical condition) and the nature of the loss being compensated.

This is to offset the benefit the claimant could obtain by investing the lump sum amounts now and earning interest on the money before they actually require the amounts to pay for treatment or care, or to use as weekly income.

## LIMITATION PERIODS

Claims for personal injury cannot be brought after of three years from the date on which the cause of action arose (section 11, *Limitation of Actions Act 1974* (Qld) (LAA)). The date the cause of action arose will usually be obvious – the date the injury occurred – but for latent injuries or those occurring over a period of time, the cause of action will usually arise on the date the claimant first experienced symptoms or sought medical treatment.

The claimant can obtain an extension of the limitation period if they identify a 'material fact of a decisive character' in relation to their cause of action (section 31, LAA). In that case, they have 12 months from when that fact came to their knowledge to commence proceedings.

### Dust disease and sexual abuse claims

Claims relating to dust disease have no limitation period (section 11(2), LAA).

Claims relating to sexual abuse of a child have no limitation period (section 11A, LAA). The court can still order a permanent stay on a claim if the effect of the lapsed time on the respondent is so burdensome that a fair trial is not possible.

### Limitation under PIPA

It is not uncommon for a claimant to commence a PIPA claim immediately prior to the expiry of their three year limitation period. If this occurs, a claimant can obtain:

- an extension of their limitation period (section 59, LAA), or
- leave to proceed despite non-compliance with PIPA, with proceedings then stayed until PIPA is complied with (section 43, LAA).

A court order is required in either case, however respondents will typically consent in the absence of prejudice to avoid unnecessary costs.

## INJURED WORKERS

The WCRA establishes the workers' compensation scheme for Queensland providing benefits for workers who sustain injury during the course of their employment including for dependants if a worker's injury results in death.

### Statutory claim

If a worker sustains an injury at work, they are entitled to lodge a statutory ('no fault') claim with WorkCover Queensland for the payment of statutory benefits.

WorkCover will make payment of hospital, medical, rehabilitation and travel expenses and weekly benefits for lost wages (supported by ongoing certification from treating or independent medical providers).

WorkCover has a statutory right to:

- recover benefits paid if the injured worker receives damages for the injury from the employer or another entity (ie. a negligence claim) (section 207B, WCRA). These benefits will form a part of the claimant's recoverable damages in any successful negligence action, and so will not be the subject of a separate recovery action against a PIPA respondent;
- recover benefits paid directly from a party liable for the injury, if the claimant elects to not pursue a damages claim against that party by way of subrogation (section 207B(8), WCRA). Anecdotally, WorkCover rarely if ever exercises that right (likely because claimants almost always sue any potentially liable party themselves).

### Common law claim

If an injured worker sues both their employer and a non-employer respondent for the same incident, apportionment of liability occurs in the usual way at law based on the respondents' respective fault.

However, if an injured worker sues a non-employer and elects not to sue their employer, the non-employer respondent is prevented from joining the employer as a contributor or third party (section 237, WCRA and *Bonser v Melnacs* [2000] QCA 13).

The CLA is excluded from operation in relation to an injury subject to the WCRA (ie. an injury sustained at work) (section 5, CLA). The exclusion of the CLA results in all damages being assessed against non-employer respondents at common, without the restrictions contained in the CLA (see 'Assessment of Damages' above).

## RECENT CASES AT A GLANCE

Case	Date	Plaintiff details	Cause of action	Injuries	General damages	Total damages
<i>Wilson v Gold Coast Hospital and Health Service</i> [2023] QSC 135	23.06.2023	Female, 46	Workplace liability	<b>Pelvis/hip injury</b> – Plaintiff not trained to handle patient restraint with injuries resulting. Also sustained secondary psychiatric injury. ISV of 20 assessed.	\$25,150	\$1,634,419
<i>Eustace v Dubrava</i> [2023] QDC 100	09.06.2023	Male, 47	Motor vehicle accident	<b>Cervical spine injury</b> – Plaintiff's car was rear-ended. Permanent aggravation of prior cervical spine pain. Also sustained secondary psychiatric injury. ISV of 4 assessed.	\$5,920	\$12,967
<i>Sneddon v Petts</i> [2023] QDC 049	28.03.2023	Male, 62	Workplace liability	<b>Lower limb injury</b> – Plaintiff fell on a rock in the course of his employment and broke his right leg. ISV of 15 assessed.	\$27,050	\$178,832
<i>Baldock-Davis v Popham</i> [2023] QSC 24	23.02.2023	Female, 24	Motor vehicle accident	<b>Multiple physical injuries (ribs, pelvis, cervical and lumbar spine)</b> – Plaintiff was struck by a vehicle while walking along a road. ISV of 12 assessed.	\$21,510	\$40,635
<i>Reddock v ST&amp;T Pty Ltd</i> [2022] QSC 293	13.01.2023	Female, 45	Workplace liability	<b>Hand injury and psychological injury (with psychological being dominant injury)</b> – Plaintiff was operating a swivel chute on a concrete truck. ISV of 22 assessed (after discounting an ISV of 30 for pre-existing hand condition).	\$43,230 (against employer) \$45,500 (against non-employer defendant)	\$633,254 (against employer) \$727,134 (against non-employer defendant)
<i>Nkamba v Queensland Childcare Service Pty Ltd</i> [2022] QDC 292	16.12.2022	Female, 53	Workplace liability	<b>Ankle injury</b> – Plaintiff stood on Lego block and rolled their ankle. Also sustained secondary psychiatric injury. ISV of 10 assessed.	\$15,600	\$197,014
<i>Chapman v Wide Bay Hospital and Health Service</i> [2022] QDC 271	02.12.2022	Female, 47	Medical negligence	<b>Bowel injury</b> – Plaintiff inadvertently suffered a bowel injury during a laparoscopic hysterectomy. Also sustained scarring and secondary psychological injury. ISV of 13 assessed (including uplift for scarring and secondary psychological injury).	\$21,780	\$201,770

# South Australia

Cheryl Phillips (Partner) and Eveline Rygorowicz (Senior Associate)

## PROCEDURAL RULES AND KEY DATES

The Uniform Civil Rules 2020 (SA) (**the Rules**) apply to all actions issued in the Supreme, District and Magistrates Court.

The Rules require parties to attempt to resolve disputes before the commencement of litigation and often involve insurers at an early stage.

The key pre-action steps are set out below.

### Step 1

The Rules now require claimants to give early notice of personal injury claims. A claimant must within 6 months of the day on which the incident occurred (or within one month after becoming aware that the injury was caused by the negligence of a person), serve a potentially liable person with **a written notice of injury** that identifies the injured person's details, circumstances of the injury, why the person is potentially liable and identifying medical records required.

### Step 2

A recipient of an early notice of injury must, within 6 weeks, serve a written response:

- setting out the recipient's address for pre-action service;
- providing a copy of any requested medical records in their possession, custody or power;
- setting out suggestions for next steps (for example, further investigation, obtaining expert evidence, negotiation, alternative dispute resolution or an invitation to institute a proceeding).

### Step 3

Prior to issuing proceedings (subject to limited exceptions), a claimant must serve on the proposed respondent **a pre-action claim** (akin to a formulated claim) that complies with Rule 61.7. This pre-action claim must, amongst other things:

- identify each proposed cause of action in sufficient detail to enable the proposed respondent to decide whether and to what extent to admit the claim, to respond to the claim and to respond to an offer;
- attach a copy of any relevant expert report in the claimant's possession, custody or power;
- make an offer to settle the claim in terms capable of giving rise to a legally binding agreement if accepted;
- propose a date and time for a pre-action meeting at which parties participate in settlement discussions.

Within 30 days of receiving a pre-action claim, the proposed respondent must serve on the claimant **a pre-action response**, which:

- accepts or rejects the claimant's offer;
- as far as reasonably practicable, responds to each identified causes of action;
- provides sufficient detail to enable the claimant to decide whether, and to what extent, to pursue the claim and to respond to the respondent's offer;
- attaches sufficient material (including expert reports and medical records held by the respondent) as is necessary for the claimant to respond to the respondent's offer; and

- confirms the suitability of the pre-action meeting details.

**A pre-action meeting** (settlement negotiation) is to be held within 21 days after the time for service of the last pre-action document (or as agreed by the parties).

Absent agreement, the meeting is to be face to face, however the parties can agree to have a telephone meeting or video meeting. The parties are to negotiate in good faith, identify the main issues in dispute and primary cause of disagreement and how the issues may be resolved without recourse to litigation.

The Rules provide cost consequences for non-compliance with the pre-action steps, including the claimant not being entitled to recover the costs of preparing, filing or serving the Claim.

The claimant must certify on the Claim whether the pre-action steps have been complied with. If there is non-compliance with pre-action steps (by either party), a special directions hearing will be listed by the Court at which time the Court may make orders as it sees fit including ordering that any pre-action step or steps in lieu be taken, staying other steps in the proceeding, making orders for ordinary steps in the proceeding to be taken or making orders for costs. The usual rule is that the party in default pays the costs of the other parties' attendance at the special directions hearing and costs thrown away by reason of the default on an indemnity basis.

The Courts have further discretion to take non-compliance into consideration when making cost orders after the final determination of the matter.

## ASSESSMENT OF DAMAGES

### Non-economic loss

Damages for non-economic loss may only be awarded if:

- the injured person's ability to lead a normal life was significantly impaired by the injury for a period of at least seven days; or
- medical expenses of at least the prescribed minimum (\$4,720 as at March 2023) have been reasonably incurred in connection with the injury.

Damages are assessed by assigning a numerical value between 0 – 60 to the injury depending on its type, nature and severity. The numerical value equates to an indexed sum of money based on the year in which the injury was sustained.

The maximum amount of damages that can be awarded for an injury occurring in 2023 (injury worth 60 points) is \$406,420.

### Economic loss

An award of damages for past and future economic loss involves an assessment of what the claimant would have earned but for the accident. Damages can be calculated by way of a mathematical calculation (based on net weekly loss) or on a more global basis considering a claimant's work skills and earnings history, tax returns, payslips and workers compensation records (where relevant).

Section 54 of the Civil Liability Act 1936 (SA) (CLA) provides that no damages are payable for the first week of incapacity.

Where future economic loss is calculated by reference to a net weekly loss, it is discounted for present value by using a multiplier with a discount rate of 5% before a further adjustment for contingencies (usually 15%) depending on the personal circumstances of the claimant.

Damages are not to exceed the prescribed maximum (\$3,779,100 as at March 2023).

### Superannuation

Awards for past loss of superannuation are based on the relevant superannuation guarantee rate at the time of the loss:

- |                              |       |
|------------------------------|-------|
| • Pre 30 June 2021           | 9.5%  |
| • 1 July 2021 – 30 June 2022 | 10%   |
| • 1 July 2022 – 30 June 2023 | 10.5% |
| • 1 July 2023 – 30 June 2024 | 11%   |

Future loss of superannuation is commonly assessed at 12%, being the superannuation guarantee rate from 1 July 2025.

### Past and future gratuitous and paid care

Awards of damages for gratuitous care or paid care are based on services that are reasonably required by the claimant, usually based on expert medical opinion.

Section 58 CLA limits an award of damages for gratuitous care to those services provided by a parent, spouse, domestic partner or child of the injured person.

Damages for gratuitous services are not to exceed an amount that is four times the state average weekly earnings (currently \$6,711 (4 x \$1,677.80)).

Paid care is assessed based on what services are reasonably required having regard to the expert medical evidence and is allowed on commercial rates.

The decision of *Amaca Pty Ltd and Werfel* [2020] SASFC 125 limits the services that are considered compensable to those provided for the benefit of the claimant and not those provided for the benefit of the household.

### Medical expenses

Damages for past and future medical expenses are awarded on the basis of the necessity or reasonableness of the medical, rehabilitation and pharmaceutical expenses having regard to expert medical opinion.

Amounts paid by Medicare are recoverable from settlement sums or judgments over \$5,000. A private health insurer may also seek reimbursement of amounts it has paid for treatment.

### Consortium

Other than in the case of catastrophic injuries, damages in the amount of \$5,000 - \$10,000 are commonly allowed for the loss or impairment of consortium suffered by a spouse or domestic partner of the claimant.

However, subject to the appeal, we note that the recent judgment of *Raccanello v MAC* [2023] SADC 84 allowed \$50,000 for loss of consortium where the claimant suffered significant injuries.

### Solatium

Damages payable for solatium for the suffering caused to the spouse or domestic partner of a deceased are capped at \$10,000.

### Interest

No interest is payable on non-economic loss.

### Other

No amounts are payable for the costs of investment or management of damages.

## INJURED WORKERS

The *Return to Work Act 2014* (SA) (RTWA) establishes the workers' compensation scheme for SA providing benefits for workers who sustain injury during the course of their employment including for dependents if a worker's injury results in death.

## STATUTORY CLAIMS FOR A WORKPLACE ACCIDENT

If a worker sustains a workplace injury in SA, they are entitled to lodge a claim for compensation through Return to Work SA (or, in the case of an exempt employer, their employer). The injury must arise from employment that is connected with SA.

The RTWA differentiates between injured workers and 'seriously injured workers' (being a worker who has been assessed as having a permanent whole person impairment (WPI) of at least 35% for physical injuries and 30% for psychiatric injuries).

An injured worker (not a 'seriously injured worker') is entitled to income maintenance for only 2 calendar years from the date of first entitlement to weekly payments. For the first 52 weeks the worker is entitled to 100% of the difference between their average weekly earnings rate and the amount earned, if any, and for the next 52 weeks 80%.

After 2 years, a 'seriously injured worker' is entitled to 80% of the difference between their average weekly earnings and any earnings, until retirement age or they can elect to receive a once-off lump sum payment for economic loss instead of ongoing weekly payments (known as a redemption).

A worker's entitlement to medical and like expenses ends one year after returning to work or one year after ceasing to receive weekly payments of compensation. This limit does not apply to 'seriously injured' workers.

### Effects of RTWA

Return to Work SA has a statutory first charge on any compensation payable to the worker by another entity (**'the wrongdoer'**).

The RTWA prohibits workers from suing their actual employer except where the worker is 'seriously injured'. An action brought by a 'seriously injured' worker against their employer is limited to damages for economic loss only. There may be little incentive for a 'seriously injured' worker to sue an employer for economic loss damages because the worker can remain on weekly compensation payments set at 80% of their pre-injury earnings until retirement, or choose to redeem those payments for a lump sum. If the worker elects to sue his or her employer at common law, those weekly payment entitlements are terminated on receipt of any award of economic loss damages.

Accordingly, Return to Work SA recoveries are often pursued at the same time as the worker brings a common law damages claim against a non-employer respondent.

In cases where the worker sues a non-employer respondent at common law, there are statutory restrictions imposed on the non-employer respondent (wrongdoer) pursuing contribution from the employer.

## LIMITATION PERIODS

The Limitation of Actions Act 1936 (SA) provides that actions in respect of personal injury must be commenced within 3 years of the cause of action accruing.

If the injury remains latent for some time after its cause, the 3-year time period begins to run when the person becomes aware of the injury.

The Courts have the discretion to extend that limitation period when:

- the action is commenced within 12 months of the claimant ascertaining previously unknown "facts material" to his or her case; or
- the failure to commence the action within time was due to the respondent's representations or conduct; and
- the court is satisfied that in all the circumstances of the case it is "just" to grant the extension of time.

There is no limitation period for an action for damages relating to personal injury resulting from child abuse.

## RECENT CASES AT A GLANCE

Case	Date	Plaintiff details	Cause of action	Injuries	Total general damages awarded
<i>Clutterbuck v Pollifrone</i> [2021] SADC 15	19.02.2021	Female, 52	Negligence	<b>Knee and psychiatric</b> – the plaintiff was visiting the respondent's farm and was injured when conveyor belts fell from the forklift the respondent was using and pinned her to the ground. The plaintiff experienced symptoms consistent with complex regional pain syndrome. She reported suffering from depression, anxiety, agoraphobia and cognitive impairment (CLA scale value 20).	\$48,354.50
<i>Amaca Pty Ltd v Werfel</i> [2020] SASCF 125	21.12.2020	Male, 44	Negligence (dust disease)	<b>Testicular mesothelioma</b> – Plaintiff diagnosed with a rare form of testicular mesothelioma diagnosed at age 40. Plaintiff alleged to have been exposed to asbestos from products manufactured by James Hardie while employed as a fencing contractor retained by the South Australian Housing Trust between 1994 and 1997 and again while undertaking home renovations in 2000, 2001 and 2004.	\$280,000
<i>Paues v Battunga Country Lions Club</i> [2020] SADC 162 (P2's determination) <i>Battunga Country Lions Club v Paues</i> [2021] SASCA 72 (P1's appealed determination)	20.11.2020	P1 – Male, 36 P2 – Female, 33	Occupiers' liability	<b>Upper extremity, neck, back and knee</b> – the plaintiffs were husband and wife spectators at a go-kart race and were hit by an out-of-control go-kart that broke through the bunting at the edge of the track.	P1 \$40,580 P2 \$21,850
<i>Sloan v Service Stream Limited</i> [2020] SADC 98	28.07.2020	Male, 48	Negligence	<b>Knee injury</b> – The first plaintiff sustained a right knee injury (CLA scale value 18).	\$13,770
<i>Corso v Arias Holdings Pty Ltd &amp; Ors</i> [2016] SADC 62	17.06.2016	Female, 36	Negligence	<b>Multiple injuries</b> – The second plaintiff sustained upper extremity (shoulder, elbow, wrist hand and thumb), neck, back and right knee injuries (CLA scale value 12).	\$74,430

# Tasmania

Andrew Seiter (Partner) and Tushka Sridharan (Senior Associate)

## PROCEDURAL RULES AND KEY DATES

**Civil procedure in Tasmania is governed by the *Supreme Court Rules 2000 (Tas)* and the *Magistrates Court (Civil Division) Rules 1998 (Tas)*, which contain similar procedural rules and provide timeframes to respond to civil actions. The following paragraphs focus on the *Supreme Court Rules 2000 (Tas)*.**

An action is commenced by the filing of a Writ in the registry which is to be served on the respondent(s) to the proceeding within 6 months after the filing of the Writ.

On application by the claimant made whilst the Writ is valid, a court may order that the original Writ and any concurrent Writ be renewed for a period the court deems fit if the defendant has not been served with the Writ.

A defendant must file a **notice of appearance** within 7 days of being served with the Writ.

A respondent has 21 days after the service of a statement of claim or a notice of appearance to file a defence.

In an action for damages for personal injuries, the claimant is to advise the defendant(s) in writing within 50 days after the close of pleadings or otherwise agreed or ordered:

- the nature of the injuries
- any secondary illnesses
- the name of each hospital and medical practitioner attended as a result of the injuries
- expenses incurred due to the injuries

- the nature of employment or self-employment that the claimant would have been engaged in or was likely to have been engaged in but for the injuries
- estimated gross annual income, and
- whether the claim is that the injuries totally or partially impacted the claimant's earning capacity.

During the course of the proceeding the court may refer the parties to mediation in an attempt to seek to resolve the dispute. If the matter does not resolve at mediation, the claimant must give a report to the court outlining that the mediation occurred and setting out the issues left to be determined.

Before trial, the parties must file a **certificate of readiness** with the court. The parties must specify that they have attended a compulsory conference including attempting to reach agreement on as many issues in dispute as possible and discussing the possibility of settlement of the action.

An **offer of compromise** is to be open for a period no less than 14 days.

A claimant is entitled to a costs order against a defendant taxed on a solicitor-client basis if, the plaintiff made an offer of compromise which was not accepted by the defendant at the time of judgment, and the judgment is no less favourable to the claimant than the terms of the offer.

## ASSESSMENT OF DAMAGES

### General damages

An annual government gazette sets out indexed amounts for non-economic loss under the *Civil Liability Act 2002 (Tas)* (**CLA**).

In calculating general damages, the CLA refers to an Amount A and an Amount B. As of 1 July 2023, Amount A is \$7,000 and Amount B is \$35,000.

If the assessed amount of non-economic loss is less than Amount A, then no damages will be awarded for non-economic loss.

If the assessed amount of non-economic loss is between Amount A and Amount B, Amount A is subtracted from the assessed amount and the result is then multiplied by 1.25.

If the assessed amount of non-economic loss is more than Amount B, then the damages awarded equals the assessed amount.

In assessing damages for non-economic loss, a court may refer to previous decisions of that court or other Australian courts to establish the appropriate amount to be awarded.

Pre-judgment interest was introduced in 2019 by way of amendment to the *Supreme Court Civil Procedure Act 1932 (Tas)*. The amendment allows the court, when making a judgment requiring the payment of an amount of money, to order that the amount, or part of the amount, carries interest from the day after the cause of

action arose and ending on the day on which judgment is entered. The interest rate from 1 July 2023 is 8.10%.

### Gratuitous care

The CLA provides that a person may not recover damages for gratuitous services unless the services have or will likely be provided to the injured person for more than six hours per week and for more than 6 consecutive months.

In calculating damages for gratuitous services:

- the hourly rate is not to exceed 1/40 of adult average weekly earnings, and
- the weekly rate is not to exceed adult average weekly earnings.

A claimant who was providing gratuitous services to another person prior to injury can claim for the loss of capacity to provide those services, providing that before the loss of capacity occurred:

- the claimant was providing the services to the other person for more than 6 hours per week and for more than 6 consecutive months and it was necessary for the services to be provided to the person; or
- the other person was an unborn child of the person before the injury occurred.

## INJURED WORKERS

The *Workers Rehabilitation and Compensation Act 1988* (Tas) (**WRCA**) establishes the workers' compensation scheme for Tasmania which provides benefits to workers who sustain injury during the course of their employment including for dependants if a worker's injury results in death.

### Statutory claims for a workplace accident

A worker is entitled to pursue a claim for compensation if he or she suffered an injury in the course of employment or contracted a disease which his or her employment contributed a substantial degree to.

If the injury to the worker resulted in death, an employer may be liable to pay compensation to the worker's dependants who, at the date of death, would have been the worker's dependants but for the injury.

An injury does not arise from a worker's employment merely because it occurs whilst the worker is travelling between his or her residence and the place of employment unless that journey occurred at the request or direction of the employer.

Compensation claims are not payable for illnesses of the mind arising from demotions, workplace discipline and failure to award promotions.

There are certain presumptions in the WRCA including, for example, a provision that where a state or government worker suffers post-traumatic stress disorder, the worker's employment is taken to have contributed a substantial degree to that injury in the absence of contrary evidence.

The injured worker must give notice of the injury to his or her employer as soon as practicable after the injury occurs and must make a claim for compensation within 6 months after the injury. There are exemptions to that requirement for certain conditions including, for example, the suffering of silicosis, dermatitis or lead poisoning by a mining employee.

Once notified of an injury, an employer must inform the worker within 14 days that the worker may have a right to a claim for compensation in relation to the injury.

If an employer receives a claim for compensation from a worker, then the employer or the employer's insurer must, within 28 days:

- notify the worker as to whether liability for the injury is accepted, and
- if no decision is made to accept or dispute liability for the injury, the employer or employer's insurer must specify the reasons why a decision has not been made and the steps to be taken to reach a decision.

If a worker is totally incapacitated, and that incapacity is supported by a certificate of a medical practitioner, their weekly payments of compensation are equal to the greater of:

- the worker's normal weekly earnings; or
- the ordinary time rate of pay of the worker for the work and hours during which the worker was engaged immediately before the incapacity.

If the worker is partially incapacitated, the compensation is made up of weekly payments for the period of incapacity which equals the difference between the worker's normal weekly payments and the amount that the worker is earning or would be able to earn in suitable employment during the period of incapacity.

The weekly payments are payable as follows:

- 100% of the weekly payment for the first 26 weeks post-incapacity
- 90% of the weekly payment for weeks 27 – 78 post-incapacity, and
- 80% of the weekly payment for week 79 post-incapacity but not exceeding nine years from the date of incapacity if the worker's impairment is less than 15% whole person impairment, with further increases to the proposed duration of compensation payments depending on the whole person impairment assessment.

A worker who suffers permanent impairment assessed at less than 5% (save for the loss of a finger or toe in part or in whole) is not entitled to compensation for permanent impairment.

A worker deemed to have suffered permanent impairment between 5-70% is entitled to compensation in accordance with the following formula:

- $\{18 + [6.1 \times (WPI - 5)]\} \times BS$
- WPI is the percentage of whole person impairment;
- BS is the basic salary.

The above formula also applies to permanent psychiatric impairment assessed between 10 – 70%.

### Effects of RTWA

A worker's outstanding entitlement to compensation under the WRCA may only be settled by entering into a settlement agreement pursuant to which the worker agrees that all further claims to compensation are extinguished.

If a worker enters into a settlement agreement in relation to all outstanding entitlements to compensation within 2 years of the date the claim was made, the agreement must be approved by the Tribunal, taking into account factors including whether all reasonable steps have been taken to rehabilitate or retrain the worker and whether the worker has returned to work. A settlement agreement entered into after 2 years since the claim was made does not have to be approved by the Tribunal but may be referred to the Tribunal for review.

The payment of or entitlement to the payment of compensation in relation to an injury does not impact a worker's right to obtain damages in respect of that injury. However, where a liability has been incurred by an employer or other individual for the payment of damages to the worker, the payment of compensation

shall be regarded as payment towards the discharge of that liability and will be set off against the amount of damages awarded.

If a worker's injury arises, in part, due to his or her own fault, the amount recoverable by the employer by way of indemnity or contribution is reduced to an extent that the Supreme Court of Tasmania considers just and equitable having regard to the degree of responsibility the worker had for the injury.

In circumstances where the injury to the worker creates a liability in a person other than the employer, the employer may seek to pursue indemnity or contribution from that other person in respect to the compensation paid to the injured worker.

A court may consider any amount paid under a previous agreement even if the previous agreement is found to be wholly or partly void, if it is satisfied that it is just and reasonable to do so when awarding damages in a hearing of an action on a previously settled cause of action arising from or related to the sexual abuse or serious physical abuse of a minor.

## LIMITATION PERIODS

The *Limitation Act 1974* (Tas) provides that actions in respect of personal injury must be commenced within three years of the date of discoverability.

The courts have discretion to extend that limitation period to 6 years from the date of discoverability when it is just and reasonable to do so.

There is no limitation period for an action for damages relating to personal injury arising from or related to the sexual abuse or serious physical abuse of the person when the person was a minor.

Actions may be brought against previously settled causes of action arising from or related to the sexual abuse or serious physical abuse of a minor if a court decides it is in the interests of justice to set aside the settlement agreement.

## RECENT CASES AT A GLANCE

Case	Date	Plaintiff details	Cause of action	Injuries	Total general damages awarded
<i>Scattergood v Commonwealth</i> [2022] TASSC 21	13.04.2022	Female, 46	Negligence	<b>Physical whiplash injuries and psychiatric injuries (adjustment disorder with depressed mood)</b> – the plaintiff was injured in a motor vehicle accident with the injuries exacerbated in a subsequent “incident” involving the sudden braking of the car she was a passenger in.	\$100,000
<i>Dann v Port Sorell Bowls Club Inc</i> [2020] TASSC 47; <i>Port Sorrell Bowls Club v Dann</i> [2022] TASFC 2	02.02.2022	Male, 44	Negligence	<b>Burns to hand, depression, anxiety, alcohol use disorder</b> – the plaintiff was burnt when he was cooking sausages on a barbecue at a bowling club when the mug that was being used to catch the fat from the barbecue overflowed and caught fire. When the plaintiff attempted to move the mug, it got caught on a bracket and the fat spilt on his hand resulting in burns. There was a 15% reduction for contributory negligence.	\$80,000
<i>ZAB v ZWM</i> [2021] TASSC 64	22.12.2021	Male 10-16 at the time of incident (alleged abuse) and aged over 40 at trial	Assault and battery – sexual abuse	<b>PTSD, depression</b> – the plaintiff was sexually assaulted by his father from when he was 10 to 16 years old.	\$300,000 (plus interest of \$67,500)
<i>Hall v Hall</i> [2014] TASSC 37	23.07.2014	Male, 34	Negligence	<b>Back, leg, neck and psychiatric</b> – the plaintiff was in a vehicle being driven by his wife. As she attempted to overtake other vehicles, she lost control of the car which hit an embankment and rolled onto its roof.	\$45,000
<i>Partridge v Hobart City Council</i> [2012] TASFC 3	27.07.2012	Female, 40	Negligence	<b>Back, knee and hand</b> – the plaintiff slipped on wet steps after leaving her solicitors’ office. There was a 20% reduction for contributory negligence.	\$40,000
<i>Dodge v Snell</i> [2011] TASSC 19	21.04.2011	Male, 41	Negligence	<b>Collarbone, shoulder, ribs, punctured lung and adjustment disorder</b> – the plaintiff was injured in a horse race due to the alleged negligent riding of another jockey (the defendant) causing the plaintiff’s horse to fall.	\$80,000

# Victoria

Andrew Seiter (Partner) and Sophie Crowther (Special Counsel)

## CLAIMS IN VICTORIA

In Victoria, most personal injury claims fall into one of two categories.

The first category is 'general liability' claims, which usually rely on common law causes of action, including for negligence or breach of contract. This covers a wide range of injury claims including those arising in public places, sports or recreational injuries and medical negligence. These claims are principally regulated by the *Wrongs Act 1958* (Vic) (**the Wrongs Act**) in particular, Parts VB and VBA.

The second category is claims arising from injuries sustained in the course of employment, which are governed by the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (**the WIRC Act**).

## GENERAL LIABILITY CLAIMS

### General damages

A prominent part of most personal injury claims is the claim for general damages, also known as 'pain and suffering' damages.

To recover general damages in Victoria under the *Wrongs Act*, a claimant must usually establish that they suffered a 'significant injury' caused by the alleged negligence of the respondent. Significant injury is established using the following degree of whole person impairment (**WPI**) thresholds:

- 5% or more for spinal injuries

- more than 5% for physical injuries other than spinal injuries, and
- 10% or more for psychiatric injuries.

A claimant's WPI is assessed by an approved medical practitioner. The medical practitioner must issue a **certificate of assessment** if they determine that the claimant's injuries satisfy the applicable impairment threshold. The claimant must serve the certificate of assessment and associated documents on each respondent to their claim.

### Referrals to a Medical Panel

Once served with a certificate of assessment and it has been received, a respondent has 60 days to refer the claimant to the Medical Panel to determine whether the claimant's injuries satisfy the relevant injury thresholds to claim general damages.

In early 2023, the procedure was disrupted by a County Court decision of *Rosata v City of Melbourne and Anor* (Ruling) [2023] VCC 630, where the Court held that there could be only one Medical Panel determination and it was binding on all respondents, including those subsequently brought into the claim. This meant that if a respondent was brought in late to the proceeding, it could not make its own referral and was, instead, bound to the outcome of an earlier referral.

However, in November 2023, the Court of Appeal overruled that decision.

In *Citywide Service Solutions Pty Ltd v Rosata; Kabbout v Crown Melbourne Ltd* [2023] VSCA 281, where the court also considered a related question in *Kabbout v Crown Melbourne Ltd*, the Court of Appeal held that each respondent was entitled to make its own referral to the Medical Panel, notwithstanding this might result in different outcomes.

It also means that if a respondent misses the time for referral to a Medical Panel, it will be deemed to have accepted that the injury is a "significant injury", and would not be entitled to rely upon another respondent's referral, even if that determined the injury did not meet the threshold.

### Other damages

It is important to note that the WPI threshold requirements only act as a gateway to claim general damages. Other damages including economic loss, medical expenses and gratuitous/attendant care can be claimed without meeting the threshold.

### Statutory caps – general damages and loss of earnings

The damages recoverable for general damages and loss of earnings are 'capped' under the *Wrongs Act*. The statutory caps are subject to indexation each financial year. The current caps are:

- general damages: \$713,780
- loss of earnings: \$4,200.60 (per week)

A 5% discount rate is also applied to the calculation of future damages, including loss of earnings.

### Attendant and gratuitous care damages

Claimants can claim damages for attendant and/or gratuitous care services where they are solely and reasonably required due to the claimed injury. Examples include nursing, domestic care and other assistance to alleviate the consequences of the claimed injury.

The *Wrongs Act* permits recovery of damages for gratuitous/attendant care services where it is required for more than 6 hours per week **or** for more than 6 months. If the care provided exceeds either threshold, damages can be awarded on the following basis:

- **less than 40 hours per week** – an hourly rate equivalent to 1/40 of the average weekly total earnings for all employees in Victoria (currently \$35 p/h), and
- **more than 40 hours per week** – the average weekly total earnings for all employees in Victoria (currently **\$1,400.20 p/w or \$35 p/h**).

A claimant may also be able to recover a sum referable to being unable to provide gratuitous care to another person, for instance, their spouse, child or grandchild.

A 5% discount rate applies to any claim for damages for future attendant/gratuitous care.

## PROCEEDINGS AND KEY DATES

Claimants generally have three years from the date of 'discoverability' to commence proceedings. This is when the claimant knows the injury is serious enough to warrant proceedings and is able to identify the party they believe is at fault.

This limitation period is suspended from the date the claimant serves a certificate of assessment to when either the certificate is accepted by the respondent or when the Medical Panel process has concluded.

Claimants in personal injury proceedings are often granted extensions on the limitation period unless the defendant can establish material prejudice.

Most personal injury proceedings are brought in the County Court of Victoria, which has unlimited monetary jurisdiction, although the Supreme Court will hear more complex matters.

In the County Court, standard timetabling orders are set listing a trial either 10 months or 12 months from the date of the first administrative mention.

Both the Supreme and County Courts require parties to attend mediation before proceeding to trial. We recommend allowing reasonable time between mediation and trial where possible to allow time for negotiations to continue if a resolution is not achieved at mediation.

## WORKPLACE INJURY CLAIMS

### Overview

The second category is claims arising from injuries sustained in the course of employment. Two classes of claims fit into this category:

- damages actions brought by seriously injured workers under ss328/335 of the WIRC Act; and
- actions brought by the Victorian WorkCover Authority (**the VWA**) against negligent non-employer third parties to recover the compensation it has paid or may pay to or on behalf of a worker pursuant to s369 claims under the WIRC Act.

As the VWA has its own entitlement to issue recovery proceedings, there are often two claims arising from the same event/injury being pursued at the same time – the worker's serious injury action and the VWA's recovery action.

### Serious injury application process

To issue a damages action, a worker must first apply to their employer and the VWA and establish they have suffered a 'serious injury' in the course of their employment. A worker has a 'serious injury' if they:

- suffers a WPI of **more than 30%** as assessed by an independent medical examination, **or**
- satisfies the 'narrative test' of serious injury.

If the VWA determines that the narrative test is satisfied, it will issue a **serious injury certificate** on application from the worker to issue a damages action.

Most workers who can bring claims fall into the second category. There is a significant body of law around what constitutes a 'serious injury' for the purposes of the narrative test. Key indicators are: the impairment must be permanent, cause pain/impairment or loss of significant bodily function.

Workers must serve a copy of their serious injury application on potential respondents. Often, this is the first time a potential third party hears of a proposed action.

The VWA has 120 days to consider the worker's application for the purposes of issuing a serious injury certificate.

It can award a serious injury certificate for general damages only, or for general damages and loss of earnings. To obtain a certificate for loss of earnings, a seriously injured worker must satisfy a further test of 40% permanent impairment of earning capacity to sue for pecuniary loss damage.

If the VWA refuses to grant a serious injury certificate, a worker can file an originating motion in the County Court seeking a review of the decision.

### Statutory conference / offers

If the worker satisfies the serious injury threshold, they must participate in a pre-litigation case conference with the VWA as the employer's statutory insurer.

After the conference, the VWA must make a settlement offer to the worker (known as a '**statutory offer**'). This offer can be \$nil. The worker then has 21 days to accept the VWA's offer or make a counter-offer.

The worker's counter-offer must remain open for 21 days. If it is not accepted, the worker has 30 days to issue proceedings.

A practice has developed where respondents are invited to the conference to explore early settlement and to participate in the statutory offer process. However, opportunities for early negotiations depend heavily on the attitude of the VWA's solicitors representing the employer as the only prospective respondent formally involved in the process.

### Damages and statutory caps

Subject to receiving a serious injury certificate, the damages entitlement for injured workers is limited to general damages and damages for loss of earnings. The applicable statutory thresholds (indexed annually) are:

- general damages: \$713,780, and
- loss of earnings: \$1,639,480

A 6% discount rate applies to the calculation of future damages, including economic loss.

A worker cannot claim other heads of damage. Usually they receive further no-fault statutory compensation from the VWA – which ultimately forms part of the associated recovery action. The VWA can fund medical and care expenses, rehabilitation/retraining and pay weekly compensation for loss of income (known as 'weekly benefits'). A lump sum impairment benefit can also be awarded. Any common law damages are reduced by the weekly benefits and impairment benefit paid to avoid double recovery.

## PROCEEDINGS

Workers generally have 6 years from the date of their injury to bring common law proceedings against the respondent they believe is at fault. This limitation period is suspended from the day:

- a worker lodges an impairment benefit claim, to either 30 days after the VWA determines the claim or notifies the worker of the Medical Panel's determination; and
- a worker lodges a serious injury application and ending upon common law proceedings being issued.

Respondents are not involved in, or have any control over, these limitation suspensions, which can be very significant and lead to damages actions being brought well after the actual 6 year mark. The Courts also tend to be generous in extending limitation periods, save where there is evidence of prejudice to the respondent.

Worker's damages actions and VWA recoveries are usually issued in the County Court of Victoria, although more complex cases can be issued in the Supreme Court of Victoria. The procedural guidance on timetabling orders discussed in the previous proceedings section applies.

## VWA RECOVERIES

The VWA is entitled to recover statutory compensation paid and payable to an injured worker from liable third parties. VWA recovery actions are often brought against host employers in labour-hire arrangements and non-employer occupiers.

The VWA's statutory entitlement to indemnity from a negligent third party is the lesser of:

- the amount of compensation paid or payable in respect of the compensable injury; or
- an amount calculated in accordance with the formula in s 369 of the WIRC Act.

In a practical sense, the first limb of the indemnity cannot be assessed with certainty because compensation payments can, conceivably, continue until death. Even claims that are closed can be re-opened.

The cap on the VWA's entitlement can therefore be determined under the second limb using the following formula.

$$[A - (B + C)] \times \frac{X}{100}$$

The formula is complicated and extremely unfavourable to third parties: It requires consideration of 3 things (as Factor B is no longer relevant).

- **Factor A** – This is the worker's **hypothetical common law entitlements** in respect of the compensable injury. This requires the court to assess what the worker would have received had legislation not limited or restricted his/her common law entitlements. All heads of damage must be included.
- **Factor X** – This is the third party's proportionate liability taking into account the proportionate responsibility of all other parties.
- **Factor C** – This is any amount the third party paid to a worker to settle common law entitlements.

Except in cases where the third party's proportionate liability is small, the formula will usually arrive at **a figure that is higher than VWA's payments to the worker.**

If there is a judgment in VWA's favour, the court will order an indemnity in its favour assessed using the formula. The VWA is then entitled to recover from a third party the amount of compensation it pays to a worker as and when it is paid, until the amount of the indemnity is exhausted.

In practice, VWA is open, in most cases, to resolving its entitlements on an 'all-in' basis. This generally involves making an educated assessment based on what the worker is likely to be paid by VWA over the life of the claim and, subject to the cap assessed under the formula, paying an amount to VWA to cover these risks. Resolution on these terms means insurers can then close their files.

## RECENT DAMAGES AWARDS

Wotton + Kearney keeps detailed records of all reported general damages awards handed down in Victoria. What we have observed is that there continues to be an inflation of general damages awards, with relatively minor injuries that reach the injury threshold now assessing at above \$100,000, with back injuries often attracting damages awards over \$300,000.

Unlike some other jurisdictions, Victoria does not have any statutory guidance on how to assess general damages. The court is, however, entitled (indeed required) to consider previous decisions as a guide when awarding general damages. However, as the awards of damages increase, it will have a natural knock on effect to later judgments, as well as to the settlement expectations of claimant lawyers at mediation.

## RECENT CASES AT A GLANCE

Case	Plaintiff details	Cause of action	Injuries	Total general damages awarded
<i>Tsiaras v SPI Management Pty Ltd</i> [2023] VCC 699	Female	Public liability – occupier’s liability	<b>Left shoulder (requiring surgery) and left knee injuries</b> – The plaintiff was injured when she fell while dancing on the dance floor of the defendant’s premises.	\$150,000  This assessment was reduced by 50% for contributory negligence.
<i>Atmis v Consolidated Property Services (Australia) Pty Ltd</i> [2022] VCC 2056	Male	Public liability / Workers compensation	<b>Low back (requiring surgery) and right shoulder (requiring surgery) injuries – also suffered a secondary psychiatric injury</b> – The plaintiff suffered a back injury due to physically demanding work duties between 2000 and 2006. He suffered a shoulder injury when he attempted to lift a heavy bin liner. The plaintiff suffered injuries while performing heavy picking/packing duties for the defendant.	\$230,000  No other damages assessed. Damages reduced by 10% for contributory negligence.
<i>Ly v Australian Pharmaceutical Industries Ltd</i> [2022] VCC 1772	Male, 66	Public liability / Workers compensation	<b>Neck and right shoulder (requiring surgery)</b> – The plaintiff suffered aggravation injuries of cervical spondylosis and an aggravation of degenerative change in the right AC joint suffered handling hazardous materials	\$200,000
<i>McGiffin v Fosterville Gold Mine Pty Ltd</i> [2022] VSC 665	Male, 29	Public liability / Workers compensation	<b>Complex regional pain syndrome type 1 affecting right arm and also suffered from an adjustment disorder with depression and anxiety</b> – The plaintiff was working at the defendant’s gold mine. On 2 March 2018 he was struck in the head and right shoulder by a large rotating bolt attached to machinery being operated by a co-worker. Restrictions on ability to care for young son. Work incapacity. The defendant admitted liability.	\$450,000
<i>Bell v Nexus Primary Health</i> [2022] VSC 605	Female	Public liability / Workers compensation	<b>Psychiatric injury including posttraumatic stress disorder caused by the assault. No capacity for work</b> – The plaintiff was employed by the defendant as a family violence outreach worker and was attacked off work premises and outside work hours. Interesting Modbury argument regarding liability.	\$375,000
<i>Becka v Tuppen &amp; Anor</i> [2022] VCC 1378	Male	Public liability / Workers compensation	<b>Multiple fractures to thoracic spine</b> – Surveillance footage captured the plaintiff performing heavy manual handling duties following the incident. The plaintiff suffered injuries in a transport accident when the van he was driving collided with a stone bridge support.	\$135,000  This assessment was reduced by 50% for contributory negligence.
<i>Gartmann v Dominion Hotel Group Pty Ltd</i> [2022] VCC 1035	Female, 29	Public liability / Workers compensation	<b>Soft tissue injury to left shoulder which resolved / treated with opioid medication leading to addiction</b> – The plaintiff continued to experience pain in her left arm, shoulder and neck caused by a psychological pain disorder. Judge not satisfied that there was an injury to the left shoulder. Minor muscular injury to the cervical spine. Short lived. Pain due to somatic symptom disorder. Evidence of work capacity. Past evidence of CRPS. The plaintiff slipped and fell on a wet floor in the course of her employment as a waitress for the defendant.	\$225,000

<i>Hooper v Citywide Service Solutions</i> [2022] VSC 239	Female, 49	Public liability / Workers compensation	<b>Multiple fractures to the pelvis, ribs and spine – also suffered a mild traumatic brain injury (later resolved) and nerve damage</b> – The plaintiff was working as a street sweeper driver. She failed to engage the handbrake before alighting from the street sweeper to go into a 7-Eleven. She was later crushed between the street sweeper and an adjacent wall.	\$550,000
<i>Russell v W Osborne &amp; Son Pty Ltd</i> [2022] VCC 425	Male, 52	Public liability / Workers compensation	<b>Multiple fractures to foot and a cervical spinal injury / developed major depressive disorder</b> – The plaintiff was in poor health at the time of the incident and had a significant history of injury to his right knee, right hip, ankles and chronic pain problems. He was also obese and suffered Type II diabetes. The plaintiff sustained injuries while replacing windscreen wipers on a truck while working as a truck driver for the defendant. The defendant admitted liability.	\$325,000
<i>Trtovac v Total Mix Pty Ltd &amp; Anor</i> [2022] VSC 149	Male	Public liability / Workers compensation	<b>Soft tissue lower back injury or an aggravation of a pre-existing degenerative injury to the lumber spine</b> – The plaintiff sustained injuries while working on a slump stand as a concrete agitator truck driver. By the time of the trial, the Court found that the plaintiff's injury was " <i>significantly psychiatric in origin or nature.</i> "	\$200,000
<i>Cassidy v Metro Trains Melbourne Pty Ltd</i> [2023] VCC 1866	Female	Public liability	<b>Fracture of the neck of her right femur, scarring, injury to her right shoulder, traumatic arthritis, a staphylococcus aureus infection post "IM" nail insertion, vulnerability to further infection, psychiatric injury and pain</b> – The plaintiff was injured when the train moved when disembarking doors that were forcibly opened.	\$250,000 Reduced 10% for contributory negligence

# Western Australia

Will Robinson (Partner) and Divij Vijayakumar (Senior Associate)

## PROCEDURAL RULES

Personal injury damages in Western Australia are regulated by the *Civil Liability Act 2002 (WA)* (**CLA**) and the *Workers' Compensation and Injury Management Act 1981 (WA)* (**WCIM**).

## GENERAL PRINCIPLES IN ASSESSING DAMAGES

The *fundamental principle* of compensation is that damages to be recovered are in monetary terms no more and no less than the claimant's actual loss.

The assessment of damages for personal injuries in an action for negligence is:

- not an exact science
- must be governed by practical common sense in the context of the facts of the particular case
- the District Court of WA has unlimited jurisdiction to hear all personal injury claims under section 50 of the District Court of Western Australia Act 1969 (WA)
- there is no trial by jury in WA personal injury litigation. This favours respondents and insurers as it prevents a situation where a "rogue jury" may award exorbitant damages, and

- section 10A of the CLA allows WA Courts to refer to earlier decisions of that court or other courts for the purpose of establishing the appropriate award (codifying a judge's ability to look to all jurisdictions when assessing awards).

## HEADS OF DAMAGE WILL TYPICALLY INCLUDE:

### General damages / non-pecuniary loss

The claimant is entitled to be compensated for the condition that they have been left in as a result of the accident with a view to giving them fair compensation for the pain, inconvenience and loss of enjoyment which they have sustained.

Section 9 of the CLA imposes restrictions on these damages.

General damages covers pain and suffering; loss of amenities of life; loss of enjoyment of life; curtailment of expectation of life; and bodily or mental harm.

### Restrictions and thresholds:

There is no cap on awards of general damages in WA, but there are thresholds that apply which are indexed annually in accordance with the consumer price index calculation.

The threshold amounts are specified in section 9 CLA and are applied as follows:

- Amount A is \$24,500
- Amount C is \$70,500

Section 9 of the CLA provides:

*If the amount of non-pecuniary loss is assessed to be more than Amount C but less than the sum of Amount A and Amount C for the year in which the amount is assessed, damages for non-pecuniary loss are not to be awarded in an amount that is more than the excess of the amount assessed over the amount calculated as follows –*

*Amount A – (Amount assessed – Amount C)*

Translation of section 9 of the CLA:

- where general damages are assessed at or below Amount A, no award will be made
- where the assessment falls between Amount A and Amount C, the amount assessed is reduced by Amount A, and
- where the assessment is more than Amount C, but not as much as the sum of Amount A and Amount C, the assessed damages must be reduced by the following amount

Therefore:

Assessment of damage amount if	Amount awarded under CLA
If less than \$24,500	No award
If between \$24,500 – \$70,500	The plaintiff does not receive the first \$24,500
If between \$70,500 – \$95,000	The threshold applies on a sliding scale
If greater than \$95,000	The plaintiff receives full award

## ECONOMIC LOSS

**Economic loss** is addressed in section 11 of the CLA and is an assessment of loss of capacity to earn (must be productive of financial loss), rather than a claim for loss of earnings. (ie As a result of the accident, has the claimant been rendered less capable of earning income? The court looks at the claimant's capacity for work beyond the particular employment in which they were engaged at the time of the accident).

It is calculated using figures net of income tax.

Under the CLA, the court is to disregard earnings to the extent that they would have accrued at a rate of more than three times the average weekly earnings at the date of the award. The average total full-time earnings of persons in WA are \$2,039.30 (as at May 2023).

### Evidence to gather with respect to loss of earning capacity:

- details of pre accident employment and education;

- pre-accident and post-accident earnings; and
- post accident earning capacity, including the kind of work (after the accident), the claimant would be in a position to undertake; the likelihood that they would be able to obtain such work; and the remuneration which they might expect to derive from it.

A claim for **loss of superannuation** will normally follow a claim for loss of earning capacity. A discount is applied to superannuation calculations to allow for the tax advantages that would be accrued from the employers contributions, expenses in the fund – *Jongen v CSR Ltd & Anor* set out an appropriate discount as being 30% but has more recently been applied at 15%.

### Past loss of earning capacity (including superannuation and interest)

**Past economic loss** is evidenced through tax returns, employer's records and workers compensation records.

### Future loss of earning capacity (including superannuation loss)

**Future economic loss** is the income loss the claimant will suffer by not being able to work because of the incident. It is calculated from the date of assessment, until the retirement age of the claimant.

Damages are calculated using multiplier tables.

### Past and future gratuitous services

A claimant is entitled to claim an amount equivalent to the commercial cost of domestic and nursing services which had been provided in the past and would also be provided in the future by the family or friends of the injured claimant.

The starting point for the basis of the claim for damages (ie. the need of the claimant for those services).

These damages continue to feature in claims, even where elements seem difficult or unlikely to be made out and as a method by which claimant solicitors seek increased awards.

Section 12 of the CLA provides that a claim for gratuitous care depends on whether:

- the services would have been, or would be, provided even if the person had not suffered the injury – then there is no award;
- the claim is assessed at below Amount B – if so, there is no entitlement to an award. This amount is also indexed annually and is currently \$7,500;
- services are provided for more than 40 hours per week – the amount of the award is not to exceed the amount calculated on a weekly basis at the rate of the average weekly earnings (AWE) of all employees in WA for the relevant quarter; and
- services are provided for less than 40 hours per week – then the amount to be awarded is not to exceed the amount calculated on an hourly rate that is 1/40 of the AWE of all employees for the relevant quarter.

### Thresholds and caps:

- damages may be awarded for services provided by a member of the same household/ family.
- no damages awarded if the court assesses the damages (past and future) at \$7,500 or less.
- the value is assessed with regard to the average weekly total earnings of all employees in WA for the relevant quarter and the rate per hour is 1/40 of the average weekly earnings, and
- a claim per week cannot exceed 40 hours.

## Special damages

Special damages are used to refer to past Medicare benefits, past private healthcare benefits and associated costs incurred by a claimant in relation to their past care.

This can include private expenses for painkillers, medical aids (such as crutches), and the costs of attending appointments (such as travel).

## OTHER CONSIDERATIONS

### Fox v Wood damages

Where a plaintiff has received workers compensation benefits upon which tax was paid and is required to repay the gross benefits from damages, the damages must be increased to allow for the tax paid.

The claimant's loss, being the tax paid on the benefits received, is a natural and foreseeable consequence of the injuries: *Fox v Wood* (1981).

When making such claims, it is normally necessary to prove that the insurer does require repayment of the gross sum.

### Vicissitudes of life

A damages award for future losses has a 6% discount factor applied to it in line with Section 5 of the Law Reform (*Miscellaneous Provisions*) Act 1941 (WA) which reflects the vicissitudes of life (ie. normal sickness, absences from employment) which would reduce the claimant's position or income.

## RECENT CASES AT A GLANCE

Case	Date	Plaintiff details	Cause of action	Injury	General damages awarded	Total damages awarded
<i>Carusi v St Mary's Anglican Girls School Inc</i> [2023] WADC 103	01.09.2023	Female, 44	Occupiers' liability	<b>Ankle injury</b> – Plaintiff sustained injuries after falling in an aisle at a performing arts centre while she was a volunteer for a dance competition.	\$110,000	\$1,191,278.34 (provisional assessment as plaintiff unsuccessful)
<i>Allen v Merym Pty Ltd t/as EMCO Building</i> [No 3] [2023]	26.05.2023	Male	Occupiers' liability & workplace injury	<b>Elbow</b> – Plaintiff sustained injuries to his right elbow after walking into a protruding scaffold tube at a construction site he was working at.	\$40,000	\$554,115
<i>Pringle v Tabloid Pty Ltd</i> [2023] WADC 16	24.02.2023	Female, 26	Negligence	<b>Caustic burns to gastrointestinal tract</b> – Plaintiff sustained injuries after consuming chips from Chicken Treat mistakenly seasoned with caustic soda.	\$100,000	\$1,126,045.39
<i>Murrell v Brosna Constructions Pty Ltd</i> [2022] WADC 68	04.08.2022	Male, 31	Workplace injury	<b>Foot injury</b> – Plaintiff sustained injury when formwork he was working on collapsed and caused him to fall 3.6 metres.	\$60,500	\$540,963.25
<i>Ciesla v Mosman Bay Construction Pty Ltd (in liq)</i> [2022] WADC 3	21.01.2022	Male, 25	Workplace injury	<b>Wrist, elbow and forearm injury</b> – Plaintiff sustained injury when he fell off a ladder while working on a construction site.	\$150,000	\$696,590.73
<i>Essaiyd v Saint</i> [2021] WADC 61	18.06.2021	Male, 43	Occupiers' liability	<b>Hand injury</b> – Plaintiff's hand injured while working on a shipping vessel as a share fisherman.	\$20,000 (but not awarded as below threshold under s9 of the CLA)	\$23,595
<i>Lawrence v Province Leader of Oceania Province of Congregation of Christian Brothers</i> [2020] WADC 27	21.05.2020	Male, 77	Historical abuse	<b>Psychiatric injury</b> – Plaintiff suffered numerous forms of abuse (including sexual and physical) as an orphan from between the age of 8 and 16.	\$400,000	\$1,329,500
<i>Parkin v Amaca Pty Ltd (formerly James Hardie &amp; Coy Pty Ltd)</i> [2020] WASC 306	15.07.2020	Female, 63	Asbestos diseases compensation	<b>Asbestos</b> – Plaintiff was exposed to asbestos-containing products whilst working with her Farther, who was constructing an extension to their home using asbestos cement sheets.	\$360,000	\$1,041,480
<i>Greenslade v Hiew</i> [2020] WADC 120	01.09.2020	Male, 47	Occupiers' & landlord's liability	<b>Back and neck</b> – Plaintiff was a bus driver who suffered injury as a result of driving over rough road conditions, causing the bus to jolt and the plaintiff's seat to jog him up and down which caused him to feel pain in his back and neck.	\$75,000	\$568,852
<i>Ciolpan v Swan Transit Services (South) Pty Ltd</i> [2020] WADC 95	14.10.2019	Male, 48	Workplace injury	<b>Neck &amp; psychiatric injury</b> – Plaintiff sustained injury when ceiling of tenanted house fell on plaintiff's head.	\$130,000	\$1,073,255

## LIMITATION PERIODS

The limitation period for personal injury claims is three years under section 14 of the *Limitation Act 2005* (WA).

For dust diseases (asbestos-related), s56 provides that the action accrues when the person has knowledge of relevant facts (ie. the diagnosis of the injury/ the significance of the injury and identity of the respondent).

For historical childhood sexual abuse claims, the time limitation has been removed entirely. Victims who had previously entered into settlement agreements resolving their claims are now able to proceed with a claim for further damages where a court determines it is 'just and reasonable' to do so.

## CLAIMS INVOLVING INJURED WORKERS

The rights of a worker injured in the course of employment are governed by the *Workers Compensation & Injury Management Act 1981* (WA) (WCIM) and WorkCover WA.

The WCIM (and its application) has become increasingly relevant with the rise in injured worker claims and contractual relationships between employers and other entities on the same sites. It provides for no-fault compensation entitlements to an injured worker, but, relevantly to insurers, limits the common law rights of injured workers, employers and third parties.

The standard limitation period for a worker's injury claim is three years.

When a worker is injured during their employment, they are generally entitled to no-fault compensation benefits under their employer's mandatory WorkCover insurance. These insurances are statutorily required and must comply with Schedule 1 of the WCIM.

A worker's entitlements under workers compensation typically includes weekly payments. A worker may also claim (a) 'no-fault' lump sum payments for their respective injuries (including where the injury is both serious and permanent), and (b) all reasonable medical and the like expenses.

A worker may bring a claim for common law damages against their employer by satisfying the requirements under s93K(4) of the WCIM as follows:

- if the worker elects to retain the right to seek the damages,
- the Director of WorkCover WA registers the election,
- court proceedings seeking damages are commenced after the Director provides written notice to the worker that the election is registered, and
- the Court is satisfied that the worker has established a whole person impairment (WPI) of greater than 15%.

### Assessment of WPI of Worker

A worker has their injury assessed by an approved medical specialist (AMS) approved by WorkCover WA, who evaluates the injury using the WorkCover WA Guides for the Evaluation of Permanent Impairment and the American Medical Association's Guides to the Evaluation of Permanent Impairment.

If the worker's injuries are assessed at 15% WPI or more, the worker has eligibility to pursue common law damages. However, being assessed over 15% WPI does not make pursuing common law damages against the employer mandatory, and all the requirements under s93K(4) must be met.

### Election by the Worker

Critically, the injured worker must elect to pursue their employer under s93K(4). Previously, workers were

required to elect to pursue common law damages by the "termination date" (being 12 months from the date in which the worker made a claim for compensation).

In light of the *Workers' Compensation and Injury Management Amendment (COVID-19 Response) Act 2020*, there is now no termination date, but workers are still required to register an election to pursue their employer at common law.

### Workers' Rights Against a Third Party

The provisions of the WCIM do not apply to, or affect, the injured worker's rights to pursue a third party for damages. An injured worker is able to pursue any third party for any alleged liability for their workplace injury. Accordingly, where the injured worker has not satisfied s93K(4) (such as the minimum 15% WPI threshold) an injured worker will often look to obtain damages from a negligent third party who may only have a limited responsibility (eg. an occupier).

We have seen an increasing number of claims where, despite the injured worker satisfying the 15% WPI threshold, the worker does not elect to pursue their employer. This results in the worker's common law rights against the employer being waived and subsequently, the rights of a negligent third party to pursue the employer for contribution under the WCIM.

### Section 93K(8) – an important consideration in all injured worker claims

As outlined above, section 93K(4) of the WCIM regulates the injured worker's ability to pursue their employer.

Where s93K(4) is satisfied, there is still a limit placed on the employers' liability to the claim under s93K(5), where an employer's liability is capped if the injured worker's WPI is above 15% but less than 25% (known as a 'capped-claim').

The capped amount is indexed every financial year by WorkCover WA and is currently valued at \$530,724.

Critically, s93K(8) provides that the employer cannot be joined to a proceeding or be joined to contribute to the claim under the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) if:

- s93K(4) has not been satisfied – that is the injured worker has not met the threshold 15% WPI and elected to pursue his employer, or
- s93K(5) has been satisfied – that is that the employer has already paid the injured worker the statutory limit (including weekly compensation payments).

The practical effect of s93K(8) is that an employer often cannot be joined to proceedings by a third party, where an injured worker has not elected to pursue their employer or satisfied the minimum WPI.

This can result in unjust outcomes where a third party (who may have limited responsibility for a claim) cannot join or pursue the employer (who has the lion's share of liability) due to the injured worker's decision to not elect to pursue their employer. Similarly, even where the employer is a party to the proceedings, in the case of a capped claim the third party could be responsible for bearing a disproportionately high share of the damages if the capped amount has been exhausted.

This means that a third party who has limited responsibility for a claim may end up paying 100% of the claim. This nuance is also as a result of Part 1F of the CLA not applying to personal injury claims – ie. the proportionate liability regime cannot be used to limit the third party's liability exposure to a 'proportion' of their liability only.

The application of s93K by the WA Courts is largely untested. Cases typically relate to the procedural

requirements to satisfy its operation, such as attaining the correct WPI to sue an employer (eg. *Gable v Steel Cap Recruitment Pty Ltd* (No 2) [2017] WADC 10) or an employee's election process, such as filing the correct forms (eg. *Mogensen v Premium Grain Handlers Pty Ltd* [2008] WASC 145).

### Section 93 – Recovery actions by workers' compensation insurers

The increase in injured worker claims in WA has led to an increase in recovery actions by workers compensation insurers. Under the WCIM, the employer of an injured worker has a statutory right to be indemnified by a negligent third party for any compensation that has been paid, or may be paid, to an injured worker – this takes the form of a subrogated recovery claim controlled by the employer's workers' compensation insurer.

The relevant workers' compensation insurer pursues its statutory rights of recovery from third parties (ie. non-employer defendants) by way of a recovery action for indemnity under section 93 of the WCIM. This is often called a workers' compensation recovery.

Section 93(1) covers compensable injuries that were caused in circumstances that create a legal liability in some person other than the employer and where neither the employer nor any person for whose negligence the employer is legally responsible is negligent. In that case, the employer is entitled to be indemnified by the person whose negligence caused the injury to the worker to the full extent of the employer's liability to pay compensation under this Act, whether or not the defendant has discharged his liability to pay damages to the worker by judgment or by settlement or otherwise.

An allowance is made for a reduction in the amount owing by a negligent third party to the extent of the worker or employer's own negligence under s93(2).

Recovery claims are often made against **occupiers of the premises** where the workplace injury occurred (such as the mine operator or site owner); **host employers** due to the increased use of labour-hire services in the mining and construction industry; **manufacturers and suppliers of relevant equipment** which may have caused or contributed to a workplace injury; and **other contractors/sub-contractors** at the site who have some involvement in the workplace injury (such as spotters or site supervisors).

Section 93 provides a statutorily-protected cause of action for an employer/workers' compensation insurer to recover sums it has paid to an injured employee from any negligent third party. WA Court decisions have protected this right and ruled against parties trying to circumvent this provision.

Some workers compensation insurers are prepared to accept reduced sums to satisfy a recovery, particularly where there is limited liability on behalf of the negligent third party.

### Limitation Period for recovery actions

The limitation period for a workers' compensation recovery action is 6 years from the date each payment of compensation is made, which means the workers' compensation insurer may be able to bring proceedings against a third party many years after the worker's injury has happened or resolved.

To circumvent this issue, an injured worker's lawyer typically notifies or "invites" the workers' compensation insurer to attend the settlement conference in the common law proceeding so that both claims can be resolved at the same time.

### Principal's Indemnity Extension

A nuance of the WA jurisdiction is the increasing prevalence of a 'principal's indemnity extension' within a workers compensation policy, particularly in the mining, oil & gas and construction industries.

A principal's indemnity extension is usually an endorsement or extension on the employers' workers compensation policy that extends insurance cover to the named principal (usually the operator or head contractor) for any claim made against the principal arising out of an injury to an employee of the subject employer (usually a sub-contractor/contractor).

In practice, what a principal's indemnity extension in a worker's compensation policy effectively does is:

- provide a form of public liability cover for the named principal, in that the workers compensation policy extension will respond to the common law claim from the injured employee (as opposed to the principal's public liability policy); and
- prevent the employer or the workers compensation insurer from bringing a WorkCover recovery as the principal is insured for such a claim under the same workers compensation policy. This results in a circuitous action (where the insurer would be recovering from themselves).

It is therefore important to review the relevant contractual materials between the principal and contractor/employer of the injured worker in order to determine whether a principal's indemnity extension is available.

Below are the current indexed tables under the CLA and the CCA (*Civil Liability Act and Consumer and Competition Act*).

(Civil Liability Act) "most extreme case"			(Consumer and Competition Act) "most extreme case"		
%	% of maximum	Award	%	% of maximum	Award
0-14%	Nil	Nil	0-14%	Nil	Nil
15%	1%	\$7,000	15%	1%	\$3,970
16%	1.5%	\$11,000	16%	1.5%	\$5,950
17%	2%	\$14,500	17%	2%	\$7,940
18%	2.5%	\$18,000	18%	2.5%	\$9,920
19%	3%	\$21,500	19%	3%	\$11,900
20%	3.5%	\$25,500	20%	3.5%	\$13,890
21%	4%	\$29,000	21%	4%	\$15,870
22%	4.5%	\$32,500	22%	4.5%	\$17,860
23%	5%	\$36,000	23%	5%	\$19,840
24%	5.5%	\$39,500	24%	5.5%	\$21,820
25%	6.5%	\$47,000	25%	6.5%	\$25,790
26%	8%	\$58,000	26%	8%	\$31,740
27%	10%	\$72,000	27%	10%	\$39,680
28%	14%	\$101,000	28%	14%	\$55,550
29%	18%	\$130,000	29%	18%	\$71,420
30%	23%	\$166,000	30%	23%	\$91,260
31%	26%	\$187,500	31%	26%	\$103,170
32%	30%	\$216,500	32%	30%	\$119,040
33%	33%	\$238,500	33%	33%	\$130,940
34%	34%	\$245,500	34%	34%	\$134,910
35%	35%	\$252,500	35%	35%	\$138,880
36%	36%	\$260,000	36%	36%	\$142,850
37%	37%	\$267,000	37%	37%	\$146,820
38%	38%	\$274,500	38%	38%	\$150,780
39%	39%	\$281,500	39%	39%	\$154,750
40%	40%	\$289,000	40%	40%	\$158,720
41%	41%	\$296,000	41%	41%	\$162,690
42%	42%	\$303,000	42%	42%	\$166,660
43%	43%	\$310,500	43%	43%	\$170,620
44%	44%	\$317,500	44%	44%	\$174,590
45%	45%	\$325,000	45%	45%	\$178,560
46%	46%	\$332,000	46%	46%	\$182,530
47%	47%	\$339,500	47%	47%	\$186,500
48%	48%	\$346,500	48%	48%	\$190,460
49%	49%	\$354,000	49%	49%	\$194,430
50%	50%	\$361,000	50%	50%	\$198,400
51%	51%	\$368,000	51%	51%	\$202,370
52%	52%	\$375,500	52%	52%	\$206,340
53%	53%	\$382,000	53%	53%	\$210,300
54%	54%	\$390,000	54%	54%	\$214,270
55%	55%	\$397,000	55%	55%	\$218,240
56%	56%	\$404,500	56%	56%	\$222,210
57%	57%	\$411,500	57%	57%	\$226,180
58%	58%	\$419,000	58%	58%	\$230,140

(Civil Liability Act) "most extreme case"			(Consumer and Competition Act) "most extreme case"		
%	% of maximum	Award	%	% of maximum	Award
59%	59%	\$426,000	59%	59%	\$234,110
60%	60%	\$433,000	60%	60%	\$238,080
61%	61%	\$440,500	61%	61%	\$242,050
62%	62%	\$447,500	62%	62%	\$246,020
63%	63%	\$455,000	63%	63%	\$249,980
64%	64%	\$462,000	64%	64%	\$253,950
65%	65%	\$469,500	65%	65%	\$257,920
66%	66%	\$476,500	66%	66%	\$261,890
67%	67%	\$483,500	67%	67%	\$265,860
68%	68%	\$491,000	68%	68%	\$269,820
69%	69%	\$498,000	69%	69%	\$273,790
70%	70%	\$505,500	70%	70%	\$277,760
71%	71%	\$512,500	71%	71%	\$281,730
72%	72%	\$520,000	72%	72%	\$285,700
73%	73%	\$527,000	73%	73%	\$289,660
74%	74%	\$534,500	74%	74%	\$293,630
75%	75%	\$541,500	75%	75%	\$297,600
76%	76%	\$548,500	76%	76%	\$301,570
77%	77%	\$556,000	77%	77%	\$305,540
78%	78%	\$563,000	78%	78%	\$309,500
79%	79%	\$570,500	79%	79%	\$313,470
80%	80%	\$577,500	80%	80%	\$317,440
81%	81%	\$585,000	81%	81%	\$321,410
82%	82%	\$592,000	82%	82%	\$325,380
83%	83%	\$599,500	83%	83%	\$329,340
84%	84%	\$606,500	84%	84%	\$333,310
85%	85%	\$613,500	85%	85%	\$337,280
86%	86%	\$621,000	86%	86%	\$341,250
87%	87%	\$628,000	87%	87%	\$345,220
88%	88%	\$635,500	88%	88%	\$349,180
89%	89%	\$642,500	89%	89%	\$353,150
90%	90%	\$650,000	90%	90%	\$357,120
91%	91%	\$657,000	91%	91%	\$361,090
92%	92%	\$664,000	92%	92%	\$365,060
93%	93%	\$671,500	93%	93%	\$369,020
94%	94%	\$678,500	94%	94%	\$372,990
95%	95%	\$686,000	95%	95%	\$376,960
96%	96%	\$693,000	96%	96%	\$380,930
97%	97%	\$700,500	97%	97%	\$384,900
98%	98%	\$707,500	98%	98%	\$388,860
99%	99%	\$715,000	99%	99%	\$392,830
100%	100%	\$722,000	100%	100%	\$396,800
(ie. "most extreme case")			(ie. "most extreme case")		

ISV	Injury between 1 Jul 17 – 30 Jun 18	Injury between 1 Jul 18 – 30 Jun 19	Injury between 1 Jul 19 – 30 Jun 20	Injury between 1 Jul 20 – 30 Jun 21	Injury between 1 Jul 21 – 30 Jun 22	Injury between 1 Jul 22 – 30 Jun 23	Injury after 1 Jul 23	ISV	Injury between 1 Jul 17 – 30 Jun 18	Injury between 1 Jul 18 – 30 Jun 19	Injury between 1 Jul 19 – 30 Jun 20	Injury between 1 Jul 20 – 30 Jun 21	Injury between 1 Jul 21 – 30 Jun 22	Injury between 1 Jul 22 – 30 Jun 23	Injury after 1 Jul 23
1	1,480	1,530	1,580	1,620	1,630	1,690	1,780	51	141,850	146,220	150,600	154,000	154,620	159,970	168,510
2	2,960	3,060	3,160	3,240	3,260	3,380	3,560	52	145,900	150,390	154,900	158,400	159,040	164,540	173,320
3	4,440	4,590	4,740	4,860	4,890	5,070	5,340	53	149,950	154,560	159,200	162,800	163,460	169,110	178,130
4	5,920	6,120	6,320	6,480	6,520	6,760	7,120	54	154,000	158,730	163,500	167,200	167,880	173,680	182,940
5	7,400	7,650	7,900	8,100	8,150	8,450	8,900	55	158,050	162,900	167,800	171,600	172,300	178,250	187,750
6	9,150	9,450	9,750	9,990	10,050	10,420	10,980	56	162,100	167,070	172,100	176,000	176,720	182,820	192,560
7	10,900	11,250	11,600	11,880	11,950	12,390	13,060	57	166,150	171,240	176,400	180,400	181,140	187,390	197,370
8	12,650	13,050	13,450	13,770	13,850	14,360	15,140	58	170,200	175,410	180,700	184,800	185,560	191,960	202,180
9	14,400	14,850	15,300	15,660	15,750	16,330	17,220	59	174,250	179,580	185,000	189,200	189,980	196,530	206,990
10	16,150	16,650	17,150	17,550	17,650	18,300	19,300	60	178,300	183,750	189,300	193,600	194,400	201,100	211,800
11	18,210	18,770	19,330	19,780	19,890	20,620	21,740	61	182,610	188,190	193,870	198,270	199,090	205,950	216,910
12	20,270	20,890	21,510	22,010	22,130	22,940	24,180	62	186,920	192,630	198,440	202,940	203,780	210,800	222,020
13	22,330	23,010	23,690	24,240	24,370	25,260	26,620	63	191,230	197,070	203,010	207,610	208,470	215,650	227,130
14	24,390	25,130	25,870	26,470	26,610	27,580	29,060	64	195,540	201,510	207,580	212,280	213,160	220,500	232,240
15	26,450	27,250	28,050	28,700	28,850	29,900	31,500	65	199,850	205,950	212,150	216,950	217,850	225,350	237,350
16	28,800	29,670	30,540	31,250	31,410	32,550	34,290	66	204,160	210,390	216,720	222,620	222,540	230,200	242,460
17	31,150	32,090	33,030	33,80	33,970	35,200	37,080	67	208,470	214,830	221,290	226,290	227,230	235,050	247,570
18	33,500	34,510	35,520	36,350	36,530	37,850	39,870	68	212,780	219,270	225,860	230,960	231,920	239,900	252,680
19	35,850	36,930	38,010	38,900	39,090	40,500	42,660	69	217,090	223,710	230,430	235,630	236,610	244,750	257,790
20	38,200	39,350	40,500	41,450	41,650	43,150	45,450	70	221,400	228,150	235,000	240,300	241,300	249,600	262,900
21	40,830	42,060	43,290	44,300	44,510	46,110	48,570	71	226,000	232,890	239,880	245,290	246,310	254,780	268,360
22	43,460	44,770	46,080	47,150	47,370	49,070	51,690	72	230,600	237,630	244,760	250,280	251,320	259,960	273,820
23	46,090	47,480	48,870	50,000	50,230	52,030	54,810	73	235,200	242,370	249,640	255,270	256,330	265,140	279,280
24	48,720	50,190	51,660	52,850	53,090	54,990	57,930	74	239,800	247,110	254,520	260,260	261,340	270,320	284,740
25	51,350	52,900	54,450	55,700	55,950	57,950	61,050	75	244,400	251,850	259,400	265,250	266,350	275,500	290,200
26	54,290	55,930	57,570	58,890	59,150	61,260	64,540	76	249,000	256,590	264,280	270,240	271,360	280,680	295,660
27	57,230	58,960	60,690	62,080	62,350	64,570	68,030	77	253,600	261,330	269,160	275,230	276,370	285,860	301,120
28	60,170	61,990	63,810	65,270	65,550	67,880	71,520	78	258,200	266,070	274,040	280,220	281,380	291,040	306,580
29	63,110	65,020	66,930	68,460	68,750	71,190	75,010	79	262,800	270,810	278,920	285,210	286,390	296,220	312,040
30	66,050	68,050	70,050	71,650	71,950	74,500	78,500	80	267,400	275,550	283,800	290,200	291,400	301,400	317,500
31	69,290	71,390	73,490	75,170	75,480	78,150	82,340	81	272,260	280,560	288,960	295,480	296,700	306,880	323,270
32	72,530	74,730	76,930	78,690	79,010	81,800	86,180	82	277,120	285,570	294,120	300,760	302,000	312,360	329,040
33	75,770	78,070	80,370	82,210	82,540	85,450	90,020	83	281,980	290,580	299,280	306,040	307,300	317,840	334,810
34	79,010	81,410	83,810	85,730	86,070	89,100	93,860	84	286,840	295,590	304,440	311,320	312,600	323,320	340,580
35	82,250	84,750	87,250	89,250	89,600	92,750	97,700	85	291,700	300,600	309,600	316,600	317,900	328,800	346,350
36	85,780	88,390	91,000	93,080	93,440	96,720	101,880	86	296,560	305,610	314,760	321,880	323,200	334,280	352,120
37	89,310	92,030	94,750	96,910	97,280	100,690	106,060	87	301,420	310,620	319,920	327,160	328,500	339,760	357,890
38	92,840	95,670	98,500	100,740	101,120	104,660	110,240	88	306,280	315,630	325,080	332,440	333,800	345,240	363,660
39	96,370	99,310	102,250	104,570	104,960	108,630	114,420	89	311,140	320,640	330,240	337,720	339,100	350,720	369,430
40	99,900	102,950	106,000	108,400	108,800	112,600	118,600	90	316,000	325,650	335,400	343,000	344,400	356,200	375,200
41	103,690	106,860	110,030	112,520	112,940	116,880	123,110	91	321,130	330,940	340,850	348,570	349,990	361,980	381,290
42	107,480	110,770	114,060	116,640	117,080	121,160	127,620	92	326,260	336,230	346,300	354,140	355,580	367,760	387,380
43	111,270	114,680	118,090	120,760	121,220	125,440	132,130	93	331,390	341,520	351,750	359,710	361,170	373,540	393,470
44	115,060	118,590	122,120	124,880	125,360	129,720	136,640	94	336,520	346,810	357,200	365,280	366,760	379,320	399,560
45	118,850	122,500	126,150	129,000	129,500	134,000	141,150	95	341,650	352,100	362,650	370,850	372,350	385,100	405,650
46	122,640	126,410	130,180	133,120	133,640	138,280	145,660	96	346,780	357,390	368,100	376,420	377,940	390,880	411,740
47	126,430	130,320	134,210	137,240	137,780	142,560	150,170	97	351,910	362,680	373,550	381,990	383,530	396,660	417,830
48	130,220	134,230	138,240	141,360	141,920	146,840	154,680	98	357,040	367,970	379,000	387,560	389,120	402,440	423,920
49	134,010	138,140	142,270	145,480	146,060	151,120	159,190	99	362,170	373,260	384,450	393,130	394,710	408,220	430,010
50	137,800	142,050	146,300	149,600	150,200	155,400	163,700	100	367,300	378,550	389,900	398,700	400,300	414,000	436,100

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