

**Colin
Biggers
& Paisley**

A User's Guide to Civil Liability in Australia.

Fourteenth edition 2025



Introduction

Welcome to the fourteenth edition of *A User's Guide to Civil Liability in Australia*. For over a decade we have annually published this practical guide to help our clients with the interpretation and application of civil liability laws in Australia.

This updated version for 2025 incorporates legislative changes and cases from the past 12 months to assist readers to navigate a range of practical Insurance claims scenarios across each state and territory within Australia.

Complex claims made simple.

We understand the importance of providing efficient claims management and legal services to our clients. Our team of insurance professionals apply claims, underwriting and litigation experience to help clients achieve the best outcomes.

We hope that you find the fourteen edition of the user's guide useful. Please contact us should you wish to discuss in more detail how we can assist you.



Gavin Creighton
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A handwritten signature in black ink, appearing to read 'G. Creighton'. The signature is written in a cursive, flowing style.

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New South Wales



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Civil Liability Act 2002 (NSW)

Application

In New South Wales, the common law of negligence has been modified by statute. The *Civil Liability Act (CLA NSW)* was enacted in 2002 to address perceived problems with the application of tort law and resulting increases in insurance premiums.

Pursuant to section 5, the CLA NSW applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

Section 3B of the CLA NSW excludes claims for:

- damages due to intentional torts;
- any injury for which compensation is subject to section 11 of the *Dust Diseases Tribunal Act 1989* (NSW);
- civil liability relating to an award of personal injury damages where the injury or death concerned resulted from smoking or other use of tobacco products;
- civil liability relating to an award to which part 6 of the *Motor Accidents Act 1988* (NSW) applies;
- civil liability relating to an award to which Chapter 5 of the *Motor Accidents Compensation Act 1999* (NSW) applies;
- civil liability relating to an award to which Part 4 of the *Motor Accident Injuries Act 2017* (NSW) applies;
- civil liability relating to an award to which Division 3 of Part 5 of the *Workers Compensation Act 1987* (NSW) applies;
- civil liability for compensation under the *Workers Compensation Act*, the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987* (NSW), the *Workers' Compensation (Dust Diseases) Act 1942* (NSW), the *Anti-Discrimination Act 1977* (NSW), or a benefit payable under the *Sporting Injuries Insurance Act 1978* (NSW);
- civil liability for financial assistance for economic loss under the *Victims' Rights and Support Act 2013* (NSW); or
- victims of crime.

Negligence - The Elements

As with common law negligence, in order to establish negligence under the CLA NSW, a plaintiff must prove that the defendant:

- owed the plaintiff a duty of care (Division 2);
- breached that duty; and
- caused the damage (Division 3).

Duty of care

The absence of a duty of care means that a defendant will not be liable in negligence to a plaintiff. For duty of care to be established, a plaintiff must establish that a reasonable person in the defendant's position would have known that it would not be unlikely (reasonably foreseeable) that the alleged negligent behaviour may result in injury to a person (*Chapman v Hearse*¹ and section 5B(1)(a)). However, while reasonable foreseeability is necessary to establish a duty of care, it is not, of itself, sufficient.

For this reason, courts are concerned with identifying the salient features which might favour imposing or mitigating against imposing a duty of care. This involves the court looking to other similar cases to consider whether a duty was owed by looking at the factors which may be common to the present case.

¹ *Chapman v Hearse* (1961) 106 CLR 112

A non-exhaustive list of common established duties of care in case law includes:

- manufacturer/consumer: *Donoghue v Stevenson*²
- occupier/visitor: *Australian Safeway Stores Pty Ltd v Zaluzna*³
- employer/employee: *Smith v Leech Brain*⁴
- doctor/patient: *Rogers v Whitaker*⁵
- parent/child: *Smith v Leurs*⁶

Section 5O of the CLA NSW defines the standard of care owed by professionals. A professional is not liable in negligence if it is established that the professional acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice (*Sydney South West Area Health Service v MD*⁷ and section 5O(1)). A court, however, is not bound by the peer professional opinion if the court considers the opinion to be irrational (*Rogers v Whitaker*). The "peer professional opinion" standard of care will not apply to warning about the risk of death or injury: *Rogers v Whitaker* and section 5P.

In terms of the duty of care for mental harm, section 32 requires that the foreseeability test be satisfied for a duty of care to exist. Section 32(1) states that a person does not owe a duty to another person to not cause that person mental harm unless "the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken" (*Tame v New South Wales; Annetts v Australian Stations Pty Ltd*⁸).

Breach

Section 5B under the CLA NSW codifies the common law principles which enliven a duty of care.

In considering whether a defendant owes a duty to a plaintiff, section 5B(1) requires a court to determine whether:

- the risk was foreseeable;
- the risk was not insignificant; and
- a reasonable person, in the person's position, would have taken those precautions.

Section 5B(2) states that in determining whether a reasonable person would have taken precautions against risk of harm, the court is to consider:

- the probability of harm absent reasonable care;
- seriousness of harm;
- burden of taking precautions; and
- social utility of the activity which creates the risk of harm.

In *Woolworths v McQuillan*⁹ the liability of occupiers was discussed, in circumstances where a customer slipped and fell on a grape on the floor of the store. The court concluded that while occupiers are required to provide a reasonable response to a risk of harm (in this case, a proper lookout for risks to customers), the law does not require a perfect response (or a perfect lookout). The duty of occupiers is to take reasonable care for the safety of entrants to the premises. Where there is a risk of slips and falls, a reasonable system should be in place to prevent them, but perfection is not required.

In respect of claims involving child sexual abuse, the courts have emphasised the need for plaintiffs to properly particularise the risk of harm against which it is alleged the defendant was negligent for failing to take precautions.¹⁰

² *Donoghue v Stevenson* [1932] UKHL 100

³ *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479

⁴ *Smith v Leech Brain* [1962] 2 QB 405

⁵ *Rogers v Whitaker* (1992) 175 CLR 479

⁶ *Smith v Leurs* (1945) 70 CLR 256

⁷ *Sydney South West Area Health Service v MD* [2009] NSWCA 343

⁸ *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317

⁹ *Woolworths v McQuillan* [2017] NSWCA 202

¹⁰ *PWJ1 v The State of New South Wales* [2020] NSWSC 1235; *PM v The Council of Trinity Grammar School* [2020] NSWSC 1353

Section 5C provides that taking better precautions after the fact does not give rise to or affect liability, nor does it constitute admitting liability.

Section 5O establishes that a professional does not breach his or her duty of care if he or she acted in a manner that is widely accepted by their peers.

Causation and remoteness

In any claim for damages for negligence, a plaintiff will be required to prove, on the balance of probabilities (section 5E), that the damage suffered was caused by the defendant's negligence.

Section 5D(1) provides that a determination that negligence caused particular harm comprises proving the following two elements:

- that the negligence was a necessary condition of the occurrence of the harm (factual causation); and
- that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).

The reference to "necessary condition" in section 5D(1)(a) requires the defendant's act to have been at least one event, which caused or materially contributed to the plaintiff's loss. Accordingly, there may be other events which contributed to the loss but the defendant's alleged act must be one of the necessary conditions. Section 5D(1)(a) is demonstrated, in part, through considering whether "but for" the defendant's negligence, the claimant's loss would actually have occurred (*March v E & M H Stramare Pty Ltd*¹¹).

The "but for" test is necessary, but it is not a sufficient test for causation, particularly where there are two or more probable causes. Section 5B(1)(b) seeks to address this by requiring the plaintiff to prove whether, as a matter of policy, the person alleged to be responsible should nevertheless not be held liable (scope of liability). This is achieved by identifying the "nature of the role which the conduct in question played" (*Pledge v RTA*¹²), or if the alleged cause should properly be seen as having caused the relevant loss or damage (*Medlin v State Government Insurance Commission*¹³).

Section 5D(3)(a) expands on the section 5D(1)(a) requirement of factual causation by establishing its determination as a subjective test of what the plaintiff would have done if the negligence had not occurred.

Similarly, section 5D(4) expands on the scope of liability requirements in Section 5D(1)(b) by establishing that it should be a normative question of whether liability should be imposed on the negligent party.

In rare cases, the evidence is not sufficient to establish that the alleged conduct was a "material" cause of the damage to the plaintiff. This is typically because of uncertainties surrounding the aetiology of injury. In such cases, the court may apply section 5D(2) of the CLA NSW and consider why responsibility for harm should be imposed on the negligent party. *Adeels Palace v Moubarak*¹⁴ is the leading case which discussed the application of section 5D(2). In finding that section 5D(2) did not apply to the respondent, the High Court did not go so far as to define in what circumstances a matter would be considered "exceptional". Australian courts are yet to establish an "exceptional" case for section 5D(2) to apply notwithstanding post *Adeels* judicial considerations in recent decisions¹⁵.

Once a plaintiff establishes that the defendant's conduct has caused the plaintiff's loss, the second element, "remoteness" will need to be satisfied. Remoteness concerns the extent of the damage for which a defendant will be liable. This is addressed by considering whether the damage that is alleged to have flowed from the breach was "reasonably foreseeable" (*Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* (The "Wagon Mound" (No 1))¹⁶).

¹¹ *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506

¹² *Pledge v RTA* (2004) 205 ALR 56

¹³ *Medlin v State Government Insurance Commission* (1995) 182 CLR 1

¹⁴ *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48

¹⁵ *Tarangelo v State of NSW* [2016] NSWCA 126 and *Woolworths Limited v Strong & Anor* [2010] NSWCA 282

¹⁶ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* (The "Wagon Mound" (No 1)) [1961] AC 388

"Defences" to negligence

Voluntary assumption of risk and obvious risks

The concept of "obvious risk" is relevant to establishing the common law complete defence of *volenti non fit injuria* (no wrong is done to one who is willing). This is particularly relevant to activities that are deemed a recreational activity (discussed below).

The common law defence of *volenti non fit injuria* entails establishing that a plaintiff both knew of a risk and voluntarily agreed to incur the risk: *Imbree v McNeilly*.¹⁷ In contrast to the common law position, section 5G of the CLA NSW imposes a presumption on a plaintiff that they were aware of obvious risks. An obvious risk, as defined in section 5F, includes risks:

- that are patent or a matter of common knowledge;
- even if they have a low probability of occurring;
- even if they are not prominent, conspicuous or physically observable.

If a court finds that a risk is an obvious one (as defined above), this means that pursuant to section 5G a person is presumed to be aware of that risk. However, this does not lead to an automatic finding of no breach of duty. The finding of obvious risk simply makes it easier for a defendant to establish the common law defence of voluntary assumption of risk because at common law, a court must consider whether the plaintiff had actual knowledge of a risk: *Canterbury Municipal Council v Taylor*.¹⁸

Section 5H also assists defendants. It states that a defendant will not owe a duty to warn of an obvious risk unless:

- the plaintiff has requested advice or information from the defendant;
- there is a requirement for the defendant to warn the plaintiff; or
- the defendant is a professional.

Recreational activities

Where personal injury results from an obvious risk relating to a dangerous recreational activity engaged in by the plaintiff, a defendant will not be liable even if the plaintiff was not aware of the risk (section 5L).

The concept of "obvious risk" is discussed immediately above. However, the inquiry into whether an activity is a "dangerous recreational activity" requires consideration of whether a "recreational activity" involves "a significant risk of physical harm" (section 5K). According to section 5K, a "recreational activity" may include any one of the following:

- any sport (whether or not the sport is an organised activity and whether or not the sport is at a professional level¹⁹);
- any pursuit of activity engaged in for enjoyment, relaxation or leisure; and
- any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or activity for enjoyment, relaxation or leisure.

Case law reflects the broad definition, suggesting that a recreational activity can be an activity either purely for recreational purposes or for exercise and wellbeing. Recreational activities include running down a sand dune, cycling, skiing²⁰ and attending a gym class (see *Kelly v State of Queensland*²¹; *Simmons v Rockdale City Council*²²). In *Singh v Lynch* [2019] NSWSC 1403, the plaintiff argued that the risk of another jockey riding negligently during a horse race, a risk more narrowly and specifically defined, was not obvious. It was held that the nature of the risk should be assessed with a reasonable level of generality, with the result that the more general risk to a jockey was obvious within the meaning of section 5L of the CLA NSW.

¹⁷ *Imbree v McNeilly* [2008] HCA 40

¹⁸ *Canterbury Municipal Council v Taylor* [2002] NSWCA 24

¹⁹ *Goode v Angland* [2017] NSWCA 311

²⁰ *Castle v Perisher Blue* [2020] NSWCA 1652

²¹ *Kelly v State of Queensland* [2013] QSC 106

²² *Simmons v Rockdale City Council* [2013] NSWSC 1431

Contrastingly, courts have taken a restrictive approach on what constitutes a "dangerous" recreational activity. Extreme sports such as air gliding will be deemed "dangerous" (*Echin v Southern Tablelands Gliding Club*²³), while more common activities such as riding a motorcycle or boarding a chair lift will not be sufficient (see *Kerslake v Shire of Northam*²⁴; *Nair-Smith v Perisher Blue Pty Ltd*²⁵).

Accordingly, in circumstances where a plaintiff has engaged in a dangerous recreational activity and, as a result of an obvious risk, is injured, a defendant may rely on the common law defence of voluntary assumption of risk (discussed above). At common law, the defence of voluntary assumption of risk has been applied in a number of circumstances. *Rootes v Shelton*²⁶ held that participants in a sport or a game voluntarily assume risks inherent in the activity. That is to say, there is no liability for any damage suffered that occurs reasonably within the parameters of the game, although this will not serve as a defence if the injury occurs during the game, but far outside the rules of the game.

Inherent risks

Section 5I(1) provides that there is no liability for inherent risks (risks that cannot be avoided). Accordingly, where a risk cannot be avoided by the exercise of reasonable care and skill, section 5I provides "that a person is not liable in negligence for such harm" (*Paul v Cooke*²⁷).

Risk warnings

Section 5M provides that there is no duty of care owed to a plaintiff for a recreational activity where there is a risk warning provided. Although a risk warning may be given orally or in writing and it need not be understood by the person receiving it, it does need to warn of the general nature of the particular risk and the risk warned of must be inherent or incidental to the activity.

In *Action Paintball Games Pty Ltd (in liquidation) v Barker*,²⁸ no duty of care was owed to a child who tripped in bushland while playing laser tag, as a risk warning of the perils of running through the bushland had been provided. However, in *Alameddine v Glenworth Valley Horse Riding Pty Ltd*,²⁹ a risk warning was found to be ineffective where a quad bike instructor rode much faster than his inexperienced participants who tried to keep up. This resulted in the plaintiff falling and the fall was not found to be a risk inherent or incidental to the quad bike riding activity.

Contractual waivers

Section 5N establishes waivers of contractual duty for recreational activities as a defence for claims in negligence.

Section 5N(1) provides that a term of contract for the supply of recreational services may exclude, restrict or modify any liability that results from breach of a warranty that the services will be rendered with reasonable care or skill.

The decision in *Insight Vacations v Young*³⁰ clarified that section 5N does not itself provide any exclusion, restriction or modification of liability. Rather, the section allows parties to contract for the exclusion, restriction or modification of liability. This was recently affirmed in *Alameddine v Glenworth Valley Horse Riding*.³¹

²³ *Echin v Southern Tablelands Gliding Club* [2013] NSWSC 516

²⁴ *Kerslake v Shire of Northam* [2009] WADC 129

²⁵ *Nair-Smith v Perisher Blue Pty Ltd* [2013] NSWSC 727

²⁶ *Rootes v Shelton* (1967) 116 CLR 383

²⁷ *Paul v Cooke* [2013] NSWCA 311

²⁸ *Action Paintball Games Pty Ltd (in liquidation) v Barker* [2013] NSWCA 128

²⁹ *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219

³⁰ *Insight Vacations v Young* [2011] HCA 16

³¹ *Alameddine v Glenworth Valley Horse Riding* [2015] NSWCA 219

Contributory negligence

Pursuant to section 5R(2), the principles relevant to determining contributory negligence in failing to take precautions against the risk of that harm are:

- what the standard of care required of a reasonable person in that situation was; and
- what the person ought to have known at the time.

Section 5S provides that in determining the extent of a reduction in damages by reason of contributory negligence (i.e. negligence by the person who suffered the harm), a court is entitled to determine that the defendant be allowed a 100% reduction if the court thinks that it is just and equitable to do so. This will result in the claim being defeated.

Although often relied upon by defendants, courts are generally reluctant to allow a high percentage for contributory negligence. For example, in the decision of *Fitzsimmons v Coles Supermarkets Australia Pty Ltd*,³² the appellant was only found to be 50% contributorily negligent for injuries sustained when she slipped on an area of wet floor that had been surrounded by three yellow warnings signs. Similarly, in the decision of *Simmons v Rockdale City Council*,³³ a cyclist travelling at approximately 30 km per hour collided with a car park boom gate on an early morning ride. Despite the presence of two speed humps and the fact that the cyclist was travelling in the opposite direction to the directional arrows painted on the road surface proximate to the boom gates, the court only held the plaintiff to be 20% contributorily negligent for the incident.

Proportionate liability

A plaintiff's loss will frequently be the result of wrongdoing by more than one person (i.e. a concurrent wrongdoer). A concurrent wrongdoer is a person who is one of two or more persons whose acts or omissions cause (independently of each other or jointly), the damage or loss that is the subject of the claim.

In such cases, the CLA NSW considers it appropriate that there be means to allocate (apportion) responsibility as between the various wrongdoers (Part 4). Section 34 allows the court to consider the role and responsibility of concurrent wrongdoers without those wrongdoers being joined to the proceedings. Section 34 applies to the following claims:

- A claim for economic loss or damage to property in an action for damages arising from a failure to take reasonable care but not including any claim arising out of personal injury;
- A claim for economic loss or damage to property in an action under section 42 of the *Fair Trading Act 1987* (NSW) (as it was prior to its repeal pursuant to the *Fair Trading Amendment (Australian Consumer Law) Act 2010* (NSW)); and
- A claim under section 18 of the *Australian Consumer Law* [Schedule 2 to the *Competition and Consumer Act 2010* (Cth)].

For claims arising out of personal injury, a cross claim must be filed, as Part 4 of the CLA NSW is not applicable.

If a claim is apportionable, section 35 provides that a defendant is only liable for the loss or damage suffered by the plaintiff for which that defendant is responsible. A court may not give judgment against the defendant for any more than that amount, irrespective of whether the other wrongdoer is a party to the proceedings.

Intoxication and criminal activity

Intoxication of a person is generally irrelevant to either the existence of the duty of care, or the standard of care, owed to that person (section 49). Intoxication is defined as being under the influence of alcohol and/or drugs (section 48).

Section 50(2) establishes that no damages will be awarded unless the death, injury or damage would have occurred in the absence of the intoxication of the claimant. If awarded, those damages are subject to a 25% or more deduction (section 50(4)).

³² *Fitzsimmons v Coles Supermarkets Australia Pty Ltd* [2013] NSWCA 273

³³ *Simmons v Rockdale City Council* [2013] NSWSC 1431

Under section 50(5), the provisions relating to intoxication do not apply where intoxication is not self-induced.

The leading case in Australia which discussed the duty of care owed to intoxicated persons was *Cole v South Tweed Heads Rugby League Football Club Ltd*,³⁴ in which Colin Biggers & Paisley acted for the club and defeated the plaintiff's claim. In that case, the High Court held that in ordinary circumstances, no duty of care is owed by the licensee of premises to a person who is served alcohol and, as a result of intoxication, is injured.

Under section 54, the court will also refuse an award of damages to a person whose death or injury occurred during, or following, conduct of the person which:

- on the balance of probabilities, constitutes a *serious* offence; and
- contributed materially to the death, or injury or damage, or to the risk of death, injury or damage.

However, if the defendant committed an offence (serious or otherwise) that caused the death, injury or damage, the section does not apply to an award of damages against it (section 54(1)).

Good samaritans and volunteers

Section 57 provides an immunity from civil liability for people who render assistance in an emergency to persons who are injured or at risk of injury. The immunity only applies where there is an emergency. The legislation is unclear whether the immunity is available for acts or omissions which are not for the benefit of the injured person but for the benefit of others, for example, bystanders within a zone of danger.

Section 57(2) provides that the acts or omissions of the good samaritan do not affect the vicarious liability of any other person.

Similarly, Part 9 of the CLA NSW provides protection for volunteers. A volunteer does not incur any personal civil liability when undertaking community work organised by a community organisation in good faith. A "community organisation" is a body corporate, a religious or charitable organisation or an authority of the state that organises the doing of community work by volunteers that is capable of being sued. "Community work" is defined to mean work that is not for private financial gain and is done for a charitable, benevolent, philanthropic, sporting, educational or cultural purpose.

Protection is excluded to volunteers when:

- the volunteer was at the time of the act or omission engaged in conduct which constitutes an offence (section 62);
- the volunteer was under the influence of drugs or alcohol at the time and failed to exercise reasonable care and skill when doing the work (section 63);
- the volunteer knew or ought reasonably to have known that they were acting outside the scope and/or contrary to instructions given (section 64);
- insurance is required (section 65);
- the volunteer is involved in a motor accident (section 66).

Food donors

Section 58C(1) provides that a person who donates food does not incur any civil liability in respect of any death or personal injury that results from the consumption of food if:

- the food is donated freely and in good faith;
- the food was safe to consume when it was donated;
- the food donor provided handling requirements; and
- those handling requirements were correct for keeping the food consumable.

³⁴ *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469

Public and other authorities

Section 43A(3) provides that a public or other authority exercising (or failing to exercise) a special statutory power will not be liable unless it was so unreasonable that no authority having the special statutory power could properly consider the act or omission to be reasonable.

The term "special statutory power" has a particular meaning ascribed by section 43A(3) to include:

- a power that is conferred by or under a statute; and
- that is of a kind that persons are not authorised to exercise without specific statutory authority.

The test for "unreasonableness" is determined subjectively and requires that no person with the requisite expertise could consider the exercise or failure to exercise to be reasonable.

The decision in *Roads and Maritime Services v Grant*³⁵ clarified that this defence will be available in road authority cases relating to the erection of road signs, as well as other circumstances. It is consistent with the decision in *Curtis v Harden Shire Council*,³⁶ where Harden Shire Council was liable for failing to install signage to indicate roadworks.

Additionally, section 44(1) removes the liability of public or other authorities for failure to exercise a regulatory function if the authority could not have been required to exercise the function in proceedings instituted by the plaintiff.

Vicarious liability

Vicarious liability imposes liability on a person ("defendant") who has a non-delegable duty over the tortfeasor in ensuring that reasonable care is taken in connection with the performance of the work or task (section 5Q(1)). In order for vicarious liability to be imposed, there must be a sufficient relationship between the defendant and the tortfeasor, and the negligence of the tortfeasor must be within the scope of employment (*Hollis v Vabu*³⁷).

Moreover, under section 26X a court cannot award exemplary, punitive or aggravated damages for injury or death caused by a person for whose tort the protected defendant is vicariously liable.

Unlawful conduct

Section 54(1)(a) provides that no damages are awarded if death, injury or damage occurred during or following the claimant committing a serious offence. A serious offence is defined as an offence that results in a sentence of six or more months of imprisonment.

Despite these provisions, it is important to recognise the common law principle precluding criminals from the award of damages (*Henwood v The Municipal Tramways Trust*³⁸). The case of *Miller v Miller*³⁹ suggests that no duty of care exists between participants in serious criminal activity. However, in this case, the claimant was found to have withdrawn from the criminal enterprise prior to the damage, and was therefore owed a duty of care.

Mental harm

Although a person is able to recover for pure mental harm (i.e. where there are no physical disabilities), this is only available in certain circumstances. Under section 30, the plaintiff must first establish that:

- they witnessed, at the scene, the victim being killed, injured or put in peril; or
- they are a close member of the family of the victim.

³⁵ *Roads and Maritime Services v Grant* [2015] NSWCA 138

³⁶ *Curtis v Harden Shire Council* [2014] NSWCA 314

³⁷ *Hollis v Vabu* (2001) 207 CLR 21

³⁸ *Henwood v The Municipal Tramways Trust (SA)* (1938) 60 CLR 438

³⁹ *Miller v Miller* [2011] HCA 9

For a plaintiff to be considered a "close member of the family" they must be:

- a parent of the victim or other person with parental responsibility for the victim;
- the spouse or partner of the victim;
- a child or stepchild of the victim or any other person for whom the victim has parental responsibility;
or
- a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim.

Given the various forms of media, the requirement that the plaintiff "witness, at the scene" is somewhat unclear. At the scene would imply that the person is physically present at the time. The question then arises whether a plaintiff would be able to claim if they were, for example, watching live footage of the victim "being killed, injured or put in peril" on the internet. Witnessing the aftermath of an accident is in most circumstances insufficient for a plaintiff to recover for pure mental harm. In 2010, however, the High Court of Australia found in *Wicks v State Rail Authority of New South Wales*⁴⁰ that "there are cases where death, or injury, or being put in peril takes place over an extended period, and this was such a case."

Additionally, section 31 provides that a defendant is only liable for a "recognised" psychiatric illness.

⁴⁰ *Wicks v State Rail Authority of New South Wales* [2010] HCA 22

Assessment of damages for personal injury

Non-economic loss - Section 16

Non-economic loss or general damages are discussed in section 16 of the CLA NSW. "Non-economic loss" is defined to mean one or more of pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement.

Damages may not be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case. In practice, this is not a difficult threshold to satisfy.

The maximum that can be awarded (for a most extreme or serious case) is \$761,500. What is a most extreme case is difficult to assess, however, it has been suggested that a quadriplegic with full brain function or a person who suffers both deafness and blindness would reach, or come very close to reaching, a most extreme case depending on their individual circumstances.

Each October, the maximum amount is reassessed. Section 16 of the CLA NSW provides a scaled amount for each percentage of economic loss.

We append the section 16 scaled amounts for your reference at page 37.

Out of pocket expenses

Out of pocket expenses are generally medical expenses incurred in order to treat the injuries and disabilities suffered as a result of the negligence of the defendant. These expenses are claimable as damages. Out of pocket expenses may take the form of past out of pocket expenses and future out of pocket expenses.

Past out of pocket expenses can generally be easily quantified by reference to government notices, private health statements and with receipts from pharmacies and other medical service providers. Future out of pocket expenses are typically the subject of expert opinion and comment involving an assessment of the expenses associated with the plaintiff's claimed injury that are likely to be incurred in the future.

Economic loss - Sections 12 and 13

In personal injury proceedings, damages are commonly awarded for loss of earning capacity or economic loss. Economic loss represents the income that a plaintiff would have earned but is now incapable of earning as a result of injuries and disabilities arising from the negligent act or omission. As with out of pocket expenses, economic loss may be divided into past economic loss and future economic loss.

Past economic loss due to loss of earnings or the deprivation or impairment of earning capacity is available pursuant to section 12 of the CLA NSW. A plaintiff can also recover under section 12 for future economic loss as a result of having been deprived of the ability to earn income in the future. They may also claim for the loss of expectation of financial support.

In calculating future economic loss, a court must determine what the plaintiff's most likely future circumstances would have been but for the injury. Economic loss must be assessed by reference to those circumstances.

The maximum that can be awarded is three times the average weekly wage for a full-time adult in NSW, where the plaintiff's earnings would have been equal to or more than this amount. As at November 2024, in Australia the average weekly earnings for full time ordinary hours worked by adults were \$1,975.80.⁴¹

Although calculation for future economic loss has traditionally been awarded (for permanent injuries) to the retirement age of 65, frequently, evidence is led as to the plaintiff's intention to work past the age of 65. Such submissions are assisted by the increase in age for retirement to 67 and, depending on the age of the plaintiff, 67 is commonly treated as the acceptable age for retirement in assessing future economic loss.

⁴¹ *Average Weekly Earnings, Australia* is issued in May and November and is available at www.abs.gov.au

A plaintiff is also entitled to loss of employer superannuation contributions based on the income assessed in accordance with sections 12 and 13. In calculating damages for future economic loss (and for all future heads of damage), a discount rate is to be applied, being a discount rate of 5% or as otherwise prescribed by regulations (section 14).

Domestic assistance - Section 15

In circumstances where a person requires personal care or domestic services as a result of the negligently inflicted injury, an amount can be awarded to compensate the plaintiff for the care that was provided (*Woolworths Ltd v Lawlor*⁴²). Domestic assistance is split into two categories - namely, assistance which is "gratuitous" and "commercial". Gratuitous services are attendant care services:

- that have been or are to be provided by another person to a claimant; and
- for which the claimant has not paid or is not liable to pay.

Commercial assistance, as the phrase suggests, is when attendant care services have been provided and the services provider has received consideration for the provision of those services.

Section 15 of the CLA NSW restricts the circumstances where a claimant can be awarded gratuitous domestic assistance. No damages may be awarded to a claimant for gratuitous attendant care services if the services are provided or are to be provided "for less than 6 hours per week and for less than 6 months."

The use of the word "and" was specifically included in the CLA NSW following the case of *Harrison v Melhem*.⁴³

In the decision of *Coles Supermarket Australia Pty Ltd v Haleluka*,⁴⁴ the court held that section 15 does not require an objective assessment of reasonable time to complete a particular service. Here, the plaintiff's husband took seven hours to perform a service that the evidence suggested would take paid professional cleaners only five hours to complete. The court held that such a finding did not make the plaintiff's husband's evidence unacceptable. It found no error in the trial judge's award for past gratuitous care.

Commercial assistance is not limited by the section 15 provisos. Nevertheless, the plaintiff will not be entitled to future commercial assistance in circumstances where he/she is receiving gratuitous assistance and there is no evidence to suggest that such assistance would cease in the future (*Miller v Galderisi*⁴⁵).

If required for 40 hours *or more* per week, the amount of damages that may be awarded for gratuitous attendant care services is capped at the average *weekly* total earnings for employees in NSW,⁴⁶ for the period between the date of injury and the date of the award.

If the services are required for *less* than 40 hours per week, the amount of damages that may be awarded is calculated at an *hourly* rate of one fortieth of the amount determined in the paragraph above. The current rate for the provision of gratuitous attendant care services is \$36.24 per hour.

⁴² *Woolworths Ltd v Lawlor* [2004] NSWCA 209

⁴³ *Harrison v Melhem* [2008] NSWCA 67

⁴⁴ *Coles Supermarket Australia Pty Ltd v Haleluka* [2012] NSWCA 343

⁴⁵ *Miller v Galderisi* [2009] NSWCA 353

⁴⁶ As determined by the Australian Statistician (each quarter) - see www.abs.gov.au

Child abuse

Part 1B (Liability of Organisations) was inserted in 2018 and contains reforms regarding duty of care, vicarious liability and identifying a proper defendant. Part 1C (Setting Aside Settlements), inserted in 2021, provides for a court to set aside a previous settlement if it is just and reasonable to do so. Part 2A (Special Provisions for Offenders in Custody), amended in 2021, retrospectively removes the application of Part 2A in relation to an injury arising from child abuse.

These amendments follow recommendations made in the Royal Commission into Institutional Responses to Child Sexual Abuse and follow similar reforms in other jurisdictions.

Duty of care

Division 2 imposes a prospective duty on organisations that wholly or partly hold responsibility over a child to prevent child abuse from occurring. This provision reverses the onus of proof in negligence by establishing a duty which the organisation must demonstrate it has adhered to by ensuring proper systems were in place and observed.

If child abuse occurs, there is a presumption that the organisation failed in its duty of care unless it can prove that reasonable precautions were taken to prevent the abuse. Factors that a court may take into consideration when determining if an organisation took reasonable care are contained in section 6F(4).

Vicarious liability

Division 3 expands the vicarious liability of organisations from employees to include non-employees who are "akin to an employee" (being individuals who carry out activities as an integral part of the activities carried on by and for the benefit of the organisation).

An exclusion is contained in section 6G(3) in respect of individuals who carry out activities for a recognisably independent business (ie an independent contractor) or an authorised carer (adopting the meaning of that role from section 137 of the CCYP Act⁴⁷).

Section 6H is in addition to the identical common law position outlined by the High Court of Australia in *Prince Alfred College Incorporated v ADC*.⁴⁸ An organisation is vicariously liable for child abuse perpetrated by an employee if the employee took advantage of their role that provided them the occasion to perpetrate the abuse. In determining if the employee's role provided the occasion for the abuse, a court is to take into account the authority, power or control over the child, the trust of the child and the ability to achieve intimacy with the child.

The landmark High Court decision in the case of *Bird v DP*⁴⁹, delivered on 13 November 2024, determined the boundaries of vicarious liability in child abuse matters. The case of *Bird v DP* concerned allegations of child abuse perpetrated by a priest of the Catholic Diocese of Ballarat (**Diocese**) in 1971, and it was agreed that the priest was not an employee of the Diocese. The High Court found by majority that on the question of whether vicarious liability ought to be extended to apply to relationships that are "akin to employment", the answer is no. In other words, there can be no finding of vicarious liability in child abuse matters unless there is an employee/employer relationship between the alleged perpetrator and the institution being held liable. This decision is contrary to the approach in overseas jurisdictions like the United Kingdom and Canada who have readily expanded vicarious liability to non-employment relationships. The High Court stated in this regard that it is for the legislatures to expand vicarious liability.

Proper defendant

Division 4 enables the appointment of a proper defendant with suitable assets for cases brought against an unincorporated association.

⁴⁷ *Children and Young Persons (Care and Protection) Act 1998*

⁴⁸ [2016] HCA 37

⁴⁹ *Bird v DP (a pseudonym)* [2024] HCA 41

This reform applies prospectively and retrospectively and overcomes the impediment that plaintiffs could not previously bring proceedings against unincorporated associations because they do not exist as a juridical entity.⁵⁰

In some child abuse claims, it may be the case that the relevant institution is unincorporated but established and governed by another legal entity capable of being a named defendant. If the unincorporated institution is named as the defendant, the establishing legal entity is able to appoint itself in lieu as the proper defendant. This does not make the two one and the same but allows the latter to conduct the litigation on behalf of and respond to the malfeasance of its unincorporated sub-part⁵¹.

Setting aside settlements

Part 1C allows for a court to set aside settlements of certain child abuse claims entered into prior to legislative reforms in:

- 2016 (section 6A of the Limitation Act 1969, which removed the limitation period for civil claims involving child sexual abuse, serious physical abuse and any other abuse perpetrated in connection with sexual or serious physical abuse); and
- 2018 (ie Part 1B identified above);

if it is "just and reasonable" to do so.

In determining whether it is just and reasonable to set aside an "affected agreement", the court may consider the amount paid, the bargaining position of the parties, the conduct of the parties and their legal representatives and any other matters the court considers relevant.

Part 1C does not, however, allow for a court to set aside an acceptance of an offer made under the National Redress Scheme,⁵² certain agreements between defendants or contracts of insurance.

If an affected agreement is set aside, the defendant cannot recover the amount paid to the plaintiff under that agreement. Rather, that amount may be taken into account in determining the damages payable.

The first judgment on Part 1C was in the matter of *EXV v Uniting Church in Australia Property Trust (NSW)*⁵³ handed down on 2 May 2024. After a mediation in December 2008 the plaintiff accepted a settlement sum from the defendant of \$115,000 inclusive of costs in exchange for his entering into a deed which released the defendant from liability for any further claims arising from his allegations. These allegations were of child sexual abuse perpetrated by a teacher while the plaintiff was a student in November 2002. This prior claim was unlitigated and both parties were legally represented at all times. The court ultimately upheld the prior Deed in favour of the defendant.

The Supreme Court's judgment in *EXV* demonstrates the unfettered scope of matters a Court may consider in determining whether to exercise its discretion to set aside a prior deed, and that evidence of either a limitation period or Ellis defence issue (ie. "legal barriers") being a material influence on the plaintiff's decision to settle at the time the prior deed was entered into is a persuasive reason in favour of doing so.

These considerations cumulate to reinforce that each deed set aside application going forward will ultimately turn on its own unique facts, and that it is not enough for a limitation period or 'Ellis defence' to have merely been available at the time. There must be evidence of these legal barriers having a material influence on the settlement to activate that undoubtedly strong, but not guaranteed, argument in favour of a deed being set aside.

Permanent stays

A permanent stay is an exceptional remedy available to a Court to indefinitely stop a proceeding from continuing because a fair trial is not possible. A Court's power to permanently stay a proceeding is born from section 67 of the *Civil Procedure Act 2005*. The 2016 amendments to the *Limitation Act 1969* (abolishing

⁵⁰ *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117 at [47]

⁵¹ *BB6 v State of New South Wales* [2021] NSWSC 1516

⁵² National Redress Scheme for Institutional Child Sexual Abuse

⁵³ *EXV v Uniting Church in Australia Property Trust (NSW)* [2024] NSWSC 490

limitation periods for child abuse claims) did not remove a Court's power to permanently stay proceedings in relation to child abuse.

A defendant in a child abuse claim can seek a permanent stay where the lapse of time has such a burdensome effect on them such that a fair trial is not possible. Tendency evidence may not be able to overcome the prejudice a defendant faces in the absence of direct evidence of the allegations. Other factors for consideration include the unavailability of key witnesses or documentary evidence or death of the alleged perpetrator, however, the presence of any of these is now considered insufficient cause for the granting of a permanent stay in a child abuse matter. Further, the onus to establish that a fair trial is not possible lies solely with the defendant which needs to demonstrate comprehensive, if not exhaustive, efforts to find evidence relating to the claim.

Each case will turn on its unique facts but the abovementioned factors will now not likely persuade a Court to grant a permanent stay. There is now an acknowledgement by the Courts that these are common denominators in many historical child abuse matters meaning the bar is raised high in terms of the extreme circumstances in which a permanent stay, now emphasised as an exceptional remedy or tool of last resort, is justified. This guidance comes from three High Court judgments handed down between 2023 and 2024⁵⁴.

Offenders in custody

Section 26B(2A) has the effect of prospectively and retrospectively removing the application of Part 2A (special provisions for offenders in custody restricting awards of damages) where an injury has arisen from child abuse (being sexual abuse or physical abuse against a child, but not an act that was lawful at the time that it was done).

Prior to this amendment, Part 2A had the effect that a plaintiff would have to meet a minimum 15% permanent impairment in order to recover any damages, and those damages would be restricted.

In effect, this means that claims for child abuse that occurred in custody are treated in the same way as child abuse that occurred in other institutional settings.

Plaintiffs in custody

There are often two key considerations specific to plaintiffs in custody who bring claims for historical child abuse:

- Pursuant to section 4 of the *Felons (Civil Proceedings) Act 1981* (NSW) an incarcerated person requires leave from the Court in which they intend to commence a proceeding. However, the threshold for leave only requires the person to show the proceeding is not an abuse of process and there is, on its face, grounds for bringing the action; and
- A plaintiff cannot claim damages for any loss (eg, economic loss) consequential to their incarceration⁵⁵. The principal being that civil law would contravene criminal law if it were to impute responsibility to a tortfeasor for an individual's wrongful act.

⁵⁴ *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; *Wilmot v State of Queensland* [2024] HCA 42; *RC v The Salvation Army (Western Australia) Property Trust* [2024] HCA 43.

⁵⁵ *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500

Dust diseases

Introduction

In 1989 the New South Wales government established the Dust Diseases Tribunal as a specialised tribunal to hold exclusive jurisdiction in New South Wales to hear claims related to dust-related condition. The objective of the Tribunal was to deliver outcomes of claims for sufferers of dust-related conditions, given the often short life expectancies from the time of diagnosis and manifestation of symptoms.

Governed by the *Dust Diseases Tribunal Act 1989*, the Tribunal has exclusive jurisdiction to hear and determine claims brought by or on behalf of people suffering or who have suffered from a dust-related condition.

A dust-related condition is defined as one of the following:

- aluminosis;
- asbestosis;
- asbestos induced carcinoma;
- asbestos related pleural disease;
- bagassosis;
- berylliosis;
- byssinosis;
- coal dust pneumoconiosis;
- farmers' lung;
- hard metal pneumoconiosis;
- mesothelioma;
- silicosis;
- silico-tuberculosis;
- talcosis; or
- any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust.

There are a number of procedural aspects unique to the *Dust Diseases Tribunal Act 1989* including the following:

- awards for provisional damages;
- no limitation periods for claims by or on behalf of injured claimants;
- damages for non-economic loss surviving for the benefit of a deceased's estate;
- the ability to rely on historical and general medical evidence which has been admitted into previous proceedings before the Tribunal; and
- the inability to relitigate issues of a general nature which have already been determined by the Tribunal.

Finally, there is the Claims Resolution Process set up by the *Dust Diseases Tribunal Regulation 2019* to deal specifically with asbestos-related conditions.

We provide a brief overview of the above elements under separate headings below.

Awards for provisional damages

Pursuant to section 11A of the *Dust Diseases Tribunal Act 1989*, a claim can be brought by an injured person in respect to the dust-related conditions that have materialised at the time of commencement of their proceedings. The same injured person is then entitled to bring a further claim for damages arising from the same cause or causes of action, in the event that they develop further dust-related conditions.

We see in many cases, an injured person will bring a claim for provisional damages in relation to their conditions of asbestos related pleural disease and/or asbestosis, with a view to preserving their rights to commence subsequent proceedings in the event that they develop mesothelioma.

No limitation period

Section 12A of the *Dust Diseases Tribunal Act 1989* enables proceedings to be brought by or on behalf of someone suffering from or who has suffered from a dust-related condition at any time.

Specifically, nothing in the *Limitation Act 1969* or any other statute of limitations can preclude the commencement of proceedings by or on behalf of someone in relation to a dust-related condition.

Survival of damages

In circumstances where proceedings have been brought by an injured person in respect to a dust-related condition prior to their death, section 12B of the *Dust Diseases Tribunal Act 1989* operates to enable the deceased's estate, to recover damages for the deceased's pain and suffering and loss of expectation of life, but only in circumstances where the deceased's death is attributable to the dust-related condition.

Section 25(3) material and Section 25B

Section 25(3) of the *Dust Diseases Tribunal Act 1989* provides that historical evidence and general medical evidence concerning dust exposure and dust diseases which has been admitted in any proceedings before the Tribunal may, with the leave of the Tribunal, be received as evidence in any other proceedings before the Tribunal, whether or not the proceedings are between the same parties.

Similarly, section 25(3) of the *Dust Diseases Tribunal Act 1989* provides that issues of a general nature determined in proceedings before the Tribunal may not be relitigated or reargued in other proceedings before the Tribunal without the leave of the Tribunal, whether or not the proceedings are between the same parties.

The objective of the two provisions above are to shorten the length of trials as well as reduce trial costs.

The claims resolution process

In attempt to further improve the efficiency with which dust diseases claims are resolved, the New South Wales Government introduced the *Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005* into Parliament on 5 May 2005. On 26 May 2005, the *Dust Diseases Tribunal Amendment (Claims Resolution) Act 2005* was assented to Parliament. Through various amendments, the Claims Resolution Process now operates under the *Dust Diseases Tribunal Regulation 2019*.

The Claims Resolution Process applies to all **asbestos-related** claims commenced on or after 1 July 2005 and involves the filing of a Statement of Claim and Statement of Particulars. A timetable commences upon service of the Statement of Particulars and in respect to malignant claims such as mesothelioma, Defendants have up to 20 days to issue any Cross Claim proceedings in accordance with section 25 of the *Dust Diseases Tribunal Regulation 2019*.

The Defendants and Cross Defendants must then file and serve a formal Reply to the Plaintiff's claim, which addresses a number of issues including liability, insurance, damages, and apportionment. An original Defendant (as sued by or on behalf of the injured person) is required to file a Reply within 20 business days (malignant claims) from the service of the Statement of Particulars and any other Defendant including Cross Defendants are required to file a Reply **within 30 business days from the date of service of the Statement of Particulars on the last of the original defendants**.

Within 35 days from the service of the Statement of Particulars, the Defendants and Cross Defendants are to reach an agreement regarding apportionment. If such agreement is not reached, the Registrar will refer the matter to a Contributions Assessor who will make a preliminary determination on apportionment within 40 days from the service of the Statement of Particulars.

The Contributions Assessor will have regard to the Replies filed and the Standard Presumptions on Apportionment.

It is open for a Defendant/Cross Defendant to challenge the Contributions Assessor's determination and have apportionment determined by the Tribunal. If the Defendant/Cross Defendant does not "materially improve" its position following the Tribunal's determination, that Defendant/Cross Defendant is liable to pay the costs of all other parties occasioned by the dispute, on an indemnity basis.

To "materially improve" its position, the Defendant/Cross Defendant must be found liable for at least 10% less than what the Contributions Assessor found, or \$20,000 whichever is the greater.

In our experience, a Defendant/Cross Defendant very rarely challenges the Contributions Assessment given the cost implications if the challenge fails.

Compulsory Mediation

Once the matter has proceeded through the Claims Resolution Process to a stage where apportionment has been either agreed or determined by a Contributions Assessor, the matter will be subject to a compulsory mediation. Naturally, it is at this stage that the parties explore settlement with the Plaintiff.

Removal of matter from the Claims Resolution Process

Regulation 20 of the *Dust Diseases Tribunal Regulation 2019* outlines the various ways in which matters can be removed from the Claims Resolution Process and returned to the Dust Diseases Tribunal. The three scenarios that can result in a matter being removed from the Claims Resolution Process are if the Tribunal determines that the matter is urgent upon proper application, **all parties agree** for the matter to be removed, and where any party is in breach of the Claims Resolution Process and the Tribunal finds that such breach has resulted in substantial prejudice to one or more of the other parties.

Standard Presumptions on Apportionment

The Standard Presumptions on Apportionment are outlined in the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007*. Essentially, it categorises Defendants/Cross Defendants as either a Category 1 Defendant or Category 2 Defendant, or both.

A Category 1 Defendant includes entities who engage in a business which relates to miners, manufacturers, suppliers and/or installers of asbestos products or plant and equipment which contained asbestos.

A Category 2 Defendant includes all other entities which may not be classified as a Category 1 Defendant and often include users of asbestos, occupiers of premises and employers of staff who were exposed to asbestos in the course of their employment.

The Standard Presumptions on Apportionment then differentiate between four different periods of exposure and apportion liability between the Category 1 and Category 2 Defendants. We outline the table for your convenience below:

	Date of Exposure	Standard Presumption for each Category of Defendants
Period A	Before 1 January 1961	Category 1: 75 percent Category 2: 25 percent
Period B	Between 1 January 1961 and 31 December 1978	Category 1: 65 percent Category 2: 35 percent
Period C	Between 1 January 1979 and 31 December 1989	Category 1: 60 percent Category 2: 40 percent
Period D	After 1 January 1990	Category 1: 40 percent Category 2: 60 percent

You will see that as the period of exposure becomes more recent in time, the liability of the Category 2 Defendants increases. This is due to a wide range of reasons, one of which is that Category 2 Defendants (employers/occupiers/users) should have acquired an increased level of knowledge regarding the detrimental health effects of exposure to asbestos and ought to have taken further steps to reduce or avoid the levels of exposure to asbestos for which they are liable.

When a Contributions Assessor determines apportionment, the ultimate liability of a Defendant within Periods A, B or C must be within 20 percentage points (less or greater) than the percentage applicable for that Defendant with respect to the relevant period of exposure. For any Defendant/Cross Defendant within Period D, the extent of variation increases to a maximum of 30 percentage points.

In most cases, there are multiple Defendants implicated for multiple periods of exposure and the Contributions Assessor's task can become quite difficult. Liability must also be determined between multiple Defendants in the same Category of Defendants. For example, multiple employers (Category 1 Defendants) in the one period of exposure. The approach adopted by the Contributions Assessor is influenced by the condition from which the Plaintiff suffers, arguments raised in the various Replies, assessments made by the Plaintiff and the time each Defendant is implicated, as a percentage of the overall period of exposure.

Should a claim fail to resolve at Mediation, the matter is returned to the Dust Diseases Tribunal for case management and ultimate Hearing on the merits.

Assessment of damages for personal injury

Non-economic loss and economic loss

Damages for non-economic loss in the Dust Diseases Tribunal is a common law assessment, without reference to a "most extreme case" or a "whole person impairment" as can be found in other NSW jurisdictions.

Similarly damages for economic loss are assessed without reference to statute.

Please see our summary of reported decisions for a guide to the assessment of damages for non-economic loss.

Out of pocket expenses

Out of pocket expenses are generally medical expenses incurred in order to treat the injuries and disabilities suffered as a result of the negligence of the Defendant. These expenses are claimable as damages. Out of pocket expenses may take the form of past out of pocket expenses and future out of pocket expenses.

Past out of pocket expenses can generally be easily quantified by reference to government notices, private health statements and with receipts from pharmacies and other medical service providers. Future out of pocket expenses are typically the subject of expert opinion and comment involving an assessment of the expenses associated with the plaintiff's claimed injury that are likely to be incurred in the future.

Domestic assistance and replacement services - Sections 15A and 15B

In many claims involving sufferers of dust-related illnesses, claimants can be entitled to compensation for the reasonable costs of domestic assistance (past and future) required as a result of their condition.

Section 15A of the *Civil Liability Act 2002* related specifically to the provision of damages for gratuitous attendant care services for dust-related conditions.

Unlike damages for past and future domestic assistance under section 15 of the *Civil Liability Act 2002*, entitlement to such damages in dust-related claims are not subject to any statutory thresholds otherwise imposed by section 15(3) of the *Civil Liability Act 2002*.

Damages for past and future domestic assistance is often assessed on the basis of expert opinion and lay evidence as to a claimant's need for care.

Similarly, sufferers of dust-related illnesses may also be entitled to seek damages in respect to past and future replacement services, also known as *Sullivan v Gordon*⁵⁶ damages, pursuant to section 15B of the *Civil Liability Act 2002*.

Damages for replacement services can be substantial, and relate to the costs associated with care and assistance that would have otherwise been provided by the injured claimant, to a dependant, but for the claimant's illness.

⁵⁶ *Sullivan v Gordon* (1999) 47 NSWLR 319

Decisions in relation to assessments of non-economic loss in dust disease cases

2008

Giuseppe Zappia v Amaca Pty Limited [2008] NSWDDT 2

Plaintiff was a 71-year-old male who developed mesothelioma as a result of his occupational exposure to asbestos between 1958 and 1960.

Illness: Mesothelioma.

Non-Economic Loss: \$230,000

Curtis J (22 January 2008)

Shaw v Amaca Pty Limited & Anor [2008] NSWDDT 3

Plaintiff was a 66-year-old male who suffered occupational exposure to asbestos but with liability and exposure being admitted, details of his exposure were not clear.

Illness: Asbestosis and Asbestos Related Pleural Disease.

Non-Economic Loss: \$100,000

O'Meally P (14 February 2008)

Tromp v Amaca Pty Limited [2008] NSWDDT 10

Plaintiff was a 76-year-old male who was exposed to materials containing asbestos which were manufactured and/or supplied by James Hardie & Coy Pty Limited over an undisclosed period of exposure (liability admitted).

Illness: Mesothelioma.

Non-Economic Loss: \$220,000

Kearns J (22 April 2008)

Hilda McNamara v Amaca Pty Limited [2008] NSWDDT 36

The Plaintiff was a 71-year old female who was exposed to asbestos dust and fibres liberated from building products used in the renovation of her home in Canberra between 1972 and 1983.

Illness: Mesothelioma.

Non-Economic Loss: \$250,000

Curtis P (5 December 2008)

2009

Phillip Raymond Kirkpatrick v Babcock Australia Pty Limited [2009] NSWDDT 4

Plaintiff was a 61-year-old male who was exposed to asbestos whilst employed as an engineer by the Defendant over an undisclosed period.

Illness: Mesothelioma.

Non-Economic Loss: \$280,000

Curtis J (1 April 2009)

Brian Anthony Mooney v Amaca Pty Limited ([2009] NSWDDT 23

Plaintiff was a 59-year-old male who suffered occupational exposure to asbestos whilst employed as an electrical contractor.

Illness: Mesothelioma

Non-Economic Loss: \$290,000

Curtis J (24 September 2009)

Bill Bramwell Roberts v Amaca Pty Limited [2009] NSWDDT 28

Plaintiff was a 64-year-old male who was exposed to asbestos dust and fibre from asbestos cement building products during the course of home renovations between 1966 and 1967.

Illness: Mesothelioma.

Non-Economic Loss: \$275,000

Curtis J (20 November 2009)

2010

John William Booth v Amaca Pty Limited & Anor [2010] NSWDDT 8

Plaintiff was a 75-year-old male exposed to asbestos dust from asbestos brake linings during the course of his employment as a motor mechanic between 1953 and 1983.

Illness: Mesothelioma.

Non-Economic Loss: \$250,000

Curtis J (10 May 2010)

Phillips v Amaca Pty Limited [2010] NSWDDT 11

Plaintiff was a 60-year-old female who was exposed to asbestos during an undisclosed period of time and liability was admitted.

Illness: Mesothelioma

Non-Economic Loss: \$250,000

O'Meally P (27 July 2010)

Hicks v Amaca Pty Limited [2010] NSWDDT 16

Plaintiff was a 66-year-old male who was exposed to materials containing asbestos which were manufactured and/or supplied by James Hardie & Coy Pty Limited over an undisclosed period of exposure (liability admitted).

Illness: Asbestosis.

Non-Economic Loss: \$150,000

Kearns J (30 November 2010)

2011

McGrath v Allianz Australia Insurance Limited [2011] NSWDDT 1

Plaintiff was a 65-year-old male who had previously received an award for provisional damages in the sum of \$140,000 and then made a further claim for damages on account of his illness

Illness: Asbestos Related Pleural Disease followed subsequently by Mesothelioma.

Non-Economic Loss: \$215,000 (with previous award not taken into account)

O'Meally P (15 March 2011)

Reilly v Malabar Electric Pty Limited & Ors [2011] NSWDDT 9

The deceased was 65 years of age at the time of his death and was exposed to asbestos whilst working as an electrician from 1960 to 1980.

Illness: Asbestosis

Non-Economic Loss: \$200,000

O'Meally P (14 February 2008)

2012

No notable decisions.

2013

Perez v State of New South Wales [2013] NSWDDT 1

Plaintiff was a 78-year-old male who sustained bystander exposure whilst asbestos roofing was removed and replaced in his presence whilst employed by the Public Transport Commission of New South Wales in 1987.

Illness: Mesothelioma.

Non-Economic Loss: \$290,000

Curtis J (26 February 2013)

Raymond John Dean v Tower Insurance Limited [2013] NSWDDT 9

Plaintiff was a 61-year-old male who suffered occupational exposure to asbestos during the course of his employment at Rogers Meatworks in the 1960's.

Illness: Mesothelioma

Non-Economic Loss: \$290,000

Finnane J (30 July 2013)

2014

Dunning v BHP Billiton Limited [2014] NSWDDT 3

Plaintiff was a 54-year-old male who was employed by BHP Billiton Limited at its Newcastle Steelworks from 1979 to 1981 when he was exposed to asbestos.

Illness: Mesothelioma.

Non-Economic Loss: \$500,000

Kearns J (31 July 2014)

Colin McMaster Rodgers v Amaca Pty Limited [2014] NSWDDT 1

Plaintiff was a 72-year-old male who was exposed to asbestos during the course of his employment as a carpenter between 1958 and 1967.

Illness: Mesothelioma.

Non-Economic Loss: \$350,000

Finnane J (21 January 2014)

2015

No notable decisions.

2016

Jolly v Idameneo (No 789) Limited [2016] NSWDDT 5

The deceased was exposed to materials containing asbestos dust and fibre during his employment as a supervisor and forklift driver between 1975 and 1977.

Illness: Mesothelioma.

Non-Economic Loss: \$300,000

Kearns J (13 December 2016)

Andrew Georgiou as Executor of the Estate of the Late Christakis Georgiou v Magnus Goldring Pty Limited [2016] NSWDDT 4

The deceased was a 83 years of age at the time of his death and had been exposed to asbestos during his employment with the Defendant from 1954 to 1963 and again in the early 1970's.

Illness: Mesothelioma

Non-Economic Loss: \$315,000

Scotting AJ (16 December 2016)

2017

Zanetic v Amaca Pty Limited [2017] NSWDDT 5

Plaintiff was a 78-year-old male who was suffered occupational exposure to products containing asbestos whilst working as a builder from 1962 to 1972.

Illness: Mesothelioma.

Non-Economic Loss: \$350,000

Russell SC J (7 July 2017)

Dib v Amaca Pty Limited [2017] NSWDDT 6

Plaintiff was a 77-year-old male who was exposed to asbestos cement building products whilst working as a plumber from 1975 to 1984.

Illness: Mesothelioma.

Non-Economic Loss: \$350,000

Russell SC J (22 August 2017)

Londos v Amaca Pty Limited [2017] NSWDDT 7

Plaintiff was 79 years of age and was exposed to asbestos during the course of his employment as a carpenter from 1978 to 1994.

Illness: Mesothelioma.

Non-Economic Loss: \$350,000

Russell SC J (22 August 2017)

Anthony David Talifero v Amaca Pty Limited [2017] NSWDDT 14

The deceased was 86 years of age at the time of his death and was exposed to asbestos during the course of his work as a self-employed painter from 1971 to 1996.

Illness: Mesothelioma.

Non-Economic Loss: \$360,000

Russell SC J (11 December 2017)

2018

Lavis v Amaca Pty Limited [2018] NSWDDT 6

Plaintiff was a 76-year-old male who was exposed to asbestos cement products in the course of constructing a large storage shed in about 1974.

Illness: Mesothelioma

Non-Economic Loss: \$370,000

Scotting L (24 April 2018)

Webber v Comcare [2018] NSWDDT 10

Plaintiff was an 86-year-old male who was exposed to materials containing asbestos during his service in the Royal Australian Air Force between 1956 and 1984.

Illness: Mesothelioma.

Non-Economic Loss: \$350,000

Russell SC J (11 December 2018)

2019

Ronald William Phillips v Amaca Pty Limited [2019] NSWDDT 5

Plaintiff was a 84 years of age and was exposed to asbestos cement building materials whilst carrying out building and construction work in the Sutherland Shire between 1977 and 1985.

Illness: Mesothelioma.

Non-Economic Loss: \$350,000

Strathdee J (24 May 2019)

Piatti v ACN 000 246 542 Pty Limited & Anor [2019] NSWDDT 7

The deceased (unknown age) was exposed to asbestos cement fibro sheets during the course of his employment from 1965 to 2007.

Illness: Mesothelioma

Non-Economic Loss: \$370,000

Russell SC J (23 August 2019)

2020

Williams v Amaca Pty Limited [2020] NSWDDT 2

Plaintiff was a 71-year-old male who was exposed to asbestos cement building products in the 1960's.

Illness: Mesothelioma.

Non-Economic Loss: \$385,000

Scotting J (11 March 2020)

Boland v Amaca Pty Limited [2020] NSWDDT 4

Plaintiff was an 84-year-old male worked in the construction industry over many years since 1952 and was exposed to asbestos cement building products.

Illness: Asbestos Related Pleural Disease.

Non-Economic Loss: \$350,000

Scotting J (4 May 2020)

2021

No notable decisions.

2022

Headon v Amaca Pty Limited [2022] NSWDDT 5

Plaintiff was 82 years of age and exposed to asbestos cement building products whilst working as a bricklayer and labourer from 1954 to 1985.

Illness: Asbestosis and Asbestos Related Pleural Disease.

Non-Economic Loss: \$350,000

Strathdee J (19 September 2022)

Hudson v Amaca Pty Limited [2022] NSWDDT 6

The deceased was 71 years of age and was exposed to asbestos cement building products whilst working as a builder in New South Wales and the Australian Capital Territory from 1980 to 1986.

Illness: Mesothelioma.

Non-Economic Loss: \$360,000

Russell SC J (21 November 2022)

2023

Torok v Allianz Australia Insurance Limited [2023] NSWDDT 2

The Plaintiff was 83 years of age and worked at the Cockatoo Dockyards as a painter and docker in the late 1980s and was exposed to asbestos during the course of his employment.

Illness: Mesothelioma.

Non-Economic Loss: \$420,000

Russell SC J (23 May 2023)

Armitage v State of New South Wales [2023] NSWDDT 3

The deceased (aged in her late 70's at the time of her death) was exposed to asbestos dust and fibre liberated from her husband's work clothes.

Illness: Mesothelioma

Non-Economic Loss: \$450,000

Strathdee J (21 July 2023)

2024

Bradley v Amaca Pty Limited [2024] NSWDDT 1

The Plaintiff was 79 years of age and was a self-employed carpenter who was exposed to building materials containing asbestos dust and fibre.

Illness: Mesothelioma.

Non-Economic Loss: \$500,000

Strathdee J (9 February 2024)

Davis v Amaca Pty Limited [2024] NSWDDT 2

The Plaintiff was an 82 year old retired carpenter who worked in South Australia between 1955 and 1968. He then worked in Queensland as a carpenter between 1969 and 1977 and then a self-employed carpenter in Queensland from 1977 to 1983. The Plaintiff also built residential dwellings in Queensland in 1969 and again in 1978. At all material times, the Plaintiff was handled and was exposed to James Hardie building products containing asbestos.

Illness: Mesothelioma

Non-Economic Loss: \$475,000

Russel SC DCJ (22 February 2024)

Keogh v CPB Contractors Pty Limited (No 2) [2024] NSWDDT 9

The Plaintiff was 52 years of age who sought damages in respect to various respirable diseases as a result of his occupational exposure to dust whilst working in coal mines in Queensland and New South Wales. He then worked in Queensland as a carpenter between 1969 and 1977 and then a self-employed carpenter in Queensland from 1977 to 1983. The Plaintiff also built residential dwellings in Queensland in 1969 and again in 1978. At all material times, the Plaintiff was handled and was exposed to James Hardie building products containing asbestos.

Illness: Coal workers pneumoconiosis, silicosis, mixed dust pneumoconiosis, COPD, emphysema

Non-Economic Loss: \$750,000

Russel SC DCJ (25 July 2024)

Appendix

Determination of damages for non-economic loss

The CLA NSW governs the assessment of damages for negligence claims in the state of New South Wales. Damages are characterised as compensating economic or non-economic loss. Non-economic loss includes pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement (section 3 of the CLA NSW).

Non-economic loss damages are to be awarded pursuant to sections 16 and 17 of the CLA NSW:

Sections 16 and 17 - Determination of damages for non-economic loss

No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.

The maximum amount of damages that may be awarded for non-economic loss is set out in section 17 of the CLA NSW and is indexed annually on 1 October. As of 1 October 2024, the maximum amount is \$761,500⁵⁷ but the maximum amount is to be awarded only in a most extreme case.

No damages are awarded if the injuries suffered do not represent 15% or more of a most extreme case.

If the severity of the non-economic loss is equal to, or greater than 15% of a most extreme case, the damages for non-economic loss are to be determined in accordance with the percentages of a most extreme case as set out in section 16 of the CLA NSW. We have set out these percentages in the table that follows at page 37.

Step-by-step guide to assessing non-economic loss

- Determine the severity of the claimant's non-economic loss as a proportion of a most extreme case. The proportion should be expressed as a percentage.
- Using the table at page 37, apply the percentage of a most extreme case, note the percentage of the maximum amount and note the damages to be awarded which we have calculated for you.

⁵⁷ At the commencement of the CLA NSW on 20 March 2009 the maximum amount was \$350,000

Section 16 of the *Civil Liability Act 2002* No 22

% of most extreme case	% of max amount	Award (rounded)	% of most extreme case	% of max amount	Award (rounded)
1%			51%	51%	\$388,500
2%			52%	52%	\$396,000
3%			53%	53%	\$403,500
4%			54%	54%	\$411,000
5%			55%	55%	\$419,000
6%			56%	56%	\$426,500
7%			57%	57%	\$434,000
8%			58%	58%	\$441,500
9%			59%	59%	\$449,500
10%			60%	60%	\$457,000
11%			61%	61%	\$464,500
12%			62%	62%	\$472,000
13%			63%	63%	\$479,500
14%			64%	64%	\$487,500
15%	1%	\$7,500	65%	65%	\$495,000
16%	1.5%	\$11,500	66%	66%	\$502,500
17%	2%	\$15,000	67%	67%	\$510,000
18%	2.5%	\$19,000	68%	68%	\$518,000
19%	3%	\$23,000	69%	69%	\$525,500
20%	3.5%	\$26,500	70%	70%	\$533,000
21%	4%	\$30,500	71%	71%	\$540,500
22%	4.5%	\$34,500	72%	72%	\$548,500
23%	5%	\$38,000	73%	73%	\$556,000
24%	5.5%	\$42,000	74%	74%	\$563,500
25%	6.5%	\$49,500	75%	75%	\$571,000
26%	8%	\$61,000	76%	76%	\$578,500
27%	10%	\$76,000	77%	77%	\$586,500
28%	14%	\$106,500	78%	78%	\$594,000
29%	18%	\$137,000	79%	79%	\$601,500
30%	23%	\$175,000	80%	80%	\$609,000
31%	26%	\$198,000	81%	81%	\$617,000
32%	30%	\$228,500	82%	82%	\$624,500
33%	33%	\$251,500	83%	83%	\$632,000
34%	34%	\$259,000	84%	84%	\$639,500
35%	35%	\$266,500	85%	85%	\$647,500
36%	36%	\$274,000	86%	86%	\$655,000
37%	37%	\$282,000	87%	87%	\$662,500
38%	38%	\$289,500	88%	88%	\$670,000
39%	39%	\$297,000	89%	89%	\$677,500
40%	40%	\$304,500	90%	90%	\$685,500
41%	41%	\$312,000	91%	91%	\$693,000
42%	42%	\$320,000	92%	92%	\$700,500
43%	43%	\$327,500	93%	93%	\$708,000
44%	44%	\$335,000	94%	94%	\$716,000
45%	45%	\$342,500	95%	95%	\$723,500
46%	46%	\$350,500	96%	96%	\$731,000
47%	47%	\$358,000	97%	97%	\$738,500
48%	48%	\$365,500	98%	98%	\$746,500
49%	49%	\$373,000	99%	99%	\$754,000
50%	50%	\$381,000	100%	100%	\$761,500

NOTES:

1. Maximum amount = \$761,500
2. "Max amount" denotes the maximum amount to be awarded for non-economic loss damages per Section 16 (2)
3. The Civil Liability Act 2002 No 22 replaces the non-economic loss damages of the Health Care Liability Act 2001
4. Award figures are rounded to the nearest \$500

Recent decisions in relation to particular injuries in New South Wales

Ankle

Samahar Miski v Penrith Whitewater Stadium Ltd [2018] NSWDC 21

30% of a most extreme case

Plaintiff was a 32-year-old female who fell out of a white water raft and landed on her ankle.

Injuries: Fractured right ankle resulting in ongoing mechanical derangement of her ankle, which had a poor prognosis for improvement. There was also contested evidence of a secondary psychological injury.

Russell DCJ (20 February 2018)

Jeffery v Gowing Bros Ltd t/as Pacific Coast Shopping Centres [2017] NSWDC 267

27% of a most extreme case

Plaintiff was a 49-year-old female who was using a travellator at the defendant's shopping centre when she slipped and fell backwards.

Injuries: She suffered an oblique fracture of the lower shaft of the fibula extending to the level of the ankle joint. She also suffered a 8cm slightly pigmented and thickened scar over the left lower leg. She suffered ongoing pain and stiffness, as well as restriction in the left ankle.

Russell DCJ (26 September 2017)

Powell v Success Leadership Pty Ltd [2015] NSWDC 269

29% of a most extreme case

Plaintiff was a 49-year-old female who, during a 30 minute cardio gym class, injured herself after making contact with an exercise ball rolled in her direction by a child.

Injuries: Fracture to her distal calcaneus, also described as an inversion injury to her left heel and ankle, with associated soft tissue injury and swelling. Plaintiff underwent conservative treatment which had not improved the condition of her left foot and ankle. She underwent steroid injection to the affected area. Her condition plateaued. Plaintiff's injury reduced her walking and standing tolerance, affected the quality of her sleep, had a negative impact on her marital harmony and limited her ability to partake in recreational past times, which included a physical fitness regime, gardening, martial arts and gymnasium training.

Levy SC DCJ (17 November 2015)

Browne v Owners of Strata Plan No 55497 [2014] NSWDC 239

20% of a most extreme case

Plaintiff was a 43-year-old female who injured herself while stepping backwards into a hole in a drainage grate.

Injuries: Injury to right ankle (anterior subtalar joint injury and ligament tearing), fracture to right cuboid bone, bruising and continuing pain and disability. She made a substantial recovery from her injury by the time of the trial while also carrying out full-time employment and domestic tasks.

Gibson DCJ (1 September 2014)

Schultz v McCormack [2014] NSWDC 67

38% of a most extreme case

Plaintiff was a 55-year-old female who slipped and fell on a tiled step.

Injuries: Tri-malleolar fracture to right ankle, soft tissue injuries in left shoulder, left hip, and to lower back. Required four surgeries to the ankle after which she developed post-operative arthritis and an infection. She suffered a permanent limp and had difficulty driving a car.

Levy SC DCJ (20 June 2014)

David Aldred v Stelcad Pty Limited [2014] NSWDC 63

25% of a most extreme case

Plaintiff was a 28-year-old male who rolled his ankle after stepping into a hole in the concrete floor of a warehouse.

Injuries: Inversion injury to left ankle, deep vein thrombosis (requiring treatment over some months), chronic pain and numerous features of a complex regional pain syndrome. He was able to return to full-time work, though he required some assistance with heavier domestic tasks.

Mahony SC DCJ (6 June 2014)

Scott Cole v DIB Group t/as DIB Group Pty Limited trading as Hill & Co & Anor [2008] NSWDC 201

33% of a most extreme case

Plaintiff was a 38-year-old male who stepped on a pit cover which collapsed beneath him.

Injuries: Serious complex fracture to left ankle. Developed deep vein thrombosis and pulmonary embolism. His ankle was scarred, and he constantly suffered from pain and swelling.

Goldring DCJ (19 September 2008)

Sparks v Phegan [2007] NSWSC 616

50% of a most extreme case

Plaintiff was a 14-year-old female who was struck by a speedboat while swimming in a river.

Injuries: Grossly dislocated right ankle with severe lacerations to right leg. She required skin grafting for scarring to her back, right leg and left leg, and subsequently became very depressed and contracted a golden staph infection while hospitalised.

Hoeben J (18 June 2007)

Reynolds v City of Sydney Council [2018] NSWDC 334

30% of a most extreme case

Plaintiff was a 50-year-old male who tripped after placing his right foot on the lip of a gutter that was damaged due to a tree root, resulting in his right foot rolling and losing his balance causing him to injure his left foot.

Injuries: Complex Lisfrancs tarso-metatarsal joint fracture of the left foot. Minor muscle atrophy in the lower left leg. Severe pain in the morning and muscle cramps. Stiffness in the area as well as restriction of movement.

Russell SC DCJ (14 November 2018)

Guides Australia Inc v McMartin [2006] NSWCA 20

31% of a most extreme case

Plaintiff was a 61-year-old female who fell into a depressed section in the lawn outside a Girl Guides Hall.

Injuries: Major lateral right ligament tear of the right ankle requiring two surgeries and use of crutches, which resulted in a right rotor cuff tear and the need for anaesthetic nerve blocks in the shoulder and neck.

Handley JA, Young CJ and Campbell AJA (16 February 2006)

Baker v Bunnings Group Ltd [2020] NSWDC 310

28% of a most extreme case

Plaintiff was a 67-year-old female who injured herself when she fell from a raised concrete island in the carpark of the defendant's store.

Injuries: Fracture and dislocation of the left ankle, with significant continuing disabilities including pain in the left ankle and foot, poor mobility and a restricted range of motion in the left ankle.

Dicker SC (18 June 2020)

Ajia v TJ & RF Fordham Pty Ltd (t/as TRN Group) [2020] NSWDC 371

29% of a most extreme case

Plaintiff was a 29-year-old male who injured his ankle when he became entangled at a building site.

Injuries: Fracture of the right ankle, non-union of the deltoid ligament and avulsion fracture of the medial malleolus in the right ankle. Subsequent loss of power and stability in right foot.

Scotting DCJ (20 July 2020)

Than v Galletta & Ors [2019] NSWDC 9

32% of a most extreme case

Plaintiff was a 36-year-old female who injured her left foot when she fell while descending an unlit stairwell in the common area of a residential premises.

Injuries: Lisfranc fracture to the left foot, left ankle dislocation, subsequent scarring to the left foot, reduced standing and walking tolerance. High risk of degenerative osteoarthritis in left ankle.

Levy SC (8 February 2019)

Arm

Kelly v Thorn; Monteleone v Thorn (No 8) [2021] NSWSC 118

40% of a most extreme case

Plaintiff was a 31-year-old male who had a trailer deck dropped onto his arm by the defendant while he was unloading sheep from the defendant's trailer.

Injuries: Fracture of the distal shaft of the radius with dorsal angulation (right arm). High-grade tear to the scapholunate ligament. Radial malunion in right arm. Chronic pain in right arm and wrist. Weakness, wasting and deformity of right wrist and arm. Major depressive disorder and generalised anxiety disorder leading to excessive consumption of alcohol.

Cavanagh J (19 February 2021)

Chapman v Dickinson (No 2) [2020] NSWDC 847

28% of a most extreme case

Plaintiff was a 59-year-old male who was injured when the bucket of a front end loader closed on his left arm at White Heavy Haulage industrial worksite.

Injuries: Significant crush injury to dorsal aspect left forearm with fracture of distal third of radius and significant crush injury impacting wrist and hand. Consequential left hand numbness, weakness and lack of dexterity. Limited range of movement in left shoulder, arm and hand. Adjustment disorder.

Taylor SC DCJ (18 December 2020)

Taj v David Pearce trading as Sydney Lifting & Rigging [2020] NSWDC 740

28% of a most extreme case

Plaintiff was a 49-year old male who jumped off a truck, fell to the ground and sustained a right elbow fracture after a stapling machine toppled off the defendant's truck and onto the plaintiff.

Injuries: Right elbow fracture. Right elbow movement restriction. Periodic pain.

Abadee DCJ, (7 December 2020)

Blakemore v Moore & Clements [2015] NSWDC 9

28% of a most extreme case

Plaintiff was a 40-year-old female who fell in the car park of her place of work.

Injuries: Comminuted fracture of right humerus (requiring several surgeries) and scarring on her upper arm. Evidence was also led of depression, a breakdown of her relationship and substantial weight gain, though it is unknown whether this evidence was accepted for the purpose of His Honour's assessment of non-economic loss.

Mahony SC DCJ (13 February 2015)

Cockburn v The Trust Company (No 2) [2014] NSWDC 119

30% of a most extreme case

Plaintiff was a 54-year-old male who, in the course of working as a driver contractor, injured his foot when it fell through a stormwater grate, which had a missing bar.

Injuries: Right arm injury (unspecified) requiring right carpal tunnel decompression surgery. Ongoing pain, a change to his personality, difficulty performing day-to-day tasks and a guarded prognosis for recovery.

Cogswell SC DCJ (2 June 2014)

Berkeley Challenge Pty Ltd v Howarth [2013] NSWCA 370

33% of a most extreme case

Plaintiff was a 48-year-old male who fell while cleaning an abattoir in the course of his employment.

Injuries: Left shoulder and elbow requiring multiple surgeries (with little positive outcome). He suffered pain that would likely increase in severity over time.

Basten and Meagher JJA, and Tobias AJA (8 November 2013)

Monzer Awad v Diamond Marble Granite Pty Limited [2012] NSWDC 89

28% of a most extreme case

Plaintiff's (male, age unknown) left forearm was crushed when a 50 kg sheet of granite became dislodged from a forklift and fell.

Injuries: Crushed left forearm and functional deficit of left upper arm, with diminished grip strength of 50% and some lifting restrictions. He also had disfigurement of his left forearm and was suspected of having compartment syndrome and an adjustment disorder.

Mahony SC DCJ (21 June 2012)

Ryland v QBE Insurance (Australia) Ltd [2012] NSWDC 136

20% of a most extreme case

Plaintiff was a 62-year-old female who slipped and fell in a shopping centre.

Injuries: Fractured right elbow requiring surgery (she fully recovered from fractures).

Court made particular mention that a plaintiff's age is "obviously relevant" as a plaintiff's lifespan will determine how long they endure pain and suffering, and a loss of their amenity of life.

Neilson DCJ (28 May 2012)

Davies v Whitehaven Coal Mining Ltd [2019] NSWSC 1125

30% of a most extreme case

Plaintiff was a 52-year-old man who suffered injury to his left shoulder when he slipped off the back of a LHD he was operating in the Whitehaven Colliery after he had refuelled and rewatered the machine.

Injuries: Aggravated osteoarthritis in his acromioclavicular joint and a partial rotator cuff tear with cuff failure as a result of the wrenching injury.

Wright J (30 August 2019)

Tsoromokos v Australian Native Landscapes Pty Ltd [2018] NSWSC 321

35% of a most extreme case

Plaintiff was a 51-year-old male who was an independent contractor carrying out repairs to the fuel tank of a Volvo loader owned and operated by the defendant, Australian Native Landscapes Pty Ltd (ANL). In the course of attempting to remove the bash plate, which weighed 200 kilograms, to gain access to the fuel tank, the bash plate fell onto the plaintiff's right arm causing serious injuries.

Injuries: Compound fracture of the right humerus with nerve damage. Surgery was performed by way of internal fixation of the right humeral fracture to repair the right brachial artery. Two days after the accident, the plaintiff underwent emergency surgery for compartment syndrome, which included an ischaemic right arm, requiring harvesting of the saphenous vein from the left thigh for use in the right brachial artery and performing fasciotomies.

Latham J (15 March 2018)

Williams v Wollongong City Council [2020] NSWDC 564

32% of a most extreme case

Plaintiff was a 62-year-old male who injured his left wrist and elbow when he fell from the top step of a set of stairs at the defendant's park.

Injuries: Fracture of the head of the left radius and soft tissue injuries to the left wrist. The plaintiff later developed wrist arthrodesis.

Dicker DCJ (24 September 2020)

Back

Monahan v Bellevarde Constructions Pty Ltd & Ors [2022] NSWDC 50

30% of a most extreme case

Plaintiff was a 33-year-old male who sustained a lifting injury to his back on a worksite.

Injuries: Musculo-ligamentous strain to the plaintiff's lumbar spine.

Levy SC J (11 March 2022)

Moffett v Robin [2021] NSWDC 211

18% of a most extreme case

Plaintiff was a 42-year-old male who was struck by a tree branch during tree felling and pruning operations conducted at Raymond Terrace in New South Wales.

Injuries: Neck and back soft tissue injuries. Associated headaches, stiffness, poor muscle tone, neck and back pain.

Dicker SC DCJ (28 May 2021)

Salim v Canterbury-Bankstown Council [2021] NSWDC 169

25% of a most extreme case

Plaintiff was a 33-year-old female who was struck in the head, neck and shoulder by a pool umbrella blown by a gust of wind, and consequently fell in the pool at the Max Parker Leisure and Aquatic Centre in Revesby.

Injuries: Immediate and chronic pain in back, neck and left shoulder, exacerbated by pre-existing degenerative changes in cervical spine.

Russell SC DCJ (13 May 2021)

Neil Carpenter v Damian James Russell [2021] NSWDC 447

25% of a most extreme case

Plaintiff was a 48-year-old male who slipped on and fell down some outdoor stairs at the defendants' property.

Injuries: Back injury (not specified). Aggravation to cervical and lumbar degenerative disease. Chronic pain.

Strathdee DCJ (31 August 2021)

Livermore v Nepean Longwall Pty Ltd [2017] NSWDC 5

25% of a most extreme case

Plaintiff (age unknown, female) was employed as a tradesman's assistant when the tradesman fell off a stool and on top of her.

Injuries: Immediate pain and discomfort in the right part of her back and from the right buttock down to the heel of her right foot. She continued to suffer from intermittent lower back discomfort with radicular pain in the right leg and foot with some numbness in that area. L5 nerve root impingement. Difficulty with prolonged sitting.

Levy SC DCJ (3 February 2017)

Jurox Pty Ltd v Fullick [2016] NSWCA 180

27% of a most extreme case (Affirmed NSWDC)

Plaintiff (age unknown, female) while emptying a 25 kg bag of dextrose into the "hopper" felt pain in her back.

Injuries: Following the incident, she suffered severe pain in her back which has continued. The injury warranted a doctor's recommendation for surgical intervention to decompress her S1 nerve root, however, the workers' compensation insurer denied liability for that procedure.

Leeming and Simpson JJA and Rothman J (29 July 2016)

WB Jones Staircase & Handrail Pty Ltd v Richardson & Ors [2014] NSWCA 127

38% of a most extreme case

Plaintiff (age unknown, male) fell after the balustrade on the first floor of a house gave way.

Injuries: Injured back requiring surgery. Court took into account evidence his lifestyle had been degraded with a loss of ability to perform work, domestic duties and recreational activities.

The trial judge's awarding of 38% of a most extreme case was upheld. On appeal, the court held that the first instance decision was based on impression, estimation and matters of opinion which are not readily susceptible to appellate review.

Beazley P, and Hoeben and Leeming JJA (17 April 2014)

Sharp v Emicon [2014] NSWSC 1072

35% of a most extreme case

Plaintiff (age unknown, male) fell from scaffolding during the course of his employment.

Injuries: Spinal fractures at the L2/L3 level with associated disabilities. At the time of the trial these fractures had healed and he had returned to full-time employment.

Harrison J (12 August 2014)

Taboas v Abigroup Contractors Pty Ltd [2014] NSWSC 13

35% of a most extreme case

Plaintiff was a 26-year-old male who sustained injury during the course of his employment from repeated heavy lifting over a period of one week.

Injuries: Multiple injuries to lumbar spine and "disabling spinal pathology".

A reasonably high assessment in circumstances where very good surveillance of the plaintiff was obtained refuting the allegation he was not able to work in the construction industry. The surveillance evidence showed him performing work on residential balconies without any apparent limitations or restrictions.

Harrison J (31 January 2014)

Nair-Smith v Perisher Blue Pty Ltd [2013] NSWSC 727

25% of a most extreme case

Plaintiff was a 44-year-old female who was hit from behind by a chair lift at Perisher Ski Resort.

Injuries: Soft tissue injury to lumbar spine, which aggravated the pre-existing pathology in her lower lumbar region (she suffered from numerous pre-existing conditions, including severe sacroiliitis with lumbar pain extending into her buttocks, neurological symptoms in her limbs when pregnant, degenerative changes in her pelvic joints and knee pain).

Beech-Jones J (7 June 2013)

Alvarenga v Mirvac Real Estate Pty Ltd & Anor [2013] NSWDC 26

30% of a most extreme case

Plaintiff was a 41-year-old female who tripped on a traveller at a shopping centre.

Injuries: Fractured tail bone, injuries to lower back and aggravation of pre-existing psychological condition.

Elkaim SC DCJ (28 March 2013)

Harris v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor [2011] NSWDC 172

33% of a most extreme case

Plaintiff was a 16-year-old male who had a skiing accident on a school excursion.

Injuries: Fractures in spine, temporary loss of feeling in legs, continued back pain that required daily medication to manage, and a temporary requirement to remain immobile for a period of time while wearing a brace.

Elkaim SC DCJ (10 November 2011)

Smith v Brambles Australia Ltd [2011] NSWSC 963

32% of a most extreme case

Plaintiff was a 46-year-old male who was thrown from a crane.

Injuries: Broken and crushed left ankle (comminuted displaced open fracture of the left foot requiring extensive surgery), a broken right foot, and severe bruising of the left ribs and right wrist. He also suffered severe pain in his legs which left him anxious and stressed, and was unable to return to pre-injury employment as a crane driver.

Schmidt J (26 August 2011)

Kearney v Ballyfore Engineering & Excavations Pty Limited [2011] NSWSC 210

38% of a most extreme case

Plaintiff was a 32-year-old male who injured himself on two separate occasions during the course of his employment; the first when he fell from a ladder and the second while attempting to lift the drawbar of a trailer.

Injuries: Chronic back pain from lower back injury which caused multiple disabilities (including difficulty performing day-to-day tasks such as walking, lifting, carrying and kneeling). He also injured his left ankle.

Rothman J (29 March 2011)

Elphick v Westfield Shopping Centre Management Co Pty Ltd [2010] NSWDC 152

33% of a most extreme case

Plaintiff was a 33-year-old male who was injured while loading cardboard boxes into a trolley.

Injuries: Injury to lower back (constantly sore) and pain radiating down his legs. He was not able to return to his employment after the accident.

This matter went on to appeal (*Elphick v Westfield Shopping Centre Management Company Pty Ltd* [2011] NSWCA 356) though the issue of damages was not addressed.

Hungerford ADCJ (30 July 2010)

Richards v Hill & Hill [2010] NSWSC 949

40% of a most extreme case

Plaintiff was a 27-year-old male who fell down a flight of stairs while undertaking shearing duties in a shearing shed.

Injuries: Significant multiple disc bruising and discogenic pain. He also suffered from a chronic adjustment disorder with mixed anxiety and a depressed mood, the symptoms of which bordered on the criteria necessary to meet a diagnosis of major depression.

Studdert J (24 September 2010)

Jefferies v Rio Tinto and Anor [2010] NSWSC 1046

33% of a most extreme case

Plaintiff was a 38-year-old male who fell 2.5 metres while climbing into a Caterpillar 785B dump truck.

Injuries: Injury to left hip and lower back. He suffered from lower back pain, groin pain and numbness in his lower leg.

Hoeben J (20 September 2010)

Hodge v CSR [2010] NSWSC 27

35% of a most extreme case

Plaintiff was a 34-year-old male who was injured while using a jackhammer weighing approximately 25 kg.

Injuries: Injury to the cervical spine which required surgery to relieve the pain. He was considered to not be fit for heavy work following the accident.

Hislop J (2 February 2010)

Bon Appetit Family Restaurant Pty Limited v Mongey [2009] NSWCA 14

30% of a most extreme case

Plaintiff (female, age unknown) slipped and fell onto her back while carrying a garbage bin.

Injuries: Back and neck injury with some associated leg pain.

On appeal, trial judge's assessment of damages was upheld. The submissions were in the range of 24% (defendant) to 33% (plaintiff). The court held that unless either of these submissions could be characterised as manifestly without foundation, the adoption of a figure between the two would itself be unreviewable.

Beazley, Tobias and Basten JJA (11 February 2009)

P & H Property Service Pty Ltd v Branigan: Westfield Shopping Centre Management Co Pty Ltd v Branigan [2008] NSWCA 195

29% of a most extreme case

Plaintiff (male, age unknown) slipped on a piece of cardboard and was injured while exiting through the back of the butchery at which he worked.

Injuries: Back injury requiring spinal fusion surgery at the L5-S1 level. He suffered from a pre-existing congenital condition of the spine making him particularly susceptible to injury. Following the accident he began using recreational drugs to deal with the pain, and developed a cannabis addiction and alcohol problem.

Initially assessed at 34% of a most extreme case, though this was reduced to 29% to take into account his pre-existing condition.

Hodgson and Bell JJA, and Rein J (11 August 2008)

Hoad v Peel Valley Exporters Pty Ltd [2008] NSWSC 981

55% of a most extreme case

Plaintiff was a 52-year-old female who sustained a severe lifting injury in the course of her employment.

Injuries: Degenerative change in back, marked restriction in back movement and significant ongoing back pain and sciatica. She underwent surgery to stabilise the prolapsed T11/T12 discs.

Harrison J (19 September 2008)

Seage v New South Wales [2008] NSWCA 328

25% of a most extreme case

Plaintiff was a 49-year-old male who suffered injury when moving a desk which weighed approximately 100 kg.

Injuries: Injury to back which led to ongoing permanent pain and significant restrictions that were likely to continue into the future.

Tobias and Macfarlan JJA, and James J (5 December 2008)

Harrison v Melhem & Anor [2008] NSWCA 67

55% of a most extreme case

Plaintiff was a 25-year-old male injured while undertaking a dangerous manual lift of a trailer.

Injuries: Injury to back at the L4-5 level requiring surgery. He was deemed to not be fit to return to labouring and heavy work. He also had a significant history of heavy drug use prior to the accident with some psychiatric symptoms.

The Court of Appeal said with regard to the trial judge's decision: "I would not disturb her award for non-economic loss even though it strikes me as very generous having regard to the need to factor out to an appropriate degree the negative impact of the earlier drug abuse."

Spigelman CJ, Mason P, and Beazley, Giles and Basten JJA (29 May 2008)

Lloyd v Thornbury [2019] NSWCA 154

30% of a most extreme case

Plaintiff (male, age unknown) slipped and fell into a hole in the rear yard of a residential property as he was running across the yard in the dark to break up a fight between three dogs. The hole had been dug in order to resolve a drainage problem, but the plumber had run out of materials to complete the work so had not filled in nor fenced the hole.

Injuries: Disc injury to his cervical spine, as well as trauma to a number of facet joints by compression forces and an aggravation of pre-existing asymptomatic degenerative changes resulting in weakness and sensory changes to his right upper arm. His prognosis was for continued pain and impairment.

Meagher, Gleeson and White JJA (25 June 2019)

Chaffey v MPM Maintenance Services Pty Ltd & Anor [2019] NSWDC 260

27% of a most extreme case

Plaintiff (male, age unknown) was stripping the former ANZ bank building in Pitt Street Sydney. The lighting in the building had been turned off by an electrician, leaving it quite dark with only two portable cradle lights placed on the building floor. As the plaintiff was stripping a panel, he slipped on the counter covered in dust and debris, subsequently injuring his back.

Injuries: Extensive competing evidence. Dr Davis diagnosed disc injuries to the cervical and lumbar spine, as well as soft tissue trauma to the in the thoracic spine. Dr Habib noted that he had pre-existing but asymptomatic degenerative changes in his back, which he considered had been strained but considered to have resolved.

Hatzistergos DCJ (12 June 2019)

Caruana v Ski Riders Motel (Kosciuszko) Pty Ltd (T/As Ski Rider Hotel Motel) [2019] NSWDC 182

**22% of a most extreme case
(assessment of quantum performed despite judgment for the defendant)**

Plaintiff (female, age unknown) suffered injury to her back when she fell over a raised step between the bedroom and the bathroom of the defendant's motel.

Injuries: It was probable that the plaintiff sustained a twisting injury to the lower thoracic spine. However, the medical evidence was such that there was difficulty in confirming objective evidence of significant spinal injury. There was no evidence of an acute injury and changes which appeared on the medical scans were longstanding. On her lumbar spine CT there was no evidence of any acute injury.

Weinstein SC DCJ (17 May 2019)

Gray v Coles Supermarkets Pty Ltd [2019] NSWDC 749 (appealed)

30% of a most extreme case

Plaintiff was a 51-year-old male employed as a picker packer who injured his lower back when picking up a pack of 24 500ml bottles of water.

Injuries: Bulging of the L5/S1 disc in the lumbosacral spine and right-sided disc prolapse at the L5/S1 level, including an annular tear. The plaintiff complained of a constant dull aching pain in the lower part of his back, radiation of the pain into his right buttock and the sacrococcygeal region, numbness, tingling and a burning sensation radiating down both legs. The plaintiff claimed he was unable to sit or stand for more than 20 minutes.

Russell SC (13 December 2019)

Health Care Corporation Pty Ltd t/as Wollongong Private Hospital v Cleary [2024] NSWCA 57

35% of a most extreme case

Plaintiff was a 50-year-old man who was injured when, following his spinal surgery, the hospital bed in which he was being conveyed by two nurses came into contact with a wall.

Injuries: Permanent damage to L5 nerve. Continuing pain, numbness and altered sensation in left leg.

Mitchelmore, Stern JJA and Harrison CJ (15 March 2024)

Marmara v Kmart Australia Ltd [2024] NSWDC 89

32% of a most extreme case

Plaintiff was a 59-year-old woman who was shopping at Kmart. While waiting in a queue at the self-serve checkout, a customer in the queue behind her whose purchases were two mountain bikes, let go of his trolley while trying to manoeuvre these large items in the trolley through the checkout. The larger of the two bikes fell onto her, striking her back.

Injuries: Mid right convex scoliosis of cervical spine, aggravation of right-sided facet joint arthropathy, narrowing of the right C4/5 neural exit foramen, changes to the C5/6 level with compression of traversing C6 nerve roots bilaterally and subacromial bursitis of the right shoulder.

Gibson DCJ (26 March 2024)

Bartlett v De Martin & Gasparini Pty Ltd [2024] NSWSC 1172

35% of a most extreme case

Plaintiff was a 37-year-old male who injured his back when lifting and moving a pipe with another worker whilst on a job site.

Injuries: Unexpected and unguarded soft tissue injury to lower lumbar spine discs. Compromised lumbar spine disc which has placed physical restrictions to the use of his back. Psychiatric injury including adjustment disorder with depression. Chronic pain.

Elkaim AJ (17 September 2024)

Stanberg v State of New South Wales [2024] NSWDC 462

20% of a most extreme case

Plaintiff was an 11-year-old child who injured his back when participating in a long jump event at the school's athletics carnival he landed in the sandpit and impacted a hard surface beneath the sand.

Injuries: Significant injury to lower back including transverse annular tear in vertebral disc ligament, fluid retention, fracture, bone stress and strained muscles. Continuing pain in lower back. Muscle spasms and tenderness.

Newlinds SC DCJ (4 October 2024)

Brain

Crilly v Bumble Group Pty Limited t/as My Security [2012] NSWDC 3

Awarded \$200,000 (equates to approximately 39% of a most extreme case)

Plaintiff was a 22-year-old male who was assaulted while leaving a hotel.

Injuries: Head injury with left frontal contusions and haemorrhage in the brain. He suffered brain damage and loss of right hearing as a result of the assault. He was intoxicated at the time of the incident and returned to his pre-injury employment shortly after the incident.

Levy SC DCJ (30 January 2012)

Quintano v B W Rose Pty Ltd and Anor [2009] NSWSC 446

90% of a most extreme case

Plaintiff was a 30-year-old male who was shot in the head during a nightclub brawl.

Injuries: Extremely severe traumatic brain injury, associated comminuted skull and orbital fractures, consequential deficits of higher cognitive function and behaviour, and physical neurological impairment. He suffered from paralysis of his right-side, the loss of an eye, extensive and obvious facial scarring, epilepsy, sensory impairment and intellectual impairment.

Brereton J (26 May 2009)

Menz v Wagga Wagga Show Society INC (No 3) [2019] NSWSC 541

75% of a most extreme case

Plaintiff (female, age unspecified) suffered brain injuries when she fell from her horse at one of the defendant's showground facilities.

Injuries: Left-sided temporal lobe petechial haemorrhage, a subtentorial cerebellar petechial haemorrhage, and a small subtentorial subdural haematoma. The plaintiff went on to suffer short-term memory loss, loss of motivation, loss of initiative, frustration and depression. Following her discharge from hospital, she required a family member to provide assistance/be on call 24 hours per day.

Bellew (20 May 2019)

Breasts

Appleton v Norris [2014] NSWCA 311

30% of a most extreme case

Plaintiff was a 26-year-old female who underwent unsuccessful reconstructive surgery to her breasts.

Injuries: Serious infection, disfigurement and asymmetry of her breasts. On appeal, the court remarked that the assessment of non-economic loss is an evaluative assessment made by a trial judge and it is not appropriate for an appellate court to engage in relatively minor alterations of such percentages or to take account of the monetary consequences of such adjustments.

McCull and Meagher JJA, and Adamson J (9 September 2014)

Turner v Blackstock [2019] NSWDC 102

32% of a most extreme case

Plaintiff was a 27-year-old female who suffered injuries to her left breast as a result of a failed breast augmentation surgery performed by the defendant.

Injuries: Extensive scarring, ongoing pain and discomfort in her left breast, which is now asymmetrical. The plaintiff has subsequently experienced considerable psychological distress and embarrassment, including with intimacy, and difficulty performing a range of previously unrestricted domestic tasks.

Levy SC (5 April 2019)

Burns

Lawson v Hubbard [2020] NSWDC 605

40% of a most extreme case

Plaintiff was a 17-year-old male who sustained extensive burns after a fire pit exploded at a birthday party at the defendant's premises.

Injuries: Substantial burns and resultant cosmetic scarring to 44% of the plaintiff's skin area of his body, including face, upper limbs, lower limbs. Anxiety, shock and psychological sequelae.

Levy SC J (13 October 2020)

Thompson v Cross [2014] NSWDC 8

28% of a most extreme case

Plaintiff was a one-year-old female who pulled the cord of a kettle and suffered burns while sitting on a bench at the defendant's (her grandmother's) house. She was 30 years old at trial.

Injuries: Burns over right nipple, abdomen, leg and foot. Significant scarring and depression partly as a result of her injuries.

Elkaim SC DCJ (13 March 2014)

Chadley Winston Tocker v Denise Kathleen Moran [2012] NSWDC 248

30% of a most extreme case

Plaintiff was a 19-year-old male who fell into a bonfire at a party.

Injuries: Severe burns and injuries to left hand, significant scarring, pigmentary change and ongoing pain.

The court ultimately found for the defendant (as the injury was not likely to have occurred had the plaintiff not been intoxicated at the time), though an assessment of damages was still undertaken.

Mahony SC DCJ (14 December 2012)

Lawson v Hubbard [2020] NSWDC 605

40% of a most extreme case

Plaintiff was a 17-year-old male who suffered extensive burns as a result of an explosion caused by the defendant pouring an accelerant onto an open fire pit.

Injuries: Extensive burns, scarring and disfigurement to 44% of the skin area of his body. Subsequent psychological sequelae including social anxiety, sleeping difficulties, loss of confidence and ability to enjoy the amenity of his life.

Levy SC (13 October 2020)

Buttocks

Adrian Michael Lightfoot and Lightington Pty Ltd Can 093 428 758 As Trustee For The Lightfoot Family Trust v Tamworth Shoppingworld Pty Ltd ACN 083 770 021 and Byron Clapham [2016] NSWDC 45

25% of a most extreme case

Plaintiff was a 64-year-old male who slipped and fell heavily to the floor in a shopping centre.

Injuries: Ongoing issues with his lumbar spine and symptoms including pain shooting into the right buttock and occasionally the right thigh.

Mahony SC DCJ (8 April 2016)

Major v Sutherland Shire Council [2014] NSWDC 129

30% of a most extreme case

Plaintiff was a 41-year-old male who was injured when a railing he was sitting on gave way causing him to roll down an embankment.

Injuries: Fell heavily on his buttocks. He began to wake from sleep with pain and discomfort, regularly used medication, suffered continual pain in his back, suffered a significant reduction in his ability to go offshore fishing (his favourite sport) and suffered interference with the way he surfs.

His Honour had regard to a recent judgment he had delivered wherein he also awarded 30% of the most extreme case (*Cockburn v The Trust Company Limited (No. 2) [2014] NSWDC 119*). His Honour noted the injuries sustained by Mr Cockburn in that case had a marginally greater interference with the enjoyment of his life compared to this plaintiff, but Mr Cockburn was older and therefore this plaintiff will suffer interference with the enjoyment of his life for a longer period, equalising the calculation to an equivalent 30%.

Cogswell SC DCJ (9 July 2014)

Chronic pain syndrome

Williams v Fraser & Stening [2021] NSWSC 416

82% of a most extreme case

Note: Judgment was ultimately determined in favour of the defendant, but MEC was still assessed.

Plaintiff was an 18-year-old female who had a history of lower lumbar pain in addition to hip pain. Plaintiff alleged that the radiologist failed to identify her pars defect and her treating specialist failed to recommend appropriate conservative, non-operative clinical management. Instead, surgical intervention was recommended and undertaken allegedly resulting in the plaintiff suffering a neuropathic pain condition, which she alleged would have been avoided had conservative treatment been implemented.

Injuries: Chronic, severe and disabling pain syndrome, comprising nociceptive and neuropathic pain radiating from her lumbar spine to her lower limbs and feet. Chronic adjustment disorder with depressed and anxious mood.

Harrison J (20 May 2021)

Gray v Wagga Wagga City Council [2021] NSWDC 108

28% of a most extreme case

Note: Judgment was ultimately determined in favour of the defendant, but MEC was still assessed.

Plaintiff was a 44-year-old female who was struck by an automatic door as she passed through the arrivals gate at Wagga Wagga City Airport.

Injuries: Chronic pain in back, leg and shoulder.

Sidis ADCJ (7 April 2021)

Hollier v Sutcliffe [2010] NSWSC 279

30% of a most extreme case

Plaintiff was a 37-year-old female who suffered injury when a contraceptive device (a small plastic rod) was incorrectly inserted into her arm.

Injuries: Chronic pain syndrome (though the factual causation test for this injury was not satisfied). She suffered a range of psychological symptoms (including anxiety and a depressed mood) which required continual treatment.

Hulme J (went to appeal before Allsop P in [2011] NSWCA 24 but the award of damages pursuant to section 16 of the CLA NSW was not considered).

Morocz v Marshman [2015] NSWSC 325

55% of a most extreme case

Plaintiff (female, age unknown) who went to the defendant to cure excessive sweating of her palms. He performed a bilateral endoscopic thoracic sympathectomy on the plaintiff at Royal North Shore Hospital on the morning of 6 February 2007. Following the surgery, the plaintiff felt dizzy and was unable even to focus on one point. She was in immense pain when the defendant visited her in the ward. Her pain and symptoms got progressively worse to the point where she could not tolerate it without medication.

Injuries: Nerve and joint pain, and severe headaches that can last for three days. While the medication was about 50% effective initially, it no longer is. A number of other symptoms flare up occasionally, such as numbness on one side of the body, tingling and burning.

Harrison J (17 April 2015)

Coughs

East West Airlines Ltd v Turner [2010] NSWCA 53

25% of a most extreme case

Plaintiff (female, age unknown) flight attendant who was exposed to smoke, which was emitted into an aircraft cabin for a period of 20 minutes during the course of her employment.

Injuries: Ongoing cough that she will continue to suffer from for the rest of her life. She also suffered from a burning throat and sore eyes.

Application for special leave to the High Court was refused.

Allsop P, Handley AJA and Hoeben J (1 April 2010)

Dental

Merle Marie McMorrow v Todarello Pty Ltd t/as The Fruit House Faulconbridge [2014] NSWDC 75

25% of a most extreme case

Plaintiff was a 50-year-old female who tripped over a pallet and fell on her mouth.

Injuries: Broken teeth requiring corrective procedures and permanent braces, pain, bruising and swelling to her face, and emotional and psychological difficulties.

Knox SC DCJ (28 April 2014)

Li Fu v Owners of Strata Plan 75626 [2012] NSWDC 85

22% of a most extreme case

Plaintiff was a 52-year-old female who walked into an unmarked glass panel during the course of her employment.

Injuries: Split lip, loss of one front tooth and a loosening of three other teeth (which later needed to be extracted). She suffered pain and difficulty eating. Court took into account her poor oral hygiene (having previously received little to no dental care).

Mahony SC DCJ (7 June 2012)

Dean v Phung [2012] NSWCA 223

Awarded \$300,000 (equating to approximately 56% of a most extreme case)

Plaintiff was a 32-year-old male who suffered injury in the course of his employment when a piece of timber struck him on the chin causing minor injuries to his front teeth. A dentist unnecessarily removed every nerve of every tooth, which was an irreversible procedure. All dental work performed was inadequate and required additional corrective procedures.

Injuries: Pain in the teeth, jaw, neck and shoulders, as well as headaches and affected sleep. He also suffered diet restrictions (only allowed to eat soft foods).

The trial judge had originally awarded 55% of a most extreme case.

Beazley, Basten and Macfarlan JJA (25 July 2012)

Feet

Gem v State of New South Wales [2017] NSWDC 108

40% of a most extreme case

Plaintiff was an 11-year-old special needs female who attended the defendant's school. Plaintiff was being supervised one-on-one by a teacher when she fell six metres from the roof of a school building.

Injuries: Bilateral foot fractures. The left foot had an oblique fracture through the calcaneus, with moderate displacement. The right foot had a fracture through the calcaneus with some slight flattening and distortion. The plaintiff also had a soft tissue injury to her lumbar spine.

Levy SC DCJ (19 May 2017)

Westerman v Roads and Maritime Services [2016] NSWDC 52

22% of a most extreme case

Plaintiff was a 48-year-old female who fell and suffered fractures in her feet when stepping into an unseen pothole while crossing a road.

Injuries: Fractures in both feet were diagnosed after CT scans. As a result, the plaintiff's ability to participate in sporting activities was diminished.

P Taylor SC DCJ (15 February 2016)

Than v Galletta & Ors [2019] NSWDC 9

32% of a most extreme case

Plaintiff was a 40-year-old female who was descending a staircase when she misplaced her foot and fell.

Injuries: Sustained a Lisfranc fracture to her left foot. As a result, the plaintiff underwent extensive physiotherapy to her left foot.

Judge Levy SC (8 February 2019)

Trajkovski v Ballgate Pty Limited [2018] NSWDC 308

15% of a most extreme case

Plaintiff was a 60-year-old male who sustained injury when a piece of glass went through his shoe at a hotel.

Injuries: Right foot cellulitis and a debridement of a right foot ulcer. He also suffered from diabetes and peripheral neuropathy, including pain in both feet, prior to the incident.

Russell SC DCJ (26 October 2018)

Head

EI-Kheir v Pinnacle Construction Group Pty Ltd [2018] NSWDC 155

17% of a most extreme case

Plaintiff (male, age unknown) suffered a laceration to his forehead on a building site when he was pulling a steel bar that subsequently hit him in the head.

Injuries: Laceration to his head causing headaches. He also sustained a soft tissue injury to his neck and lower back.

Hatzistergos DCJ (14 June 2018)

AEA Constructions Pty Ltd v Wharekawa; AEA Constructions Pty Ltd v Building Partners Pty Ltd [2019] NSWCA 176

35% of a most extreme case

Plaintiff was a 34-year-old male who was injured after being struck by a stray nail fired from an explosive power tool.

Injuries: Depressed fracture of the skull. The nail had penetrated approximately half the thickness of his skull. Twenty-four hours after removal of the nail, he displayed signs of neurological damage. His gait was ataxic and he had diminished control and power in his lower limbs. He also continues to suffer recurring migraines.

Basten JA, Gleeson JA, White JA (19 July 2019)

Tauri By His Tutor Carmelle Skipper v Janlin; Circuses Pty Limited T/As Stardust Circus (No 3) [2020] NSWSC 1918

55% of a most extreme case

Plaintiff was an 18-month-old male who fell between the planks of seating for patrons at a circus conducted by the defendant. Upon falling, the plaintiff struck his head on a metal support attached to the bottom of the stand.

Injuries: Comminuted, depressed and displaced fracture of the left frontal bone associated with a small left frontal extra-dural haematoma. Multiple small areas of the left frontal contusion and mild local mass effect. Pneumothorax (left lung).

Rothman J (24 December 2020)

Mattock v State of New South Wales (New South Wales Department of Education) (No 2) [2021] NSWSC 1045

35% of a most extreme case

Plaintiff was a 15-year-old male who sustained a head injury while playing touch football at Eden Marine High School.

Injuries: Mild traumatic brain injury.

Harrison ASJ (19 August 2021)

Hand

Gould v South Western Sydney Local Health District [2017] NSWDC 67

28% of a most extreme case

Plaintiff was an 8-year-old boy who sustained injury to his left thumb while playing outdoors.

Injuries: Severe complex crushing injury to his left thumb and an injury to his middle finger. He developed infection and gangrene to the tip of the left thumb, which eventually resulted in the left thumb being amputated.

Levy SC DCJ (30 March 2017)

***Vo v Tran* [2016] NSWSC 1043**

32% of a most extreme case

Plaintiff was a 36-year-old female whose left hand was caught in a juicing machine causing a partial amputation of one of her fingers and injuries to others.

Injuries: Complex left-hand mutilation injury resulting in an amputation of the ring finger with severe nerve damage. Plaintiff said that she still has restrictions, pain and difficulties with lifting and carrying, pushing and pulling, grasping, manipulating objects, operating a keyboard and driving due to her left-hand injuries. Plaintiff suffered from avoidance symptoms consistent with post-traumatic stress disorder and hyperarousal symptoms.

Hall J (29 July 2016)

***Metaxoulis v McDonald's Australia Ltd* [2015] NSWCA 95**

26% of a most extreme case

Plaintiff was a 41-year-old male who fell off playground equipment at a McDonald's after helping to rescue a small child who had been stuck on the equipment.

Injuries: Aggravation of a pre-existing injury to his left wrist and a minor rib injury.

Unanimously held on appeal that the court will not intervene in the first instance evaluative judgment as to the appropriate proportion, except on the well-established ground that the trial judge has in some way mistaken the facts or the legal principles to be applied or otherwise demonstrated error.

McColl, Basten and Macfarlan JJA (13 April 2015)

***Agresta v Agresta* [2010] NSWCA 330**

20-24% of a most extreme case

Plaintiff was a 61-year-old female who was injured while loading tomatoes into the hopper of a sauce making machine.

Injuries: Tops of the middle and ring fingers on her left hand were amputated to the first joint. She also lost the pads of her index and little fingers on the left hand.

McColl and Macfarlan JJA, and Sackville AJA (7 December 2010)

Heart attack

***George v Survery* [2009] NSWSC 1348**

65% of a most extreme case

Plaintiff was a 57-year-old male who alleged his general practitioner was negligent after he suffered a heart attack having repeatedly complained of chest pain to the general practitioner.

Injuries: Heart attack (given a life expectancy of two years). He underwent a heart transplant and later developed osteoporosis, gout and a number of skin cancers as a result of the immunosuppressant medication he was required to take.

Hoeben J (9 December 2009)

Zora v St Vincent's Hospital Sydney Limited [2016] NSWDC 365

18% of a most extreme case

Plaintiff was a 55-year-old male who claimed he suffered injuries to his heart and lungs following a negligently performed invasive coronary angiogram surgery.

Injuries: Heart attack, requiring a saphenous vein graft, acute pulmonary oedema, low cardiac output, right ventricular impairment and collapse of lungs. However, the plaintiff's pre-existing heart disease and risk factors (notably smoking) meant that the plaintiff would likely have suffered a heart attack later in life in any event. He also suffered very little loss in terms of cardiac function.

Gibson DCJ (22 December 2016)

Hip

Geoffrey Barker v A J Zanco Pty Limited t/as Krack Solutions [2023] NSWDC 43

23% of a most extreme case

Plaintiff was a 75-year-old male who tripped and fell over a protruding concrete slab which was part of a footpath that the Defendant had worked on and replaced with new concrete.

Injuries: Left hip (greater trochanter) fracture leading to total left hip replacement and left knee pain.

Montgomery DCJ (1 March 2023)

Newport v Li & Anor [2022] NSWDC 8

32% of a most extreme case

Plaintiff was a 69-year-old female who was inadvertently bumped into by a worker at a fruit and vegetable market.

Injuries: Displaced sub-trochanteric fracture of the plaintiff's right hip.

Levy SC DCJ (11 February 2022)

Towers v State of New South Wales [2015] NSWDC 10

27% of a most extreme case

Plaintiff was a 45-year-old male who slipped and fell while descending a set of stairs during the course of his employment as a cleaner.

Injuries: Injury to right hip and knee causing a serious aggravation of his pre-existing osteoarthritic hip. He requires a total hip replacement and the injuries have affected his day-to-day activities.

Mahony SC DCJ (13 February 2015)

Bridge v Coles Supermarkets Australia Pty Ltd (No 3) [2017] NSWSC 1800

36% of a most extreme case

Plaintiff was a 53-year-old man who slipped and fell in the underground car park of a Coles supermarket.

Injuries: Suffered a peri-prosthetic hip fracture in the region of his left hip requiring a complete revision of his hip replacement, and suffered from reactive depression.

Campbell J (19 December 2017)

Neate v Fox [2012] NSWDC 2

51% of a most extreme case

Plaintiff was a 68-year-old male who was injured when he fell while alighting from a light aircraft.

Injuries: Sub-trochanteric fracture of the neck of the left femur. Injury to left hip and a compression fracture of the spine. He was diagnosed with depression and continued to walk with a substantial limp.

Justice Levy remarked that his assessment of non-economic loss would have been in the order of 55% had it not been for the advanced age of the plaintiff.

Levy SC DCJ (27 January 2012)

Haleluka v Coles Supermarkets Australia Pty Ltd [2011] NSWDC 47

30% of a most extreme case

Plaintiff was a 48-year-old female who was struck by a trolley laden with boxes.

Injuries: Injury to right hip and lower back resulting in continual pain. She also suffered an aggravation of a pre-existing lower back injury.

Elkaim SC DCJ (23 June 2011)

Knee

Mersal v Georges River Council [2021] NSWDC 395

20% of a most extreme case

Note: Judgment was ultimately determined in favour of the defendants, but MEC was still assessed.

Plaintiff was a 14-year-old female who was playing touch football and got her foot stuck in a depression in the playing field at Peakhurst Park.

Injuries: Ruptured anterior cruciate ligament (ACL) and chronic pain.

Coleman SC DCJ (13 August 2021)

Pamela Spencer v QLSL Pty Ltd (t/as Supply-Ling Pty Ltd) & Ors [2017] NSWDC 26

26% of a most extreme case

Plaintiff was a 45-year-old female who stepped into a drain after the grate over the drain was not properly positioned.

Injuries: Injuries included a medial meniscus tear of the left knee, left hip and lower back pain.

Hatzistergos DCJ (14 February 2017)

Australia and New Zealand Banking Group Ltd v Haq [2016] NSWCA 93

29% of a most extreme case

Plaintiff was a 54-year-old who on standing up from a desk, caught her foot on "a bunch of wires", tripped and fell, injuring her left knee.

Injuries: Fracture of the left knee that required surgery on two occasions.

Basten JA, Simpson JA and Sackville AJA (3 May 2016)

Denis Johnston v State of New South Wales [2015] NSWDC 46**28% of a most extreme case**

Plaintiff was a 63-year-old male who was injured when a light globe exploded while he was placing it in a socket, causing him to twist on his knee.

Injuries: Injury to right knee which required a total knee reconstruction. He had a history of post-traumatic stress disorder and a delusional disorder, though these conditions were engendered by excessive alcohol use and he had been sober for a period of 10 years.

Mahony SC DCJ (17 April 2015)

Hair v Munro [2013] NSWDC 25**28% of a most extreme case**

Plaintiff (female, age unknown) fell while inspecting a house.

Injuries: Fracture in her left knee required surgery and post-traumatic stress disorder. There was a strong probability she would develop osteoarthritis.

Elkaim SC DCJ (28 March 2013)

Kingi-Rihari v Millfair Pty Ltd t/as The Arthouse Hotel [2012] NSWSC 1592**32% of a most extreme case**

Plaintiff was a 35-year-old male who slipped on a wet floor.

Injuries: Injury to knee ultimately requiring arthroscopic surgery (and likely future surgery). He also suffered psychological illness, which had improved by the trial date.

Schmidt J (19 December 2012)

CG Maloney Pty Ltd v Hutton-Potts & Anor [2006] NSWCA 136**40% of a most extreme case**

Plaintiff was a 48-year-old female who fell on unbuffed polish on a wooden floor.

Injuries: Injury to left knee causing pain and requiring fluid to be drained from the knee on a number of occasions. She was expected to require a total knee replacement in the future.

Santow, McColl and Bryson JJA (23 May 2006)

Fatma Abdel Razzak v Coles Supermarkets Australia Pty Ltd [2017] NSWDC 183**15% of a most extreme case**

Plaintiff (female, age unknown) slipped and fell on grapes that were on the floor at Coles.

Injuries: Traumatic chondromalacia patellae of the knees (right more than left) and left tennis elbow.

Russell, DCJ (22 June 2017)

Trigas v The Owners - Strata Plan No. 10579 [2019] NSWDC 473**27% of a most extreme case**

Plaintiff (male, age unknown) who was struck by a branch when a tree fell on him.

Injuries: Soft tissue contusion and burning contusion of the left knee, together with a sprain injury to the anterior cruciate ligament with a possibility of avulsion fractures. The injury had largely resolved by the trial date.

J Smith SC, DCJ (12 September 2019)

Leg

Liccardy v Daniel Payne t/as Sussex Inlet pontoons Pty Ltd & Anor [2022] NSWDC 246

32% of a most extreme case

Plaintiff sustained injuries to his legs when attempting to climb back onto a boat, the propeller of which striking the plaintiff's legs.

Injuries: 6cm deep x 15cm long open transverse lacerations to the anterior lateral aspect of the plaintiff's left leg below the knee.

Levy J (5 July 2022)

Faruk v Sydney Airport Corporation Limited & Asset Link Services Pty Ltd [2021] NSWDC 206

23% of a most extreme case

Plaintiff was a 41-year-old man who slipped and fell at the Sydney Airport taxi rank toilet.

Injuries: Fractured neck of the left femur. Chronic left knee, and left and bilateral hip pain.

Gibson DCJ (28 May 2021)

Paul Denniss v Fluor Australia Pty Ltd & Ors [2016] NSWDC 54

30% of a most extreme case

Plaintiff was a 47-year-old male who claimed that he injured his left leg while working as a scaffolder.

Injuries: Acute exacerbation of a pre-existing arthritic condition in the left knee and ganglion and scarring on the left ankle. Plaintiff's social life and happy personality suffered. His sleep was affected by pain and he rose regularly during the night. The effect on the plaintiff's intimate relationship was great, with sexual relations becoming difficult and occurring rarely.

Sidis ADCJ (20 April 2016)

Sampco Pty Ltd v Wurth [2015] NSWCA 117

25% of a most extreme case

Plaintiff was a 50-year-old female who fell in a car park after catching her foot in an unguarded drain-way.

Injuries: Twisting of right foot, causing a broken bone and bruising, and residual disabilities.

At first instance, a meniscal tear in her left knee was found to have been caused by the accident and 28% of the most extreme case was awarded. On appeal, the court found that the tear did not result from the accident and the assessment was reduced to 25%, though this entailed the court to "err on the side of generosity to the plaintiff."

Basten and Meagher JJA, and Adamson J (7 May 2015)

Smythe v Burgman (No 2) [2015] NSWSC 298

40% of a most extreme case

Plaintiff was a 54-year-old female who alleged negligence against her medical practitioner for failure to diagnose a leg clot before it led to her leg being amputated.

Injuries: Amputation of left leg below the knee causing significant pain and trauma. She was still able to participate in most of the activities in which she engaged before the loss of her leg, and her psychiatric prognosis after the amputation was good.

The court held that there was no liability on the part of the medical practitioner though an assessment of damages was undertaken.

Adamson J (25 March 2015)

Lewis v Clifton [2011] NSWDC 79

33% of a most extreme case

Plaintiff was a 33-year-old male who was assaulted at the urinal in a hotel by another patron.

Injuries: Significant injury to right leg requiring surgery and various pain killing drugs to deal with a chronic pain syndrome. His success as an amateur boxer was taken into consideration by the court.

Appeal on the assessment of damages was dismissed (*Clifton v Lewis* [2012] NSWCA 229).

Elkaim SC DCJ (29 July 2011)

Haralambopoulos v Longin [2011] NSWSC 852

45% of a most extreme case

Plaintiff was a 49-year-old male who fell through a hole in the floor of a house which was under construction.

Injuries: Right tibial fracture with displacement, compartment syndrome in his right leg, a fracture of bones in his foot and back pain.

Hulme J (28 July 2011)

Carter v Hastings River Greyhound Racing Club [2019] NSWSC 780

30% of a most extreme case

Plaintiff was a 47-year-old male who was moving the catching pen gate across the inside of the railing at the greyhound track when the lure smashed into his left leg between his knee and ankle.

Injuries: Tibial and fibular fractures and a soft tissue injury to the back of the plaintiff's calf. He was also left with a very large and unsightly scar at the site of the fracture on his left leg.

Harrison AsJ (27 June 2019)

Moggridge v Benevolent Society [2019] NSWSC 638

15% of a most extreme case

Plaintiff was a 68-year-old male who was in the process of transferring from his wheelchair to a recliner with the assistance of a nurse when he suffered a right leg spasm and fell backwards.

Injuries: Tibial plateau of his left leg. He also sustained minimal/undisplaced fractures of his femoral neck.

Harrison AsJ (3 June 2019)

Whitton v Dexus Funds Management [2019] NSWDC 579

23% of a most extreme case

Plaintiff was a 71-year-old female who injured her right leg as a result of being struck by a scooter in a shopping centre operated by the defendant.

Injuries: Fractured right femur, subsequent pain and ongoing disability, including pain in the right hip and aggravated pain in the back. Difficulties performing pre-injury domestic tasks. It was noted that the plaintiff had a considerable medical history at the time of accident, including type 2 diabetes, obesity, diverticulitis, total left shoulder replacement, right total knee replacement and previous injury to the right femur.

Dicker SC (18 October 2019)

Multiple injuries

Chadwick v Bondi Beach Food Pty Limited [2023] NSWSC 197

25% of a most extreme case

Plaintiff was a 27-year-old male who was assaulted in an establishment owned by the First Defendant after an argument occurred between the Plaintiff and another patron.

Injuries: PTSD, minor neck injury and permanent scarring

Elkaim AJ (9 March 2023)

Alelaimat v Synergy Scaffolding Services (No 3) [2022] NSWSC 536

34% of a most extreme case

Plaintiff was a 42-year-old-man who was struck by a scaffold plank while working on a worksite.

Injuries: Lumbar canal stenosis involving a L4/5 disc protrusion and injuries to the plaintiff's left shoulder.

Campbell J (5 May 2022)

Parkes v Mt Owen Pty Ltd & Anor [2022] NSWSC 909

40% of a most extreme case

Plaintiff was 23 years of age when he sustained injury while obtaining a hydraulic oil sample, in the form of a crush injury to his right leg.

Injuries: Soft-tissue crush injury to the plaintiff's right leg, developing into complex regional pain syndrome.

Campbell J (7 July 2022)

Yin v Sidhu [2022] NSWDC 251

29% of a most extreme case

Plaintiff was a 61-year-old owner of a small Bichon Frise poodle which was attacked by a 45kg Rottweiler. During the attack the plaintiff sustained puncture wounds to her left hand and sustained consequential mental harm.

Injuries: Pulley-type A1 laceration to the plaintiff's left thumb, lacerated left index finger and lacerations to the dorsum of her left hand, plus PTSD, anxiety and depression.

Levy SCJ (8 July 2022)

El Dehaibi v Hanzoul Pty Ltd t/as Mr Fresh Punchbowl [2021] NSWDC 240

20% of a most extreme case

Plaintiff was a 52-year-old female who fell on a footpath outside the shop 'Mr Fresh Fruit and Vegies,' which had been damaged due to the defendant's operation of a forklift on the footpath.

Injuries: Soft tissue musculo-ligamentous sprain and aggravation of underlying degenerative changes in left shoulder, left knee and right wrist. Fractured right fifth finger. Aggravation of a pre-existing chronic condition in the lumbar spine.

Levy SCJ (9 June 2021)

Julie Walker v Top Hut Banoon Pastoral Co Pty Limited trading as Trustee the Wakefield Family Trust; Shear Away Pty Limited v Top Hut Banoon Pastoral Co Pty Limited trading as Trustee the Wakefield Family Trust [2021] NSWDC 147

35% of a most extreme case

Plaintiff was a 54-year-old female who fell off a step and onto the ground after the step moved and fell apart while she was working as a shearers' cook at a premises in Banoon.

Injuries: Injuries to the lower back, right wrist, left ankle, right knee. Psychiatric injury formulated as an Adjustment Disorder. Exacerbation of plaintiff's type 1 diabetes mellitus.

Weinstein SCJ (23 April 2021)

Kime v Vicinity Centres PM Pty Ltd & Anor [2021] NSWDC 113

30% of a most extreme case

Plaintiff was a 64-year-old female who tripped and fell while walking over a "kinked" wet weather mat at Salamander Bay Shopping Centre.

Injuries: Soft tissue injuries to right shoulder and right knee. Continued/chronic shoulder, back and knee pain. Restriction of movement in right and arm, shoulder and knee. Occasional lumbar spasms. Wasting of right quadriceps. Reduced mobility.

Levy SCJ (8 April 2021)

Castle v Perisher Blue Pty Limited [2020] NSWSC 1652

37% of a most extreme case

Plaintiff was a 53-year old female who collided with a ski instructor employed by the defendant on the ski slopes of Perisher Blue.

Injuries: Fractured right hamate, dislocation of the joint between the hamate and the fifth metacarpal and a tear of the ulna collateral ligament of her right first metacarpophalangeal joint. Tear of the anterior portion of the left supraspinatus tendon. Depression and anxiety, potential post-traumatic stress disorder. Continued pain, bilateral shoulder dysfunction and swelling and sweating of the right hand with limited pinch and grip strength.

Cavanagh J (20 November 2020)

Cuschieri Te Puia v Sheerin [2020] NSWDC 527

35% of a most extreme case

Plaintiff was a 5-year-old male who was attacked and bitten by the defendant's two German Shephard Pointer dogs on the defendant's property.

Injuries: Bite exposing tissue around right eye. 10-12cm laceration right forearm, exposing tissue. 3-4cm wide laceration above right forearm. Minor nose laceration. Permanent facial and

forearm disfigurement from scarring. Adjustment disorder with features of post-traumatic stress disorder.

Judge Levy SC (14 September 2020)

Oakley v Collins & Anor [2018] NSWDC 141

26% of a most extreme case

Plaintiff was a 17-year-old female who slipped on a tiled floor at a friend's house after the friend had mopped the floor.

Injuries: Impingement in the right shoulder, injury to rib cage on the right side of the chest wall, rotator cuff injury to the region of the right shoulder, and a fracture of the blade of the right scapula.

Russell SC DCJ (8 June 2018)

Smith v Carnival Plc trading as P&O Cruises Australia [2018] NSWSC 782

33% of a most extreme case

Plaintiff was a 14-year-old female who was aboard a cruise ship when three ceiling panels fell from above and hit her head and left shoulder.

Injuries: Discal injury to the C6-7 level resulting in chronic pain and chronic adjustment disorder with mixed anxiety and depressed mood.

Campbell J (31 May 2018)

Wharekawa v AEA Constructions Pty Ltd; Building Partners Pty Ltd v AEA Constructions Pty Ltd [2018] NSWSC 684

35% of a most extreme case

Plaintiff was a 28-year-old male who was on a building site when a nail struck him in his left temple.

Injuries: Depressed fracture of the skull which has resulted in suffering recurring migraine and diminished control over lower limbs. Local pain to neck, loss of balance fluctuating during the first 12 months until spinal fusion surgery (spinal injury not attributed to the incident). Ongoing post-traumatic stress disorder.

Fagan J (17 May 2018)

Benton v Historic Houses Trust of NSW [2017] NSWDC 324

44% of a most extreme case

Plaintiff was a 41-year-old female who fell down a ditch and landed in a creek during the course of her employment with a catering company that was providing catering services at Vacluse House.

Injuries: A deformed right wrist, 1 cm cut to right forehead, and pins and needles sensation to the fingers of the right hand. As a result of the deformed right wrist, the plaintiff had a mechanical instability problem with her right wrist, including a CRPS which was secondary to the fracture injury. The plaintiff went on to develop the majority of the essential elements of post-traumatic stress disorder, some adjustment symptoms, and an adverse chronic pain experience, with a relatively severe post-traumatic chronic regional pain syndrome at the right distal forearm, wrist and hand, with an unfavorable prognosis.

Judge Levy SC (17 November 2017)

Cooper v Nominal Defendant [2017] NSWDC 3**86% of a most extreme case**

Plaintiff was a 25-year-old male who was driving an "offroad bike" that was neither registrable or insured when a collision occurred. The plaintiff and his friend had been in each other's company for a lengthy period of time consuming alcohol. However, the plaintiff's blood alcohol concentration was of no evidentiary value. Both the plaintiff and his friend allegedly collided into each other prior to daylight on a public street.

Injuries: Open fracture of both bones of the lower leg (tibia and fibula). Fracture of both bones of the forearm, multiple injuries to fingers and hand, including partial amputation of the fifth finger, brachial nerve palsy. Chest injury - collapsed lung, fracture of the fourth left rib undisplaced. Pelvic injuries - "open book" pelvic fractures, including the dislocation of left sacro-iliac joint. Avulsion of the rectus abdominis, open perineal degloving injury, including tearing of the scrotum. Anal and rectal injuries associated with this degloving injury. Perforation of the bladder. Other: C8 and T1 nerve root avulsions and suspected brain injury. Plaintiff's left lower leg was eventually amputated below the knee leaving 10 cm of the tibia.

Neilson DCJ (20 January 2017)

Oberlechner v Hornsby Shire Council [2017] NSWSC 23**30% of a most extreme case**

Plaintiff was a 48-year-old male who was walking his dogs at 9.30 pm when he followed his dog off the road on to uninhabited land owned by the defendant. Plaintiff fell some distance.

Injuries: Fractures to his left hand and wrist and to the right ankle, as well as several soft tissue injuries and exacerbation of post-traumatic stress disorder.

Adams J (2 February 2017)

Hitchen v Strategic Formwork; Hitchen v RTS Holdings Pty Ltd [2017] NSWSC 75**70% of a most extreme case**

Plaintiff was a 25-year-old male who during the course of his employment was removing beams from a pile, above his height, when the pile of beams fell on top of him.

Injuries: A fracture dislocation at T12/T11, fractured transverse process of L1/L2, undisplaced fracture of the distal left fibula, incomplete spinal cord injury with partial loss of function of the right and left legs, and neuropathic bladder and other impairments.

Harrison AsJ (17 February 2017)

Shanice Titus v MHC Leisure Fund Services Pty Ltd t/as MHC Property Trust No. 1 Op Trust No. 1 & Anor [2017] NSWDC 162**25% of a most extreme case**

Plaintiff was a 16-year-old female who fell four metres into an open manhole, which was used to place or remove beer kegs for the adjacent hotel premises.

Injuries: An impact injury to the right knee (medial meniscus posterior horn contusion) which required physiotherapy. Plaintiff sustained soft tissue injuries to her right wrist, cervical and lumbar spines. Injury to her right jaw, which the plaintiff alleges was a result of hitting her face when she fell into the hole, and symptoms include grinding of the teeth. Plaintiff also sustained abrasions to her right thigh, leg and right arm. Plaintiff required a scribe for her examination in year 11 because of her wrist pain. Contributory negligence (10%) was applied as the plaintiff failed to take reasonable care for her own safety by failing to observe the open keg chute (used 2-3 times per week and plaintiff walked the same route daily to school).

Mahony SC DCJ (30 June 2017)

Heang v Tran [2016] NSWDC 188

30% of a most extreme case

Plaintiff was a 36-year-old female who slipped and fell onto her right side and sustained bodily injury in the defendant's fruit shop due to the condition of the floor.

Injuries: Soft tissue injuries to her neck, her right shoulder, her right arm, and to her upper and lower back. She was also considerably shaken by the experience. Since that time, she has had ongoing pain, restriction of movement and discomfort in those areas, as well as experiencing headaches and distressing psychological symptoms. Beforehand, the plaintiff did not have any such physical or emotional problems.

Levy SCJ (26 August 2016)

Courts v Essential Energy (aka Country Energy) [2014] NSWSC 1483

50% of a most extreme case

Plaintiff was a 49-year-old male who was electrocuted while unloading sheep from a vehicle.

Injuries: Debridement and skin graft to his scalp, multiple debridements of his left foot, amputation of two toes and attempted skin graft to his left foot. A year after the accident his left leg was amputated below the knee and further skin grafts were required. He also suffered osteomyelitis in his skull and continued to suffer from phantom pain in his left leg.

The court took into account his active pre-accident lifestyle and noted that his bravery and stoicism ought not to lead to any moderation of the damages awarded.

Adamson J (29 October 2014)

Jacobe v QSR Pty Ltd (t/as Kentucky Fried Chicken Lakemba) [2014] NSWDC 150

18% of a most extreme case

Plaintiff was a 55-year-old male who tripped over a concrete wheel in the car park of a KFC store.

Injuries: Fell onto his right shoulder, right knee and right ankle causing ongoing pain, as well as bruising to his right shoulder.

Ultimately the court held for the defendant, however, an assessment of non-economic loss was still undertaken.

Levy SC DCJ (19 September 2014)

Motorcycling Events Group Australia Pty Ltd v Kelly [2013] NSWCA 361

50% of a most extreme case

Plaintiff was a 58-year-old male who was hit by a motorcyclist at a motorcycle training course.

Injuries: Upper body injuries, chest pains, difficulty breathing and weakness, pain and restriction of movement in his right arm, shoulder and neck. The court took into account his extraordinary level of fitness before the accident and noted he spent a month in hospital and was in an induced coma for three days.

On appeal, the initial assessment of non-economic loss was upheld.

Basten, Meagher and Gleeson JJA (29 October 2013)

Ryan v A F Concrete Pumping Pty Ltd & Another [2013] NSWSC 113

65% of a most extreme case

Plaintiff (male, age unknown) was hit in the head by concrete which had been ejected from a pipe while working on a building site.

Injuries: Traumatic brain injury, as well as injuries to the face, head, teeth and shoulders. He suffered from post-traumatic stress disorder for a time, however, this was eventually resolved. Over time his appearance improved substantially and there was no obvious disfigurement, though he remained self-conscious. He had largely recovered from his physical injuries at the time of the trial though the court made note that he had been forced to pick out the pieces of concrete lodged in his face one by one in a process which was described by medical practitioners as approaching self-mutilation.

Adamson J (26 February 2013)

Mason v Demasi [2012] NSWCA 210

25% of a most extreme case

Plaintiff was a 35-year-old female who was attacked by a Rottweiler dog.

Injuries: Injury to leg causing scarring, numbness and the development of post-traumatic stress disorder. The court took into account her pre-existing emotional condition that made her prone to exaggeration and manipulation.

Beazley, McColl and Meagher JJA (13 July 2012)

Rebecca Nemeth v Westfield Limited & PT Limited [2012] NSWDC 76

25% of a most extreme case

Plaintiff was a 34-year-old female who fell into a drainage gully after her foot got stuck on a portion of rubber on a speed bump.

Injuries: Fracture to the right ankle and psychiatric injury, resulting in restricted mobility and an inability to undertake heavy cleaning and domestic chores.

Mahony SC DCJ (11 May 2012)

Garzo v Liverpool/Campbelltown Christian School Limited & Anor [2011] NSWSC 292

35% of a most extreme case

Plaintiff was a 31-year-old female who fell on a marked pedestrian crossing while exiting a school.

Injuries: Fractured right elbow and restricted use of right arm. She suffered ongoing pain requiring medication and sustained significant dental injuries to two of her teeth.

Ultimately it was held that the defendant was not liable, however, an assessment of damages was still undertaken.

Garling J (15 April 2011)

Wakeling v Coles Group Limited [2011] NSWDC 20

29% of a most extreme case

Plaintiff was a 22-year-old male who slipped and fell in a Coles supermarket.

Injuries: Twisting and swelling to right ankle, minor bruising injuries to right knee, wrist, elbow and shoulder and a lower back injury. Court also took into consideration his significant history of drug addiction.

Levy SC DCJ (4 April 2011)

Varga v Galea [2011] NSWCA 76

40% of a most extreme case

Plaintiff was a 64-year-old male who suffered an injury while working as a bricklayer.

Injuries: Injuries to back (burst fracture at L1 causing loss of 30% height centrally and injuries at T12, T10 and L2), lower back pain, pain in left knee and a hernia.

First instance decision was upheld on appeal and an application for special leave was dismissed.

Beazley and McColl JJA, and Handley AJA (4 April 2011)

Jajeh v Woolworths Limited [2010] NSWDC 239

37% of a most extreme case

Plaintiff was a 27-year-old female who slipped on water in a Woolworths store.

Injuries: Injury to left side of abdomen, epigastric pain, a posterior disc bulge at the level L4-5 (with narrowing and dehydration of the L5-S1 disc), injury to her neck, right wrist and right knee (these eventually resolved over time), as well as chronic major depression and chronic pain disorder.

Levy SC DCJ (26 October 2010)

Hadaway v Robinson & Ors [2010] NSWDC 188

35% of a most extreme case

Plaintiff was a 44-year-old male who was assaulted when leaving a hotel.

Injuries: Fracture of the lower third of his leg, a long spiral fracture to the mid shaft of the left tibia, a spiral fracture at the proximal neck of the left fibula, a fractured nose, a ruptured ear drum, multiple bruises, swelling to the face and inside of the mouth and bruising and swelling to his testicles. He was admitted to hospital on a number of occasions and underwent multiple surgeries, and later developed various secondary wounds as a result of his injured left leg.

This decision was reversed in *Cregan Hotel Management Pty Ltd v Hadaway* [2011] NSWCA 338, though the issue of non-economic loss was not in contention.

Levy SC DCJ (3 September 2010)

Husain Jammal v & S Tadros [2010] NSWDC 190

20% of a most extreme case

Plaintiff was a 65-year-old male who fell while walking down a set of stairs.

Injuries: Allegedly suffered from pain in the lower back, right shoulder and right leg.

Nicholson SC DCJ (30 July 2010)

Sijuk v Ilvari Pty Ltd (t/as Craftsman Homes) [2010] NSWSC 793

31% of a most extreme case

Plaintiff was a 54-year-old male who fell a substantial distance from scaffolding.

Injuries: Injury to left shoulder, neck strain, injury to lower back, chronic adjustment disorder and severe chronic depression. His injuries rendered him unable to undertake full-time employment.

Hall J (12 July 2010)

Freudenstein v Marhop Pty Ltd & Ors [2010] NSWSC 724

33% of a most extreme case

Plaintiff was a 38-year-old male who fell from the roof of the Mona Vale Hotel.

Injuries: Back pain (disc protrusions at the L4-L5 and L5-S1 levels), injury to the left shoulder (rotator cuff lesion) and psychological difficulties. He suffered a great deal of pain and was clearly disabled by the accident.

Kirby J (8 July 2010)

Huseyin v Qantas Airways Ltd [2010] NSWSC 372

45% of a most extreme case

Plaintiff was a 29-year-old male who was struck on the head by a metal roller door.

Injuries: Soft tissue injury to the neck, shoulders, back and head, and post-traumatic fibromyalgia syndrome. He was unable to work, partake in domestic duties or undertake pre-injury recreational pursuits, though there were prospects of improvement.

Fullerton J (30 April 2010)

Schneider v State of New South Wales [2009] NSWDC 108

40% of a most extreme case

Plaintiff was a 48-year-old female who fell into an uncovered hole and landed on her tailbone.

Injuries: Damage to her back and later development of symptoms in her arms and legs, as well as carpal tunnel syndrome. She also suffered chronic adjustment disorder, chronic anxiety and depression. Her ongoing need for medical treatment rendered her unemployable.

Levy SC DCJ (16 October 2009)

State Rail Authority of New South Wales v Chu [2008] NSWCA 14

25% of a most extreme case

Plaintiff was a 36-year-old female who fell down a set of stairs.

Injuries: Fractured left ankle, depression and psychological problems.

Shortly after the accident she was sexually assaulted. At first instance the court held that her decreased mobility as a result of her fractured left ankle made her vulnerable to the sexual attack awarding her 30% of the most extreme case. On appeal, this was reduced to 25% as the court found that the defendant could not be held liable for the psychological injury resulting from the sexual assault.

Hodgson and Bell JJA, and Mathews AJA (6 March 2008)

Sam Chamma v Soliman and Sons Pty Ltd and Ors [2008] NSWSC 165

75% of a most extreme case

Plaintiff was a 22-year-old male who fell headfirst from a partially completed second floor balcony, some five metres above the ground, during the course of his employment.

Injuries: Severe and potentially life threatening injuries. He suffered brain damage, continuing disabilities and mental health problems, and underwent surgery to his knee, right arm, left wrist, jaw and face (requiring bone grafts and the installation of screws and plates). He suffered a large scar across his face and general scarring from his surgeries, damaged and lost teeth, continuing pain, a prolonged stay in hospital and decreased mobility (which gradually improved with physiotherapy). He also suffered from mood swings, frustration,

chronic depression, marital strain, diminished sexual function, personality changes, forgetfulness, and post-traumatic stress disorder.

Patten AJ (5 March 2008)

Naidoo v Brisbane Waters Administration Pty Ltd trading as Brisbane Waters Private Hospital [2017] NSWDC 372

27% of a most extreme case

Plaintiff was a 46-year-old female who blacked out/fell asleep while driving home from hospital. The plaintiff claimed that she should not have been permitted to drive as she had been suffering from tiredness, drowsiness and/or sedation.

Injuries: Injury to her neck and right shoulder. She also suffered aggravation of her lower back condition and a temporary aggravation of her psychiatric condition.

Wilson SC DCJ (20 December 2017)

Frazer v Romeo [2020] NSWDC 415

28% of a most extreme case

Plaintiff was a 37-year-old female who injured her left arm and leg as a result of being bitten by two dogs owned by the defendants.

Injuries: Two puncture sites to the right lateral thigh and two puncture sites to the left upper arm over the medial edge of the bicep.

P Taylor SC (12 June 2020)

Sartor v Bitton [2019] NSWDC 723

28% of a most extreme case

Plaintiff was a 42-year-old female who injured her left ankle, 11th rib, lower back and neck as a result of falling onto the deck of a catamaran operated by the defendant.

Injuries: Fractured left 11th rib, left ankle ligament tenderness, reduction in plantar flexion and generalised reduction in range of motion in the cervical spine.

Russell SC (4 December 2019)

Badra v Value Constructions Pty Ltd [2024] NSWSC 1307

37% of a most extreme case

Plaintiff was a 37 year old man. The case was fought on the facts. The Plaintiff alleged that he had been working on a construction site with three other persons employed by the First Defendant. On the morning of the accident, the Second Defendant had placed plastic sheeting over a hole that was above a stormwater drain. Plaintiff was walking across the site and fell into the stormwater drain hole which was covered with the plastic sheeting.

Injuries: Right shoulder, neck, back and right hip, depression. Complaints of pain are extreme and has a gross restriction of movement and significant pain.

Cavanagh SC J (3 November 2023)

Neck

Walker v Portmans Pty Ltd [2009] NSWDC 46

31.5% of a most extreme case

Plaintiff was a 63-year-old female who tripped on a vacuum cleaner cord.

Injuries: Injuries to neck, left shoulder and lower back requiring surgery in the very near future.

Levy DCJ (22 May 2009)

Westfield Shoppingtown Liverpool v Jevtich [2008] NSWCA 139

30% of a most extreme case

Plaintiff was a 62-year-old male who fell at a Westfield shopping centre.

Injuries: Injuries predominantly to neck, as well as injuries to his jaw and leg. He underwent surgery and had pre-existing lower back pain and Parkinson's disease.

Hodgson, Tobias and Bell JJA (18 June 2008)

Erect Safe Scaffolding v Sutton [2008] NSWCA 114

38% of a most extreme case

Plaintiff was a 60-year-old male who fell after hitting his head on the cross bar of scaffolding.

Injuries: Disc prolapse at the C2-3 level with some impingement of the nerves and musculo-skeletal injury to the C1-2 level. He suffered from constant pain radiating down his arms and loss of sensation in a finger of his left hand. He was able to continue working for approximately a year after the accident after which his pain levels barred his ability to work.

Giles and Basten JJA and McClellan CJ (6 June 2008)

Langdon v Carnival PLC [2024] NSWCA 168

25% of a most extreme case

Applicant in the appeal dropped approximately 30cm onto the tiled floor of a pool following the collapse of a wooden step. Carnival admitted breach of a duty of care in relation to the incident, but disputed that the injuries the subject of the claim were caused by the incident, and hence denied liability.

Injuries: Neck and left shoulder, as well as a psychological injury through aggravation of a pre-existing, but until then asymptomatic, degenerative change of the cervical spine and left shoulder.

Ward P, Kirk JA, Basten AJA (16 July 2024)

Psychological injury

Perry v Kinnear & Ors (No. 5) [2021] NSWDC 145

30% of a most extreme case

Note: Judgment was ultimately determined in favour of the defendants, but MEC was still assessed.

Plaintiff was a 16-year-old female who was allegedly sexually assaulted by the first defendant who was her foster carer.

Injuries: Borderline personality disorder. Cognitive personality disorder. Potentially post-traumatic stress disorder and attention deficit hyperactivity disorder.

Montgomery DCJ (30 April 2021)

Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre [2020] NSWCA

30% of a most extreme case

Appellant (male, age unknown) was employed as a security guard at the Lidcombe Power Centre. An intruder entered the premises by climbing through a gap above an external roller door and up a set of fire stairs. The appellant was threatened by the intruder and then accosted the intruder.

Injuries: Chronic post-traumatic stress disorder and depressive disorder.

Basten JA, McCallum JA and Emmett AJA (22 December 2020)

Trial at first instance: Judgment in favour of the defendants as the appellant, by leaving the safety of the control room and accosting the intruder was the "author of his own downfall". 22% MEC.

Arndell BHT Arndell v Old Bar Beach Festival Incorporated; Cox v Mid-Coast Council [2020] NSWSC 1710

60% for plaintiff and 55% for pilot - of a most extreme case

Plaintiff was a 14-year-old female who suffered injuries as a consequence of a light aircraft colliding with a Ferris Wheel the plaintiff was riding at the Old Bar Festival in Old Bar, NSW. Pilot was a cross-defendant.

Injuries: No compensable physical injury for either plaintiff or pilot.

Plaintiff experienced significant psychological decompensation against the back of a pre-existing psychological vulnerability. Generalised anxiety disorder and a major depressive disorder with co-existing trauma-induced symptoms.

Pilot suffered post-traumatic stress disorder, major depressive disorder, re-experiencing phenomena, hypervigilance, mood issues, avoidance problems, phobia related to sharp objects.

Rothman J (1 December 2020)

Lee (a pseudonym) v Dhupar [2020] NSWDC 717

38% of a most extreme case

Plaintiff was a 39-year-old female who conceived and gave birth to a child 12 months after the defendant performed an elective tubal ligation procedure on her, the aim of which was to achieve permanent sterilisation.

Injuries: Physical effects of pregnancy and caesarean section. Major depressive disorder.

Judge Levy SC (19 November 2020)

Plaintiff A and B v Bird; Plaintiff C v Bird; Plaintiff D v Bird [2020] NSWSC 1379

A's case 30% of a most extreme case

C's case 28% of a most extreme case

B and D were children who were sexually assaulted by the defendant at Footprints Childcare Centre. A and C are B and D's mothers, respectively.

Injuries: A: Post-traumatic stress disorder, alcohol and drug addiction.

B: Post-traumatic stress disorder.

C: Chronic adjustment disorder with mixed depression and anxious mood. Alcohol abuse disorder.

D: Psychiatric disorder and transient exacerbation of symptoms. Childhood post-traumatic stress disorder.

Schmidt AJ (9 October 2020)

Sorbello v South Western Sydney Local Health Network; Sultan v South Western Sydney Local Health Network [2016] NSWSC 863

35% of a most extreme case

Plaintiff (Sorbello), a 23-year-old female, gave birth to a boy who suffered severe injury as the result of oxygen deprivation during his birth at the defendant hospital. The boy was profoundly disabled, had a significantly shortened life expectancy and required lifetime care.

Injuries: Nervous shock, depressive condition as a result of the defendant hospital's negligence.

Plaintiff was a 25-year-old male, the ex-husband of Sorbello and father of Sorbello's son. Plaintiff was present at the birth of his son and described it as "disgusting like a scene from a horror movie". The court held that Sultan had not suffered a psychiatric injury after the birth of his son and therefore no damages were awarded.

Schmidt J (24 June 2016)

Talwar v Ox Two Pty Ltd t/as Ocean Extreme & Anor [2017] NSWDC 72

28% of a most extreme case

Plaintiff was a 25-year-old female who was involved in a boating misadventure which resulted in the plaintiff being thrown from her seat. Plaintiff's face and head were struck with a metal handlebar structure on the vessel.

Injuries: Plaintiff was unable to speak for a short time. Her face was bruised and bleeding profusely. Plaintiff was shocked and frightened and sustained a strain to her neck which lasted an estimated 5-6 weeks. Additionally, the plaintiff suffered a haematoma to her right lower jaw which was painful and uncomfortable and took some time to resolve. Plaintiff's lasting injury is psychological.

Levy SC DCJ (6 April 2017)

Cate Doosey v Nigel Walsh & Complete Building Inspection Services Pty Ltd; Evangeline Doosey-Shaw by her next friend Cate Doosey v Nigel Walsh & Complete Building Inspection Services Pty Ltd [2017] NSWDC 8

26% of a most extreme case

Plaintiff was a 48-year-old female who came to the aid of her 7-year-old daughter who was "crumpled and unresponsive on the concrete 2.57m below the deck of the balcony".

Injuries: Permanent psychological impairment - post-traumatic stress disorder as a result of her daughter's fall.

Montgomery DCJ (3 February 2017)

Lee v Carlton Crest Hotel (Sydney) Pty Ltd [2014] NSWSC 1280

50% of a most extreme case

Plaintiff was a 34-year-old female who witnessed her husband being fatally injured when a car he was parking fell off the edge of the second storey of a car park.

Injuries: Severe nervous shock (was deemed suicidal). Court noted the prospects of her recovery were bleak.

Beech-Jones J (19 September 2014)

Hall v State of New South Wales [2014] NSWCA 154

25% of a most extreme case

Plaintiff (female, age unknown) suffered psychiatric injury when she witnessed a fight break out between two students at a correctional facility she worked in.

Injuries: Post-traumatic stress disorder. She had pre-existing psychiatric issues and it was accepted that her life had been significantly affected by her psychiatric injuries.

Meagher and Leeming JJA, and McDougall J (19 May 2014)

Rasmussen v South Western Sydney Local Health District [2013] NSWSC 656

40% of a most extreme case

Plaintiff was a 31-year-old female whose new born baby boy died at the age of four days as a result of hospital negligence.

Injuries: Anxiety disorder with a pathological grief condition. The court took into account submissions that the birthing and rearing of her two subsequent children were tainted by grief at the loss of her first born. The court noted there were several indications of her capacity to function but found she remained vulnerable to stressors.

Adamson J (29 May 2013)

Thornton v Wollondilly Mobile Engineering [2012] NSWSC 621

25% of a most extreme case

Plaintiff was a 17-year-old male who witnessed his supervisor die as a result of a work related incident.

Injuries: Nervous shock arising from post-traumatic stress disorder.

Adamson J (7 June 2012)

Miskovic v Stryker Corporation t/as KSS Security [2010] NSWSC 128; (No 2) [2010] NSWSC 1495; [2011] NSWCA 369

Assessed damages of \$275,000 (approximately 58% of a most extreme case)

Plaintiff (male, age unknown) allegedly suffered psychiatric injuries as a result of his employment as a security guard.

Injuries: Major depressive disorder and obsessive compulsory disorder (symptoms of which included stress, overreaction, depression, difficulty sleeping, stomach cramps and nervousness). The court accepted this was one of the worst cases of psychiatric injury and his disorders were chronic and profound.

Ultimately, the court found for the defendant and an appeal was dismissed with costs.

Rothman J (first instance) (19 April 2010)

Peter Steven Benic v State of New South Wales [2010] NSWSC 1039

33% of a most extreme case

Plaintiff was a 47-year-old male who suffered psychiatric injury as a result of his employment in the New South Wales Police Force.

Injuries: Post-traumatic stress disorder. Court held there was no evidence his daily functioning was significantly impeded by the post-traumatic stress disorder.

Garling J (30 November 2010)

Doherty v New South Wales [2010] NSWSC 450

37% of a most extreme case

Plaintiff was a 47-year-old male who suffered psychological injuries as a result of his employment in the forensic group of the New South Wales Police Force.

Injuries: Post-traumatic stress disorder and a major depressive disorder from which he would never fully recover.

Price J (20 May 2010)

Sretenovic v Reed [2009] NSWCA 280

20% of a most extreme case

Plaintiff was an 11-year-old male who was attacked by a dog.

Injuries: Chronic post-traumatic stress disorder, a mood disorder and a personality change. Physical injuries sustained as a result of the dog attack were largely resolved at the time of the trial.

At first instance, the plaintiff was assessed as having suffered 35% of the most extreme case. This assessment was overturned on appeal and reduced to 20%.

Beazley and McColl JJA (7 September 2009)

De Beer v the State of New South Wales & Anor [2009] NSWSC 364

40% of a most extreme case

Plaintiff was a 16 or 17-year-old male who received an electric shock at a school camp.

Injuries: Ongoing problems including headaches, memory concentration and fatigue issues, as well as a psychological disorder known as dysthymia (a chronic mood disorder). There were little prospects of recovery from these psychological injuries.

Schmidt AJ (11 May 2009)

Jones v Dapto Leagues Club [2008] NSWCA 32

23% of a most extreme case

Plaintiff (male, age unknown) was electrocuted causing him to fall back and strike his head on concrete pavement.

Injuries: Post-traumatic stress disorder and brain injury. The court took his pre-accident disposition of heavy drinking into account.

At first instance, the trial judge held that his injuries were not a result of the accident. This finding was overturned on appeal.

Mason P, Beazley and Bell JJA (18 March 2008)

Kazic v GIO Workers Compensation (NSW) Ltd [2007] NSWDC 342

27% of a most extreme case

Plaintiff was a 40-year-old male who was struck on the head by a piece of scaffolding.

Injuries: Damage to his head, neck, shoulder, leg and psychological adjustment disorder. The court found his physical problems were largely resolved prior to the trial and his psychological condition had a strong scope for improvement.

Johnstone DCJ (5 October 2007)

Capar v SPG Investments Pty Limited t/a Lidcombe Power Centre & Ors (No. 5) [2019] NSWSC 507

25% of a most extreme case

Plaintiff was a 42-year-old male who while working as a security guard was confronted with an axe wielding intruder who said to him, "I'm going to kill you".

Injuries: Chronic post-traumatic stress disorder and associated depression within background of pre-existing psychological sequelae and substance abuse (alcohol and marijuana).

Bellew J (13 May 2019)

Frangie v South Western Sydney Local Health District t/as Liverpool Hospital [2019] NSWDC 42

25% of a most extreme case

Plaintiffs were the wife, two daughters and son of a man admitted to the defendant's hospital after suffering a severe heart attack. The man was discharged and died three days later when at home. The plaintiffs resultantly suffered mental/nervous shock.

Injuries: Mental and nervous shock, major depressive disorder, aggravated PTSD, adjustment disorder and anxiety.

Abadee DCJ (7 March 2019)

Alderson v Gause [2024] NSWDC 152

31% of a most extreme case

Residential premises was owned by the Defendant and rented to the Plaintiff and her partner. The Plaintiff's partner died in a house fire. A smoke alarm that was fitted to the premises had been tampered with and therefore did not sound. Plaintiff was 21 years old at the time of the fire. It was disputed whether the Plaintiff had suffered a recognisable psychiatric illness under s 31 of the *Civil Liability Act*.

Injuries: Mental harm consisting of a recognised psychiatric illness resulting from the Defendant's negligence..

Montgomery DCJ (6 May 2024)

T2 (by his tutor T1) v State of New South Wales [2024] NSWSC 1347

40% of a most extreme case

Plaintiff was a 14-year-old child who was injured when a group of students assaulted him in a nearby park after school.

Injuries: Deterioration of mental state and psychological injury. Heightened trauma and decreased quality of life. Exacerbation of a pre-existing condition being autism spectrum disorder (**ASD**).

Harrison ASJ (25 October 2024)

Scalp

O'Toole v Temelkovska [2012] NSWDC 88

25% of a most extreme case

Plaintiff was a 12-year-old female who underwent chemical treatment in a hairdressing salon to add coloured highlights to her hair.

Injuries: Full thickness burn to the scalp at the crown, requiring her to undergo surgery and resulting in a permanent alopecia bald patch.

Levy SC DCJ (20 June 2012)

Shoulder

Mansell v Coles Supermarkets Australia Pty Limited [2017] NSWDC 309

27% of a most extreme case

Plaintiff was a 59-year-old male who slipped in the defendant's supermarket in Vincentia, New South Wales. He fell on his right shoulder and neck.

Injuries: Aggravation of degenerative right shoulder (possible partial tear) resulting in sharp pain and adhesive capsulitis.

Russell DCJ (3 November 2017)

Allen v Strata Plan 54664 [2016] NSWDC 217

25% of a most extreme case

Plaintiff was an 88-year-old female who tripped over a mat left by the defendant in a lift.

Injuries: Fractured right shoulder resulting in reduced motion in her right arm. Plaintiff was forced to undergo a reverse shoulder replacement on her right side.

Gibson DCJ (16 September 2016)

Awad v ISPT Pty Limited & Jones Lang LaSalle (NSW) Pty Limited & Glad Cleaning Services Pty Limited (No 1) [2015] NSWDC 329

15% of a most extreme case

Plaintiff was a 44-year-old female who slipped on the floor of a common area of the Southgate shopping centre and fell on her right side.

Injuries: Soft tissue injury to upper right arm and right shoulder.

Neilson DCJ

Hornsby Shire Council v Viscardi [2015] NSWCA 417

28% of a most extreme case. Affirmed DC judgment.

Plaintiff (male, age unknown) sustained soft tissue injuries to his right shoulder in a fall that occurred while he was walking at night in a poorly illuminated open-air council car park. Plaintiff lost his footing after stepping into a depression or defect which had formed in the bitumen paving of the car park surface.

Injuries: Significant and permanent restriction in right shoulder movement. In reaching assessment for non-economic loss, the judge also took into account psychological problems suffered by the plaintiff which followed the breakdown of his personal relationship and his limited ability to participate in leisure and sporting activities.

Beazley P, Gleeson and Simpson JJA (22 December 2015)

Viscardi v Hornsby Shire Council [2015] NSWDC 19**28% of a most extreme case**

Plaintiff was a 62-year-old male who fell while walking over a depression in a poorly illuminated council car park.

Injuries: Soft tissue injuries to the right shoulder resulting in significant and permanent restriction of the right shoulder movement and the need to take medication for pain relief and depression. Court considered the superimposed effect of the subject accident on the plaintiff's pre-existing health problems and disabilities caused additional and significant problems.

Levy SC DCJ (4 March 2015)

Borg v Ramsay Health Care t/as North Shore Private Hospital Pty Limited [2014] NSWSC 37**20% of a most extreme case**

Plaintiff was a 42-year-old male who fell from an operating table at a hospital prior to undergoing surgery to repair his right shoulder while under anesthesia.

Injuries: The court accepted that he suffered injury (and aggravation of pre-existing injury) to his right shoulder, as well as anxiety when undergoing further surgical procedures.

Adamson J (12 February 2014)

Fullin v WR & EM Kennedy Nominees Pty Limited t/as Franbridge Distributors [2013] NSWDC 70**25% of a most extreme case**

Plaintiff was a 75-year-old male who fell from a landing at a hardware store.

Injuries: Tearing in right shoulder (requiring rotator cuff repair) and ongoing pain. His age and existing health issues were taken into consideration by the court.

Elkaim SC DCJ (24 May 2013)

Langendoen v Coolangatta Estate Pty Ltd [2012] NSWDC 210**28% of a most extreme case**

Plaintiff was a 49-year-old female who fell off a wall while intoxicated.

Injuries: Fracture of the shoulder which resulted in an obvious unevenness of the plaintiff's shoulders.

Ultimately, damages were reduced 40% due to contributory negligence.

Elkaim SC DCJ (9 November 2012)

Marshbaum v Loose Fit Pty Ltd & Anor [2010] NSWSC 1130; [2011] NSWCA 372**32% of a most extreme case**

Plaintiff was a 60-year-old female who sustained injury while descending a staircase at a fitness centre.

Injuries: Fracture and dislocation of left shoulder requiring surgery. She also injured her arm, sustained bruising to her face and suffered from pain in her left leg. She developed stiffness and underwent procedures that were unsuccessful and ultimately increased her pain levels.

Decision was appealed, though the assessment of non-economic loss was not in question.

Hoeben J (11 October 2010)

Hodges v Coles Group Ltd [2009] NSWDC 189

33% of a most extreme case

Plaintiff was a 40-year-old male who suffered injury while trying to stop a large load from falling.

Injuries: Traumatic dislocation of his right shoulder and a later development of post-operative frozen shoulder and chronic pain syndrome. He was unable to return to his pre-accident employment.

Williams DCJ (4 June 2009)

Ali v Holdmark Developers [2009] NSWDC 75

20% of a most extreme case

Plaintiff (female, age unknown) fell at the foot of an elevator in a shopping centre.

Injuries: Small tear, tendonitis and degenerative change in her left shoulder. She experienced ongoing pain, restrictions to her movement and soft tissue injuries to her right knee and foot.

Murrell SC DCJ (27 April 2009)

Officeworks Ltd v Christopher [2019] NSWCA 96

<15% of a most extreme case (29% at first instance)

Plaintiff was a 73-year-old female who fell to the ground when something dropped from a height which struck her. She had two surgeries and complications post incident but the Court of Appeal found that the plaintiff failed to establish a causal connection between the incident and residual restrictions.

Injuries: Transient pain.

Meagher, Gleeson and Leeming JJA (6 May 2019)

Makaroff v Nepean Blue Mountains Local Health District [2019] NSWSC 715

40% of a most extreme case

Plaintiff was a 67-year-old female who sustained injury as a result of medical negligence following right shoulder dislocation.

Injuries: Irreparable rotator cuff tear (supraspinatus and infraspinatus tendons); medial subluxation of the right biceps; significant restriction to right shoulder range of motion.

Harrison AsJ (14 June 2019)

Spinal cord

Hobson v Northern Sydney Local Health District [2017] NSWSC 589

85% of a most extreme case

Plaintiff was a 24-year-old male who was born with Noonan Syndrome. The plaintiff underwent a number of operations designed to remedy this defect. It was in the course of the surgeries that he sustained a hypotensive insult to his spinal cord that rendered him a paraplegic.

Injuries: Paraplegic who the Supreme Court held would likely have a future life expectancy of 30 years, to the age of 62.

Harrison J (17 May 2017)

SW v MK (No. 5) [2019] NSWDC 242

69% of a most extreme case

Plaintiff was a 19-year-old female who was travelling in a cab and pulled a knife on the taxi driver as she was attempting to get out of the cab. The taxi driver sped off causing her to fall from the taxi.

Injuries: Paraplegic who has lost the use of her limbs, sexual functioning and bladder control.

Gibson DCJ (24 May 2019)

Spleen

Addison v The Owners - Strata Plan No. 32680 [2010] NSWDC 251

25% of a most extreme case

Plaintiff was a 19-year-old male who fell into a pit on a pathway.

Injuries: Underwent a splenectomy (removal of the spleen) resulting in a large scar, the need for ongoing antibiotics and immunodeficiency.

Gibson DCJ (6 October 2010)

Wrist

Hodgson v Sydney Water Corporation [2016] NSWDC 361

20% of a most extreme case

Plaintiff was a 30-year-old female who fell on a concrete stormwater drain "apron" that was partially concealed by sand. The apron was slippery and dangerous at the time and this caused the plaintiff's fall.

Injuries: Fractured wrist, severe bruising and right shoulder injuries, as well as pain in the right buttock.

Dicker SC DCJ (15 December 2016)

Aldi Foods Pty Ltd v Young [2016] NSWCA 109

Appellate court deemed the plaintiff's injuries fell below the 15% minimum

Plaintiff (female, age unknown) tripped on a pallet jack in the defendant's store and fell on the floor.

Injuries: Aggravation of her pre-existing knee and back problems, pain in her right shoulder and pain in her wrist and hand. The Court of Appeal deemed that the pre-existing injuries had not been aggravated to such an extent as to warrant non-economic loss equal or greater than 15% of the most extreme case.

Meagher and Simpson JJA and Adamson J (13 May 2016)

Jackson v Mazzafero [2012] NSWCA 170

26% of a most extreme case

Plaintiff was a 57-year-old female who slipped and fell sustaining injury.

Injuries: Fractured left wrist and reflex sympathetic dystrophy, which gradually resolved.

Macfarlan and Hoeben JJA (15 June 2012)

Guiney v Australand Holdings Ltd & Ors; Castlehaven Sales No 2 (trading as Castlehaven Realtors) & Ors v Guiney & Ors (No 2) [2008] NSWCA 124

26% of a most extreme case

Plaintiff was a 49-year-old female who slipped and fell on wet tiles in a bathroom.

Injuries: Aggravation of a pre-existing left wrist injury that subsequently required surgery.

Mason P, Giles JA, and Einstein J (30 May 2008)

Drew Cuthbertson v State of New South Wales; Daniel Fletcher v State of New South Wales [2017] NSWDC 367

25% of a most extreme case

Plaintiff (male, age unknown) who was grabbed by a police officer on the arm and in the region of the left chest and shoved off a train.

Injuries: Wrist injury and fracture to his right distal ulna. He initially experienced pain and discomfort in his right wrist area, which restricted him from twisting his lower arm.

Montgomery DCJ (15 December 2017)

Greentree v Blacktown City Council [2021] NSWDC

25% of a most extreme case

Note: Judgment was ultimately determined in favour of the defendant, but MEC was still assessed.

Plaintiff was a 74-year-old female who suffered injury when she tripped and fell on a footpath, which was under the control and management of the defendant.

Injuries: Fractured left wrist and two fingers.

Wilson SC DCJ (16 July 2021)

Williams v Wollongong City Council [2020] NSWDC 564

35% of a most extreme case

Plaintiff was a 62-year-old male who fell from the top step of a stepped walkway leading to the toilet amenities at Mount Keira Summit Park.

Injuries: Fracture of the head of the radius and soft tissue injury of the wrist with a possibility of a fracture to the hand capitate. Completely fused wrist with some slight loss of movement in the fingers and left shoulders. Significant operation scars.

Dicker DCJ (24 September 2020)

Cases below 15%

The following are summaries of cases where the requisite threshold of 15% of a most extreme case for non-economic loss was not met, preventing the plaintiff from receiving non-economic loss damages.

Council of the City of Sydney v Hunter [2014] NSWCA 449

Plaintiff (male, age unknown) tripped over a tree root and fell, suffering injury to his right knee. The minor nature of the plaintiff's fall failed to reach the threshold of 15% in accordance with section 16 of the CLA NSW (and no causal connection was established).

Ward and Emmett JJA, Simpson J (19 December 2014)

Gaynor Colleen Smith v Jones Lang La Salle Pty Ltd [2013] NSWDC 155

10% of a most extreme case (*did not exceed the threshold*)

Plaintiff was a 73-year-old female who tripped and fell. She sustained soft tissue injuries that did not require surgery and ceased to affect her by the time of the trial.

Threshold of 15% for an award of non-economic loss damages under section 16 of the CLA NSW was not met.

Judge MJ Finnane QC (28 March 2013)

Alzawy v CPT Custodian Pty Ltd [2009] NSWDC 304

8-10% of a most extreme case (*did not exceed the threshold*)

Plaintiff was a 28-year-old female who sustained injury when she slipped and fell at the Centro Bankstown shopping centre, suffering soft tissue injuries to her back and left shoulder. These injuries were held to be an aggravation of her pre-existing injuries, and would have resolved within three months of the accident.

Threshold of 15% for an award of non-economic loss damages under section 16 of the CLA NSW was not met.

Hungerford ADCJ (30 October 2009)

Cooper v State of New South Wales [2019] NSWDC 20

5% of a most extreme case (*did not exceed the threshold*)

Plaintiff was a 36-year-old female who swerved and hit a police officer when he was in the process of arresting an offender in the middle of the road. Plaintiff suffered soft tissue injury to her lower back. The injury was held to be self-limiting and only caused her back pain for a very short time after the incident.

Threshold of 15% for an award of non-economic loss damages under section 16 of the CLA NSW was not met.

Russell SC DCJ (22 February 2019)

Manmi v Manmi [2019] NSWDC 96

15% of a most extreme case

Plaintiff was a 35-year-old male who injured his neck when he slipped and fell on a bathmat at the defendant's house.

Injuries: Ongoing pain in the neck, decreased range of motion, dizziness and benign paroxysmal positional vertigo. It was noted that this injury was an aggravation of a pre-existing soft tissue injury of the plaintiff's cervical spine.

Dicker SC (3 April 2019)

Eye

Cecilia Si Chen v Kmart Australia Limited [2022] NSWDC 519

25% of a most extreme case

Plaintiff was a 6-year-old female who suffered injury to her right upper eyelid when she was walking in the children's section of Kmart and her eye came into contact with a metal clothing rack.

Injuries: Scarring to right eye.

Montgomery DCJ (28 October 2022)

White v Redding [2019] NSWCA 152

55% of a most extreme case

Plaintiff was a 16-year-old female who suffered an injury to her left eye when it was hit by a tennis ball.

Injuries: 97 per cent loss of vision in the respondent's left eye. The vision in her left eye was "6/36", meaning that she could only see detail from six metres away that a normal person would see from 36 metres away. Career limiting injury. The plaintiff had prospect of a successful gymnastics/sporting career, which was curtailed by the injury.

Macfarlan, Gleeson and White JJA (24 June 2019)

Best v Rosamond [2019] NSWDC 344

Non-economic award of \$60,000

Plaintiff (male, age unknown) who was punched in the eye by the defendant when he was caught kissing the defendant's (then) wife.

Injuries: Diplopia ("double vision"), floaters and a disturbance of sensation infraorbital nerve, as well as an infra orbital paraesthesia (loss of sensation).

Abadee DCJ (24 July 2019)

Internal

Hamlyn v Stanton (No. 3) [2020] NSWDC 632

30% of a most extreme case

Note: Judgment was ultimately determined in favour of the defendants, but MEC was still assessed.

Plaintiff was a 61-year-old male who, after receiving a diagnosis for prostate cancer and upon the defendant's advice, elected to undergo a prostatectomy. Plaintiff alleged that the post-operative injuries and disabilities he suffered could have been avoided had he received a fully informed explanation about the alternative of radiation therapy.

Injuries: Post-operative anaemia, post-operative ileus, clostridium difficile colitis and retroperitoneal collection. Prolonged urinary and faecal incontinence. Stress and anxiety.

Abadee DCJ (23 October 2020)

Kylie Bernadette Tinnock v Murrumbidgee Local Health District [2017] NSWSC 1003

38% of a most extreme case

Plaintiff was a 46-year-old female who sustained injuries following surgery for the repair of an incisional hernia when a surgical mesh was placed over the hernia dissection.

Injuries: Serious mesh infection requiring aggressive treatment including re-exploration of the wound. She also sustained extensive scarring in her abdomen and symptomatic aggravation of pre-existing degenerative changes to her back.

Campbell J (28 July 2019)

Amputation

Wormleaton v Thomas & Coffey Limited (No 4) [2015] NSWSC 260

66% of a most extreme case

Plaintiff was a 45-year-old male who had been rigging with other dogmen when the beam they had been standing on began to fall. The plaintiff fell backwards over a rock and the beam fell on his leg.

Injuries: Leg amputation and a severe knee injury. He developed significant phantom limb pain, which continues to affect him from time to time and a severe traumatic disruption to the structure of his knee. The injury to the right knee has led to degenerative arthritis.

Campbell J (20 March 2015)

Courts v Essential Energy (aka Country Energy) [2014] NSWSC 1483

50% of a most extreme case

Plaintiff was a 49-year-old male who came into contact with an uninsulated electric power wire. The electricity passed from his head through his body and out through the toes of his left foot.

Injuries: His left leg was amputated as a consequence about a year after the incident. He also underwent debridement and skin graft to his scalp, multiple debridements of his left foot, amputation of two toes and an attempted skin graft to his left foot.

Adamson J (29 October 2014)

Teeth

Jones v Braund (No 2) [2020] NSWDC 54

20% of a most extreme case

Plaintiff was a male in his mid-50s who suffered injuries as a result of a failed maxillary tooth removal surgery performed by the defendant.

Injuries: Severe and large haematomas, destruction of the bone on the right maxilla, fractured prosthetic bridge and exposed implants, difficulties in eating, with speech/ phonetics and subsequent psychological sequelae including anxiety, distress, bouts of anger and loss of self-esteem.

Abadee DCJ (19 March 2020)

02

Australian Capital Territory

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Civil Law (Wrongs) Act 2002 (ACT)

Application

The *Civil Law (Wrongs) Act 2002 (ACT)* (**CLWA ACT**) modifies the common law of negligence in the Australian Capital Territory and was enacted to address the problems associated with tort law and increased insurance premiums.

Nonetheless, the Australian Capital Territory has not implemented many of the drastic changes that have been implemented in other jurisdictions, such as caps and thresholds for quantum of damages, and changes to the principles of negligence.

The provisions relating to negligence contained in chapter 4 of the CLWA ACT apply to all claims for damages for harm resulting from negligence whether brought in tort, contract or statute, with the exception of workers' compensation claims.

Chapter 5 of the CLWA ACT, which sets out the pre-litigation procedures, applies to all civil claims for damages, including motor vehicle accident claims. Claims where there has been a workers' compensation claim are generally excluded from the operation of the CLWA ACT, subject to certain exceptions.

Chapter 7 of the CLWA ACT, which pertains to damages, applies to all civil claims for damages for harm, including compulsory third-party claims, except claims under workers' compensation legislation.

Pre-litigation procedures

The pre-litigation procedures are a set of procedures that are available prior to issuing the substantive proceedings. They provide the claimant with an opportunity to test the case by obtaining documents and evidence. These procedures apply to all causes of action under the CLWA ACT and their purpose is to place all parties in a position where they have sufficient information that allows them to assess liability and quantum in relation to the claim (section 63).

Initially, under section 51, the claimant must give written notice to the respondent within the period that ends earlier of the following:

- Nine months after the alleged incident or the first appearance of symptoms; or
- Four months after solicitors for the claimant are first instructed or the day the respondent is first identified.

Following this initial notification, the respondent must respond to the claimant within the required period (section 52) and may add additional parties as contributors (section 57). It is important to note that the acknowledgment of oneself as the proper respondent is not an admission of liability (section 58).

The respondent must attempt to resolve the claim within the prescribed period and must take all reasonable steps to investigate the alleged incident which resulted in the personal injury to which the claim relates (section 61).

The pre-litigation procedures also provide a mechanism for the exchange of documents and evidence. Under section 64, the claimant must give all documents which relate to the alleged incident, liability and quantum of damages to all other parties. Similarly, the respondent and contributor must give copies of reports and documents to all other parties (sections 68-70).

There is no requirement to give documents if they are already in the possession of the other party (section 77), however, there are penalties for false and misleading statements (section 80).

If there is a failure to disclose documents or incorrect information has been provided, then costs may be ordered against the non-complying party (section 62) and the party may not be able to rely on the documents during substantive proceedings (section 75).

While the pre-litigation procedures are required in order to commence substantive proceedings, the court may allow an action to continue to trial irrespective of their compliance with the part if there are concerns that the claimant will be deprived of a fair hearing (*Al-Rawahi v Niazi*⁵⁸).

Negligence - the elements

In order to establish negligence under the CLWA ACT, a claimant must prove that the defendant:

- owed the claimant a duty of care (section 42);
- breached the duty of care (section 43); and
- caused the harm allegedly sustained by the claimant (section 45).

Duty of care

Section 42 of the CLWA ACT provides that the standard of care required of the defendant is that of a reasonable person in the defendant's position, who was in a position where they had all the information that the defendant had or ought reasonably to have had, at the time of the incident out of which the injury arose.

Within the CLWA ACT, there is no reference to a different standard of care which should apply to professionals. The decision in *Haylock v Morris and Hugh*⁵⁹ confirmed that the common law test in *Rogers v Whitaker*⁶⁰ should be applied. This test establishes that professionals' standard of care includes the obligation to provide information and warn of the associated risks.

Breach

In relation to foreseeability of harm, section 43 of the CLWA ACT provides that a person is not negligent in failing to take precautions against a risk of harm (i.e. there is no breach of duty) unless:

- the risk was foreseeable (the defendant knew or ought to have known of the risk);
- the risk was not insignificant; and
- a reasonable person would have taken those precautions.

Among other relevant factors, the court must objectively consider:

- the probability of harm absent precautions;
- the likely seriousness of harm;
- the burden of taking precautions; and
- the social utility of the activity creating the risk of harm.

In *Grierson v ACT*,⁶¹ the court held that a duty was owed to all road users of a footpath and the failure to carry out a repair of a known hazard constituted a breach. The court also noted that a relevant factor in determining the level of duty was whether the plaintiff took reasonable care for their own safety.

In *Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam*,⁶² the court held that there was a standard of care required by the appellant company to assess the works performed. This required taking precautions a reasonable person would have taken against a foreseeable and not insignificant risk of harm. The risk of a passenger's clothes or accessories catching on the vehicle's interior was an obvious risk requiring those precautions.

⁵⁸ *Al-Rawahi v Niazi* [2006] 203 FLR 94

⁵⁹ *Haylock v Morris and Hugh* [2006] ACTSC 86

⁶⁰ *Rogers v Whitaker* [1992] HCA 58

⁶¹ *Grierson v ACT* [2011] ACTSC 113

⁶² *Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam* [2014] ACTCA 22

Causation

Section 45(1) provides that in order to establish causation, the claimant must prove that:

- the negligence was a necessary condition of the harm ("factual causation"); and
- the harm falls within the scope of the defendant's liability ("scope of liability").

The factual causation element can be shown by considering whether but for the defendant's negligence, the claimant's loss would actually have occurred. The "but for" test is a necessary but not sufficient test for causation. Rather, the question of whether conduct is a "cause" of injury is to be determined by a value judgment involving ordinary notions of language and common sense. This is discussed in *March v E & MH Stramare Pty Ltd*.⁶³

In considering the scope of liability, the court may take into account whether there were new intervening acts that severed the chain of causation and the remoteness of the kind of damage caused.

Section 45(2) provides that if the plaintiff has been negligently exposed to a similar risk of harm by more than one defendant and it is not possible to hold any one or more of them responsible, then the court:

- may continue to apply the common law principle to attribute the responsibility for the harm to the defendants; but
- must consider the position of each individual defendant and state the reasons for bringing the defendant within the scope of liability.

The onus is on the claimant to prove any fact relevant to the issue of causation on the balance of probabilities (section 46).

⁶³ *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506

"Defences" to negligence

Recreational activities

The CLWA ACT does not contain any provisions related to dangerous recreational activities or obvious risk. However, schedule 3 of the CLWA ACT provides a defence to equine activity sponsors, equine professionals or anyone else, in relation to personal injury or death resulting from the inherent risks of equine activities.

Equine activities are defined to include the following:

- an equine show, fair, competition performance or parade that involves horses;
- teaching or training horses;
- agisting or boarding horses;
- riding, inspecting or evaluating a horse;
- rides, hunts, trips or other activities that are sponsored by an equine activity sponsor; or
- placing/replacing horseshoes.

The defence is not available if the equine professional failed to provide a warning notice to the participants. Furthermore, the defence does not apply to activities within the horseracing industry, breaches of the *Competition and Consumer Act 2010* (Cth) or claims under the *Workers Compensation Act 1951* (ACT). In addition, it does not apply if the following occurred:

- the injury was caused by faulty equipment provided by the defendant;
- the defendant provided the horse and failed to make prudent efforts to assess the participant's ability to manage the horse safely;
- the injury was caused by a dangerous latent condition of the land or facility used for the equine activity, and the defendant knew or ought to have known of the condition and failed to display a warning about the condition;
- the defendant acted in a way that showed intentional or reckless disregard for the safety of the participant, thereby causing the injury;
- the defendant intentionally injured the participant; or
- before the injury happened, the defendant had not complied with clause 4 (professional standards) in relation to the facility.

Inherent risks

The Australian Capital Territory has not specifically implemented any legislative reform to limit liability in respect to inherent risks except in relation to equine activities, where "inherent risks" is defined as being dangers or conditions that are an integral part of equine activities, including the behaviour and movement of the equine itself, surface conditions, collisions with other equine or objects and other participants' actions.

Risk warnings

The Australian Capital Territory has not specifically implemented any legislative reform to limit liability in respect of risk warnings except in relation to equine activities (see Recreational Activities above).

Contractual waivers

The Australian Capital Territory has not specifically implemented legislative reform to limit liability through contractual waivers.

Contributory negligence

Section 102 of the CLWA ACT allows the court to reduce the damages recoverable by the claimant if the claimant contributed to the negligence. The reduction is calculated to the extent that is just and equitable and is at the court's discretion (*Heywood v Miller*⁶⁴).

In *Baker v Mackenzie*,⁶⁵ the plaintiff, a 14-year-old high school student, was injured after walking into the side of a vehicle driven by the defendant. Eighty percent contributory negligence was attributed to the plaintiff as the degree of departure from the standard of reasonable care was significantly greater on the plaintiff's part.

Section 103 provides that if there are two or more people liable under section 102 for the damage suffered by a person, then Part 2.5 (proceedings against and contributions between wrongdoers) will apply in determining the contributions between the wrongdoers.

Section 104 provides that where a claimant suffers damage partly because they were contributorily negligent, and a third person suffers damage following from the damage suffered by the claimant, then any contributory negligence by the claimant must be taken into account under section 102. This would mean that the damages recoverable by the third party would be reduced.

However, if a joint respondent avoids liability by pleading a statutory limitation period, they are not entitled to recover damages or contribution from a claimant who was contributorily negligent (section 105).

Contributory negligence is not an available defence where it relates to a person's death (section 27).

Proportionate liability

An apportionable claim is a claim for economic loss or damage to property in an action for damages arising from a failure to take reasonable care, or for damages under the *Australian Consumer Law* (section 107B). It does not apply to, inter alia, a consumer claim or a claim arising out of personal injury. A "consumer claim" is one which relates to goods, services or financial advice (section 107C).

Proportionate liability is concerned with concurrent wrongdoers. A concurrent wrongdoer is one of two or more people whose independent act or omission causes loss or damage (section 107D). A concurrent wrongdoer is required to assist the claimant or plaintiff in identifying other concurrent wrongdoers (section 107G). Their liability can be limited to an amount that reflects the proportion of loss or damage attributable to the wrongdoer's responsibility (section 107F).

Proportionate liability does not apply to wrongdoers who intentionally or fraudulently caused loss or damage (section 107E). Proportionate liability also does not affect other types of liabilities, including vicarious liability and joint liability (section 107K).

In a proceeding that involves an apportionable claim, there can be any number of defendants but a person can only be included as a defendant with the court's leave (section 107J). A defendant must not be required to indemnify or contribute to any damages recovered from another concurrent wrongdoer (section 107H).

If the claimant or plaintiff recovers a portion of the damages from a concurrent wrongdoer, they are still able to bring a subsequent proceeding against another concurrent wrongdoer for loss or damage (section 107I).

Intoxication and criminal activity

Sections 95 to 97 of the CLWA ACT provide for a rebuttable presumption of contributory negligence if the defendant claims contributory negligence.

If the claimant was intoxicated at the time of the alleged incident, then contributory negligence must be presumed (section 95). This is rebuttable if the claimant can establish, on a balance of probabilities, that the intoxication did not contribute to the incident or that the intoxication was not self-induced.

⁶⁴ *Heywood v Miller* [2005] ACTSC 4

⁶⁵ *Baker v Mackenzie* [2015] ACTSC 272

Similarly, section 96 presumes contributory negligence if the claimant relied on the care and skill of a person who was intoxicated, and if the claimant knew or ought to have known that the person they were relying on was intoxicated. This presumption can be rebutted if it is established that the intoxication did not contribute to the incident or that the claimant could not reasonably be expected to avoid the risk.

In *Johnson v Rustenburg*,⁶⁶ it was held that the claimant was not contributorily negligent despite relying on a driver who was intoxicated, as there were no signs of intoxication that were observable. In *Stafford v Carrigy-Ryan*,⁶⁷ it was stated that the test to be applied was whether a sober person would have foreseen that relying on an intoxicated driver was exposing them to risk of injury as a result of the intoxication.

The leading case in Australia which discussed the duty of care owed to intoxicated persons was *Cole v South Tweed Heads Rugby League Football Club Ltd*,⁶⁸ in which Colin Biggers & Paisley acted for the club and defeated the plaintiff's claim. In that case, the High Court held that in ordinary circumstances, no duty of care is owed by the licensee of premises to a person who is served alcohol and, as a result of intoxication, is injured.

Section 97 presumes contributory negligence if, at the time of the accident, the claimant:

- was not wearing a seatbelt when required by law to do so;
- was not wearing a helmet when required by law to do so; or
- was not within the passenger compartment of the motor vehicle.

If the claimant can demonstrate they could not reasonably be expected to have avoided the risk, then the presumption is rebutted.

Further, if the court is satisfied, on the balance of probabilities, that the claimant was committing an indictable offence and that this contributed materially to the risk of injury, then liability for damages is excluded (section 94). Despite this exclusion, the power is discretionary if the court is satisfied that the case is exceptional, or if the exclusion would operate harshly and unjustly.

Good samaritans and volunteers

Parts 2.1 and 2.2 of the CLWA ACT set out provisions regarding the liability of good samaritans and volunteers.

A good samaritan is immune from civil liability (other than causes of action based in defamation or third-party motor vehicle claims) for acts done and omissions made in good faith or honestly and without recklessness assisting a person injured or at risk of being injured, or in need of emergency assistance (section 5).

The legislation is unclear whether the immunity is available for acts or omissions which are not for the benefit of the injured person but for the benefit of others, for example bystanders within a zone of danger.

Similarly, a volunteer is immune from civil liability (other than for causes of action based in defamation or third-party motor vehicle claims) for acts done and omissions made honestly and without recklessness when carrying out community work for a community organisation (section 8).

A "community organisation" is a corporation that directs or coordinates the carrying out of community work (as defined by section 7) by volunteers (section 6).

Any liability that would otherwise attach to a volunteer for a community organisation, attaches instead to that community organisation (section 9).

The territory may assume liability of community organisations for volunteers if the organisation was carrying out a function that is a recognised government responsibility (section 10).

This defence is not available where:

- the volunteer was impaired by voluntarily consumed drugs or alcohol;

⁶⁶ *Johnson v Rustenburg* [2014] ACTSC 386

⁶⁷ *Stafford v Carrigy-Ryan* [2014] ACTCA 27

⁶⁸ *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469

- the volunteer acted contrary to instructions given by the community organisation; or
- the volunteer acted outside the scope of activities authorised by the community organisation.

Food donors

Part 2.2A of the CLWA ACT protects food donors from incurring liability for any personal injury proceedings that result from the consumption of donated food. A donor is defined in section 11A as a person who donates food in good faith for a charitable or benevolent purpose with the intention that the consumer will not pay for it. This definition does not include a person who distributes food donated by others.

The donor does not incur liability if the food was fit for human consumption when it left the possession and control of the donor (section 11B). Furthermore, if the food had to be handled in a particular way or was only consumable for a limited time, then the donor must have notified the collectors of these requirements in order to be protected from civil liability.

Public and other authorities

Public or other authorities will only be liable for breach of statutory duty in relation to the exercise or failure to exercise a function of the authority, where the act or omission is so unreasonable that no authority with such functions could properly consider the act or omission of a reasonable exercise of those functions (section 111).

Further, no liability is incurred based on a failure of the authority to exercise its functions, or to prohibit or regulate an activity, where it could not have been required to do so.

Certain principles apply regarding the assessment of a public or other authority's exercise of its functions and any corresponding duty of care, as elucidated in section 110 of the CLWA ACT.

A public or other authority is not liable for harm arising from a failure to maintain, repair or renew a road unless the authority knew or ought to have known of the particular risk which caused the harm (section 113). For the purpose of this section, the term "road" means a street, road, lane, cyclepath, footpath or paved area that is open to, or used by, the public.

Vicarious liability

The Australian Capital Territory has not introduced legislative reform in relation to vicarious liability.

An employer can be found vicariously liable for a wrongful, unauthorised or negligent act of an employee if it was carried out in the course of employment and so closely connected with an authorised act that it may be regarded as a performing that act (*NSW v Lepore*, *Samin v Queensland*, *Rich v Queensland*⁶⁹).

Refer to the New South Wales section for further discussion of the principles of vicarious liability.

Unlawful conduct

Section 94 of the CLWA ACT provides that damages are not available where an incident causing injury occurred while the injured person was engaged in conduct that is an indictable offence, and that conduct materially contributed to the risk, resulting in the injury.

However, damages may be awarded where the circumstances of the case are exceptional and the exclusion would operate harshly and unjustly.

It is important to recognise the common law principle precluding convicted criminals from receiving an award for damages in circumstances where they have engaged in criminal conduct (*Henwood v The Municipal Tramways Trust (SA)*⁷⁰). The case of *Miller v Miller*⁷¹ suggests that no duty of care exists between

⁶⁹ *NSW v Lepore*, *Samin v Queensland*, *Rich v Queensland* (2003) 212 CLR 511

⁷⁰ *Henwood v The Municipal Tramways Trust (SA)* (1938) 60 CLR 438

⁷¹ *Miller v Miller* [2011] HCA 9

participants in serious criminal activity. However, in this case, the claimant was found to have withdrawn from the criminal enterprise prior to the damage, and was therefore owed a duty of care.

Mental harm

Under the CLWA ACT, a plaintiff is not prevented from recovering damages for personal injury even though the injury only arose completely or partly from shock (section 33).

Section 34 provides that a defendant does not owe the plaintiff a duty not to cause mental harm, unless a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might suffer mental harm if reasonable care was not taken.

Factors that the court must consider in relation to pure mental harm include:

- whether the mental harm was suffered due to sudden shock;
- whether the plaintiff witnessed a person being killed, injured or put in danger;
- the nature of the relationship between the plaintiff and the witnessed person; and
- the relationship between the plaintiff and the defendant.

In relation to consequential mental harm, the court must consider the nature of the bodily injury from which the mental harm arose.

Damages are not awarded for pure mental harm or for economic loss for consequential mental harm that resulted from negligence, unless there is a recognised psychiatric illness (section 35).

For clarification of whether the harm is a recognised psychiatric illness, see the Diagnostic and Statistical Manual of Mental Disorders (DSM).

Section 36 provides that sufferers of mental or nervous shock are eligible for an award. Sufferers include:

- a parent of the person who was killed, injured or put in danger;
- a domestic partner of the person who was killed, injured or put in danger; or
- other family members who were within sight or hearing of the incident.

Given the various forms of media, the requirement that the plaintiff is "within sight or hearing of the incident" is somewhat unclear. The question then arises whether a plaintiff would be able to claim if they were, for example, watching live footage of the victim "being killed, injured or put in peril" on the internet. Witnessing the aftermath of an accident is in most circumstances insufficient for a plaintiff to recover for pure mental harm. In 2010, however, the High Court of Australia found in *Wicks v State Rail Authority of New South Wales*⁷² that "there are cases where death, or injury, or being put in peril takes place over an extended period, and this was such a case".

⁷² *Wicks v State Rail Authority of New South Wales* [2010] HCA 22

Child abuse

Chapter 8A (Institutional Child Abuse) was inserted in 2018 and applies retrospectively.

Part 8A.2 (Proceedings Against Unincorporated Bodies) contains reforms to assist claimants to identify a proper defendant.

Part 8A.3 (Setting Aside Abuse Settlement Agreements) commenced on 9 December 2022 and provides for a court to set aside a previous settlement if the settlement agreement is not "just and reasonable".

These amendments follow recommendations made in the Royal Commission into Institutional Responses to Child Sexual Abuse and follow similar reforms in other jurisdictions.

Limitation period

Section 21C of the *Limitation Act 1985* was inserted in 2016 and abolishes the limitation period for causes of action that substantially arise from child abuse a person was subjected to as a child. However, the amendment does not limit a court's power to permanently stay proceedings where the passage of time has a prejudicial effect on the defendant's ability to receive a fair trial.

Child abuse is defined by reference to section 114AA of the CLWA ACT, being the physical or sexual abuse of a child.

Notice of claim

For a proceeding based on a child abuse claim, the Notice of Claim must be given within a reasonable time before the claimant brings the proceeding against the respondent and the notice periods (ie nine months from injury or four months from instructing a solicitor) set out for other claims does not apply.

Proper defendant

Section 114D enables an unincorporated body to nominate an entity that is capable of being sued to act as the defendant for the unincorporated body in a proceeding for a claim of child abuse. If a nomination is not made, or the nominated entity is not capable of being sued or has insufficient assets to meet a judgment, a court may appoint a related trust as a defendant under section 114E.

Once nominated or appointed, the proper defendant is entitled to rely on any defence, immunity, or indemnity available to the unincorporated body.

If a trust is nominated or appointed as a proper defendant, under section 114G, the trustee is able to accept liability and apply trust property to the claim despite any restriction in the trust deed or territory law. A trustee will not be in breach of trust by complying with Chapter 8A.

Section 114F allows proceedings to commence or continue against an unincorporated body pending the nomination or appointment of a proper defendant, and a court is empowered to make orders against that unincorporated body.

Setting aside settlements

Part 8A.3 allows for a court to set aside settlements of certain child abuse claims entered into prior to the legislative reforms in:

- 2016 (before the commencement of section 21C of the Limitation Act 1985); or
- 2018 (ie Chapter 8A identified above);

The court may set aside a settlement agreement if satisfied that when the agreement was made there were legal barriers to the claimant obtaining full compensation through a legal cause of action *or* the agreement is not a "just and reasonable" agreement.

In determining whether to set aside a settlement agreement, the court may consider the amount paid, the bargaining position of the parties, the conduct of the parties and their legal representatives and any other matter the court considers relevant.

Part 8A.3 does not, however, allow for a court to set aside an acceptance of any offer made under the National Redress Scheme for Institutional Child Sexual Abuse, certain agreements between defendants or contracts of insurance.

If an affected agreement is set aside, the defendant cannot recover the amount paid to the plaintiff under the agreement. Rather, that amount may be taken into account in determining the damages payable.

In the decision of *Walsh (a pseudonym) v Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn* [2024] ACTSC 81 an application was brought to set aside a 2006 deed of release on the basis that it was not a just and reasonable agreement. The Court was required to interpret part 8A.3 and in particular section 114K(3) of the CLWA ACT. That subsection provides that a court **may** set aside an agreement if when the agreement was made there were "legal barriers" to the person being fully compensated or in all the circumstances (when an application is made to set aside the agreement) it is "not a just and reasonable agreement".

The term "legal barriers" is not defined by the CLWA ACT and the court held "*legal barriers includes potential defences and remedies (being reasonably, in the sense of non-fancifully, available to a defendant) whether they are notified by a putative defendant to the plaintiff or not*".⁷³

The term "not just and reasonable agreement" is also not defined by the CLWA ACT and the court held at [217] that the subsection directs attention to whether *the agreement* is just and reasonable, not whether it is just and reasonable to set aside the agreement. In this respect, the CLWA ACT legislation differs from its respective State counterparts throughout Australia. Without providing an exhaustive list, a Court may take into account:

1. the amount paid to the applicant under the agreement;
2. the bargaining position of the parties to the agreement;
3. the conduct of a party other than the applicant; and
4. the conduct of a legal representative of a party other than the applicant.⁷⁴

Matters occurring after the agreement may also be taken into account if relevant to assessing whether an agreement is not just and reasonable.

The Court held in *Walsh* that the limitation period which existed at the time of the Deed was a legal barrier and also identified difficulties in identifying the proper defendant and the then law regarding vicarious liability for intentional torts.

The Court in *Walsh* also held that the Deed, in all of the circumstances, was not a just and reasonable agreement (at the time the application was made) as the plaintiff was not legally represented before he signed the Release, he had not been advised of rights he may have had at the time and perhaps more importantly, he received no independent advice as to the potential quantum of his claim.

Another key decision to consider the CLWA ACT legislation was *Xavier (a pseudonym) v Trustees of the Marist Brothers* [2024] ACTSC 141 where the defendant conceded that, in circumstances where potentially relevant documents (potentially of importance both in establishing the defendant's liability and concerning the quantum of damages) were not in the possession of the plaintiff at the time of the making of the Deed of Release, it was open to the Court to conclude that "*the agreement is, in all the circumstances, not a just and reasonable agreement*".⁷⁵

⁷³ *Walsh (a pseudonym) v Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn* [2024] ACTSC 81 at 197.

⁷⁴ ss 114K(4)(a)-(c) of the CLWA ACT.

⁷⁵ *Xavier (a pseudonym) v Trustees of the Marist Brothers* [2024] ACTSC 141 at 16.

Assessment of damages for personal injury

Non-economic loss - Section 99

Non-economic loss or general damages are defined by section 99 as pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement.

In deciding damages for non-economic loss, the court may refer to earlier decisions to determine the appropriate award for the proceedings (section 99). Thus, the common law position regarding general damages has not been modified by the CLWA ACT.

In *Hutchison v Fitzpatrick*,⁷⁶ the court stated that the assessment of general damages is subjective and dependent on the individual facts and circumstances of each case. Hence, practitioners may bring earlier decisions to the court's attention for the purpose of assessing general damages.

Interest

The civil court procedures contained in the *Court Procedures Rules 2006* (ACT) provide for interest up until judgment. The Court may order that interest be included in the amount for which judgment is given at the rate it considers appropriate, on all or part of the money, and for any period from when the cause of action arose until the day before judgment is entered.

Alternatively, the Court may order that a lump sum be included in the amount for judgment instead of interest.⁷⁷

Out of pocket expenses

Out of pocket expenses are generally medical expenses incurred in order to treat the injuries and disabilities suffered as a result of the negligence of the defendant. These expenses are claimable as damages. Out of pocket expenses may take the form of past out of pocket expenses and future out of pocket expenses.

Past out of pocket expenses can generally be easily quantified by reference to government notices and with receipts from pharmacies and other medical service providers. Future out of pocket expenses are typically the subject of expert opinion and comment involving an assessment of the expenses that are likely to be incurred in the future and are associated with the plaintiff's claimed injury.

Economic loss - Section 98

In personal injury proceedings, damages can be awarded for loss of earning capacity or economic loss.

A claimant can seek damages for past economic loss to compensate for loss of earnings or the deprivation or impairment of past earning capacity. Section 98 similarly allows a claimant to seek damages for future economic loss to compensate for lost prospective earnings or the deprivation of future earning capacity.

Section 98 of the CLWA ACT provides that the maximum award that a court may make for loss of earnings is limited to the present value of three times the average weekly earnings. As at November 2024, in Australia the average weekly earnings for full time ordinary hours worked by adults were \$1,973.70.⁷⁸

We refer you to the Appendix at page 102 for further information, including various case examples outlining a variety of injuries and the non-economic loss damages awarded.

⁷⁶ *Hutchison v Fitzpatrick* [2009] ACTSC 43

⁷⁷ *Court Procedures Rules 2006* (ACT) pt 2.16 Reg 1619

⁷⁸ *Average Weekly Earnings, Australia* is issued in May and November and is available at www.abs.gov.au

Gratuitous care and services - Section 100

A claimant may seek damages for loss of capacity to perform domestic services that they may have reasonably been expected to perform for the household had they not been injured.

Section 100 does not distinguish between whether the services were performed for the claimant's sole benefit or for the benefit of other members of the claimant's household. Similarly, the court does not consider the following to be material to an award for damages:

- whether the claimant was paid to perform the services;
- whether the claimant will need to pay someone else to perform the services; or
- whether other people are likely to perform the services.

See *Pasfield v Ugarkovich*,⁷⁹ where the claimant was awarded damages for gratuitous care and service despite the fact that the claimant's husband and grandmother were performing the relevant tasks.

⁷⁹ *Pasfield v Ugarkovich* [2014] ACTSC 10

Dust diseases

Legislation in each state regarding the limitation period for claiming damages

Section 16B of the *Limitation Act 1985* (ACT) prescribes that there is a three year period of limitation for personal injury suffered from a dust related condition. At the time of preparing this document, there are no specific limitation provisions in the Australian Capital Territory for dust related diseases.

Procedure - how a claim is instituted in each state

Ordinarily, a cause of action seeking damages arising from a personal injury would be subject to the usual claims procedure under the *Civil Law (Wrongs) Act 2002* (ACT). However, the *Civil Law (Wrongs) Act 2002* (ACT) would not be applicable to a dust disease related claim as such claims would ordinarily fall within the scope of the *Workers Compensation Act 1951* (ACT). Therefore, any claim for damages arising from dust diseases would fall within the scope of the usual claim procedure under the *Workers Compensation Act 1951* (ACT).

A claim for damages arising from a dust disease claim would under the *Workers Compensation Act 1951* (ACT) have the following four general steps:

1. A worker must notify their employer of the injury as soon as possible. Please note:
 - a. the employer does not investigate the claim - the insurer will investigate it.
 - b. the employer must continue paying the worker until advised by the insurer.
 - c. the employer cannot use the injured workers' personal or annual leave in place of workers' compensation.
 - d. the employer will seek reimbursement of wages from the insurer
2. The employer must notify their insurer within 48 hours of receiving notification and enter the details of the injury in the Register of Injuries for the workplace.
3. The worker must complete and give the claim form and Certificate of Capacity to the employer/insurer within 7 days or the employer will stop payment of the workers' wages.
4. The insurer must establish a personal injury plan in consultation with the employer and injured worker and must comply with reasonable duties under this plan.

What is considered a dust related condition? Definitions in specific legislation

Unlike other jurisdictions, for example Queensland,⁸⁰ the legislature of the Australian Capital Territory has not sought to statutorily constrain or define what is a "dust related condition" within a single definition. In light of this position, a number of legislative instruments inform the definition of what is a "dust related condition".⁸¹ Further, within the legislative provisions that deal with dust related conditions, there is a separate regime developing for cases which specifically involve crystalline silica.⁸²

As the legislature is yet to define what a "dust related condition" is within the Australian Capital Territory, the following key definitions inform what would be considered a "dust related condition" within the jurisdiction (noting the emphasis in bold italic text appears in the original document):

⁸⁰ cf *Civil Liability Act 2003* (Qld) sch 2.

⁸¹ *Workers Compensation Act 1951* (ACT); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Regulation 2011* (ACT).

⁸² See generally *Work Health and Safety Amendment Regulation 2022 (No 1)* (ACT), *Work Health and Safety Amendment Regulation 2022 (No 2)* (ACT), *Work Health and Safety Amendment Regulation 2022 (No 3)* (ACT).

"asbestos" means the asbestiform varieties of mineral silicates belonging to the serpentine or amphibole groups of rock forming minerals, including the following:

- (a) actinolite asbestos;
- (b) grunerite (or amosite) asbestos (brown);
- (c) anthophyllite asbestos;
- (d) chrysotile asbestos (white);
- (e) crocidolite asbestos (blue);
- (f) tremolite asbestos;
- (g) a mixture that contains 1 or more of the minerals referred to in paragraphs (a) to (f).⁸³

asbestos-related disease means a disease caused by exposure to asbestos."⁸⁴

"crystalline silica material" means

- (a) engineered stone; or
- (b) any cement, concrete, masonry, mortar or brick product containing crystalline silica; or
- (c) natural stone containing crystalline silica."⁸⁵

Significant cases regarding civil procedure, awards of damages, etc.

It appears from reported and published judgments handed down by the various Courts within the Australian Capital Territory that dust disease cases are simply not advancing to a point where the Court is required to deliver a judgment. Indeed, when cases have advanced to the point that a judgment is delivered, it is more often than not that the Court is required to consider an award of damages rather than a question of liability.⁸⁶ When a Court within the Australian Capital Territory has been required to consider a question of liability, the Court (in this case the Court of Appeal or the Supreme Court of the Australian Capital Territory) appears to adopt an approach similar and familiar to those who practice within New South Wales.⁸⁷ This is of course keeping with the fact aspects of claims advanced for dust disease involve the interpretation of the common law which has been well developed within New South Wales.

The type of industries that are affected

Workers may be exposed to dust or airborne particles in a number of industries, including:

- stonemasonry;
- excavation, earth moving and drilling plant operations;
- paving and surfacing;
- mining, quarrying and mineral ore processing;
- tunnelling;
- construction activities;
- brick, concrete or stone cutting (including grinding, jack hammering or chiseling);
- hydraulic fracturing of gas and oil wells;
- pottery making.

⁸³ *Work Health and Safety Act 2011* (ACT) s 197A

⁸⁴ *Workers Compensation Act 1951* (ACT), Dictionary.

⁸⁵ *Work Health and Safety Regulation 2011* (ACT) s 418A.

⁸⁶ See, for example, *Parkinson v Lend Lease Securities & Investments Pty Ltd* (2010) 4 ACTLR 213.

⁸⁷ See, for example, *Snorkel Elevating Work Platforms Pty Ltd and Anor v Borren Metal Forming Limited* [2010] ACTCA 23.

Appendix

Recent decisions in relation to particular injuries in the Australian Capital Territory

Assessment of damages

The assessment of damages at common law requires the court to make a determination of an amount which would put the plaintiff, so far as possible, in the same position as he or she would have been in if they had not suffered the wrong: *Becker v Queensland Investment Corporation*.⁸⁸

Courts have stated that the assessment of general damages is a subjective process which turns on the individual facts and circumstances of each case. It is for this reason that sub-section 99(2) permits the parties or their representatives to bring earlier decisions to the court's attention for the purpose of assessing general damages: *Hutchinson v Fitzpatrick*.⁸⁹ In addition, interest accrues on the past component of the general damages assessed.

The fact that the plaintiff "cannot remember" the pain and suffering "does not mean that he is not entitled to be compensated for his pain and suffering": *Pavic v Australian Capital*.⁹⁰

Ankle

Jennings v George Harcourt Management Pty Ltd [2018] ACTSC 33

Plaintiff was a 63-year-old female who tripped over low line railway sleepers in a car park, leading her to fall.

Injuries: Fractured left distal tibia and fibula requiring surgery. She had symptomatic degenerative changes. Factored in seven years of past pain and suffering, a proportion of which was causally related to the incident as well as ongoing reduced mobility, pain and impaired psychological state.

General damages: \$125,000 (\$85,000 for past)

Murrell CJ, Burns and Loukas-Karlsson JJ (20 November 2018)

Arm

Calvary Hospital Auxiliary Inc v D'Amico [2016] ACTCA 39

Plaintiff (female, age unknown) suffered injuries in the course of her employment as a barista due to repetitive use of her right arm.

Injuries: Right upper limb pain resulting in thoracic outlet syndrome, including surgery. Her condition did not improve and she also developed frequent cramping in the right hand fingers.

General damages: \$100,000 (\$50,000 attributed to the past)

Refshauge, Penfold and Katzmann JJ (15 August 2016)

⁸⁸ *Becker v Queensland Investment Corporation* [2009] ACTSC 134

⁸⁹ *Hutchinson v Fitzpatrick* [2009] ACTSC 43

⁹⁰ *Pavic v Australian Capital Territory* [2007] ACTSC 97

Rhodin v Coles Supermarkets Australia Pty Ltd [2019] ACTSC 207

Plaintiff was a 48-year-old female who was working at Coles. While in the course of her employment, the plaintiff entered the seafood cool room at the supermarket and slipped on ice covering the floor resulting in her crashing into a metal trolley.

Injuries: Plaintiff suffered injury to her left wrist and arm with ongoing pain and subsequent onset of depression. She had curtailment of normal activities including domestic and occupational tasks.

General damages: \$150,000 (\$50,000 for past)

Collier J (13 August 2019)

Back

Glover v Fuller (No 2) [2023] ACTSC 12

Plaintiff was a 12-year-old male who sustained a back injury following an accident sustained whilst "tubing" on the back of a motorboat.

Injuries: The plaintiff sustained mild scoliosis of the lower back and upper lumbar spine with bilateral defects. The Plaintiff also suffered from chronic pain.

General damages: \$28,000.00

McWilliam AJ (31 January 2023)

Roberson v Icon Distribution Investments Limited and Jemena Networks (ACT) Pty Ltd trading as ActewAGL Distribution [2020] ACTSC 320

Plaintiff was a 32-year-old male who sought damages in relation to three separate injuries over the course of his employment at ActewAGL Distribution.

Injuries: The injuries claimed by the plaintiff were:

1. an injury to his lower back and right hip in 2013 as a result of entering and exiting trenches and crouching and kneeling for sustained periods;
2. an injury to his lower back suffered as the result of heavy lifting when he was required to lift a 400kg switchboard with fellow workers in 2017; and
3. an injury to his left hip claimed to have occurred on 15 October 2018 when the plaintiff was required to adopt an awkward posture on top of a large switchboard to perform his duties.

General damages: 2013 Injury: \$60,000.00
2017 Injury: \$140,000.00
2018 Injury: \$50,000.00
Total general damages: \$350,000.00

Crowe AJ (2 December 2020)

Lewis v Woolworths Limited [2018] ACTSC 200

Plaintiff was a 20-year-old female who was loading a pallet at a Big W store as part of her employment when a forklift struck the work cage, causing it to strike the plaintiff in the shins. The plaintiff stepped backwards and jarred her back.

Injuries: Plaintiff suffered a musculoligamentous strain at her lumbar spine with aggravation of pre-existing asymptomatic lumbar spondylosis at the L5/S1 level. Initial significant levels of disability restriction settled to residual ongoing pain with possible need for spinal decompression.

General damages: \$170,000 (\$60,000 for past)

Mossop J (1 August 2018)

Singh v Cooper and Insurance Australia Limited [2015] ACTSC 243

Plaintiff (age unknown) was in a moderately severe motor vehicle accident in which her car was spun 180 degrees.

Injuries: The incident caused her long-term back pain, as well as pain in the left wrist, right elbow and upper thoracic region. The back pain clearly impacted upon her enjoyment of life and made her more vulnerable to stress in normal circumstances. Plaintiff was expected to suffer long-term, if not permanent, back pain.

General damages: \$100,000 (\$50,000 attributed to the past)

Mossop M (21 August 2015)

Johnson v Rustenburg [2014] ACTSC 386

Plaintiff (age unknown) was in a motor vehicle accident during which she was thrown forward and collided with the central console.

Injuries: Plaintiff suffered a fracture to the vertebrae, had to wear a brace for three months and required physiotherapy treatment. Plaintiff also suffered swelling of the left ankle, minor fracture of the nose, a chip to the lower incisor and bruising from the seatbelt. Plaintiff suffered from ongoing relatively minor back pain that was controlled by paracetamol. Although some activities had been affected by her back pain, there was little impact upon work capacity or lifestyle.

General damages: \$90,000 (\$50,000 attributed to the past)

Mossop M (15 September 2014)

Justin Shephard v Faw Industries Pty Ltd and Ors [2014] ACTSC 20

Plaintiff was a 27-year-old male who suffered back injuries while lifting and carrying lengths of timber at work. He sued his employer for negligence.

Injuries: Plaintiff suffered ongoing back pain and developed erectile problems. As a result, his marriage broke down and he suffered depression. He also lost his job and started consuming excessive alcohol.

General damages: \$140,000 (\$70,000 attributed to the past)

Harper M (17 February 2014)

Downie v Jantom Co Pty Ltd [2013] ACTSC 171

Plaintiff (female, age unknown) sustained injuries to her lower back at work when her office chair collapsed and she fell to the floor.

Injuries: Since the incident, she underwent considerable treatment, including a lumbar fusion, she was left with permanent and severe lower back pain and permanent sciatica down the left leg. The pain was debilitating and caused a substantial interference with the plaintiff's working life, home life and personal relationships. She also suffered from depression and anxiety with little likelihood of recovery.

General damages: \$140,000 (\$70,000 attributed to the past)

Harper M (29 August 2013)

Utting v Clarke & Insurance Australia Limited t/as NRMA Insurance [2016] ACTSC 168

Plaintiff (age unknown) was injured in a motor vehicle accident. Although liability was admitted, the defendant challenged the nature and extent of injuries suffered by the plaintiff.

Injuries: Soft tissue injuries including cervical spine injury and whiplash disorder with consequential headaches, thoracic spinal pain disorder, chronic lumbosacral spinal pain syndrome and some psychological consequences.

General damages: \$75,000 (\$37,500 attributed to the past)

Elkaim J (14 July 2016)

Bowel

Dixon v Foote & Calvary Health Care Ltd [2012] ACTSC 101

Plaintiff (female, age unknown) consulted a urogynaecologist for advice concerning the breakdown of a mesh sling which supported the prolapse of her uterus. She was admitted to Calvary Hospital for the purpose of trimming the sling. Her uterus was damaged as a result of the surgery.

Injuries: Following the surgery, the plaintiff developed a fistula which was repaired at the National Capital Hospital. Subsequent to the injury, she improved her fitness to around the same level as prior to the injury. Plaintiff developed a permanent condition affecting the functioning of her bowel. This presented her with risks that could lead to very serious, even fatal consequences. She suffered from constipation from the time of the surgery. Plaintiff also had unsightly abdominal scarring and swelling, she could not obtain travel insurance and faced significant medical risks when travelling outside Australia.

General damages: \$140,000 (\$70,000 attributed to the past)

Sidis AJ (27 June 2012)

Brain

Stafford v Carrigy-Ryan & Anor [2013] ACTSC 99

Plaintiff (male, age unknown) was a passenger in a motor vehicle which ran off the road and overturned several times. Prior to the accident, the plaintiff's sporting activities included water skiing, snow skiing, golf, exercise, go-kart racing and motorcycle riding.

Injuries: Plaintiff suffered a mild brain injury and post-concussion syndrome from which he substantially recovered within 12 months of the accident and completely recovered by the hearing.

General damages: \$40,000

Sidis AJ (4 July 2013)

Dental

Robinson v Ng [2014] ACTSC 227

Plaintiff was a 51-year-old female who was injured during a molar extraction procedure where one tooth was pushed through the wall of her sinus, requiring remedial surgery.

Injuries: Osteomyelitis (bone infection) as a complication of having her tooth root pushed through the wall of her sinus. Despite recovery from this she suffered facial nerve palsy, headaches and consequential fatigue which were likely to continue indefinitely.

General damages: \$170,000 (\$110,000 attributable to the past)

Mossop M (7 November 2014)

Foot

Munday v Australian Capital Territory [2004] ACTSC 134

Plaintiff (male, age unknown) impaled his right foot on an exposed nail on a detached fence paling. The treatment failed to include a swab, to properly explore and drain the puncture wound and failed to detect pseudomonas leading to bone damage.

Injuries: Pseudomonas in the right foot, accelerating the need for a knee replacement and was unable to walk without crutches.

General damages: \$50,000, (\$25,000 attributed to the past)

Higgins CJ (20 December 2014)

Ribs

Ali v Allianz Australia Insurance Ltd (No 2) [2016] ACTSC 172

Plaintiff was a 46-year-old male who fell 2.5 metres onto a hard surface in his course of employment as a labourer.

Injuries: Plaintiff suffered a laceration to his right hand and three broken ribs (closed period pain and injury)

General damages: \$25,000 (\$25,000 for past)

Mossop AsJ (12 July 2016)

Hand

Pavic v Australian Capital Territory [2007] ACTSC 97

Plaintiff (male, age unknown) claimed damages for negligent medical treatment he received at Canberra Hospital when he was three weeks old.

Injuries: At birth he displayed some abnormalities, including a breathing difficulty for which he was treated with an infusion of calcium gluconate administered through a needle and cannula into the back of his right hand. This line was placed for three days when nursing staff noticed a burn injury to the back of the hand which was treated with a skin graft. The burning of the hand caused pain and suffering and required surgery. The surgery left a clearly visible scar because of its colour and its differences to the surface of the back of the hand. Part of the scarring was raised.

General damages: \$50,000 (\$25,000 attributed to the past)

Harper M (3 December 2007)

Head

Ryan v Bunnings Group Ltd [2020] ACTSC 353

Plaintiff was a 56-year-old male who suffered an injury to his nose and face when he entered the foyer of Bunnings Warehouse as an employee swung her arm, hitting the plaintiff in his face.

Injuries: Shock, fracture to nasal bone, fracture to nasal septum, and pain in the face and nose.

General damages: \$8,500

Loukas-Karlsson J (23 December 2020)

Hip

Spence v Neilson [2018] ACTSC 273

Plaintiff was a 59-year-old female who had sought consultation on the removal of her varicose veins. After the surgery by the defendant, she allegedly suffered a disabling hip and tendon condition.

Injuries: Hip and buttock pain possibly caused by tears to her gluteal tendons during surgical procedure. There was no clear causal mechanism. The award for general damages applied a 30% discount for past and 60% discount for future to account for the lack of causal finality and other vicissitudes.

General damages: \$88,000 (\$56,000 for past)

Mossop J (12 October 2018)

Wormald v Caftor Pty Ltd trading as Mooseheads Bar and Café [2012] ACTSC 97

Plaintiff was a 35-year-old male who was injured when a security guard fell on top of him when he attempted to take the plaintiff out of a bar in 2001. He sued the bar owner for the security guard's negligence.

Injuries: A fracture on the left hip bone. He continued to have constant hip and widespread pain for 10.5 years after the incident. Plaintiff was deprived of the ability to work and enjoy his trade and hobbies. He was dependent on drugs and on others as a result of the injuries. His marriage broke down and sleep was continuously disrupted by the pain. He had been in substantial pain for over a decade.

General damages: \$140,000

Katzmann J (15 June 2012)

Seselja v Reardon [2020] ACTSC 167 (pending appeal)

Plaintiff, a 26-year-old woman, suffered injury as the consequence of a collision between two vehicles.

Injuries: Permanent disability of the right hip, anxiety, intermittent neck and shoulder symptoms with headache, aggravation of pre-existing degenerative changes.

General damages: \$110,000

Crowe AJ (26 June 2020)

Knee

Philp v Australian Mutual Provident Society [1999] ACTSC 12

Plaintiff (male, age unknown) sustained injuries after slipping and falling on ceramic tiles on the footpath of a building, striking his knee to the ground.

Injuries: A severe left knee injury including dislocation of his patellar and a tear of the medial ligament. The injury was assessed at 15% whole person impairment, which, although not utilised by the court for the assessment of general damages, did go to showing the significance of the plaintiff's disability resulting from injury.

General damages: \$33,000 (\$20,000 attributed to the past)

Connolly M (26 February 1999)

Leg

Buljat v Coles Supermarket Australia Pty Limited [2022] ACTCA 71

Elderly female plaintiff slipped on a grape and fell to the floor in a Coles Supermarket.

Injuries: Plaintiff sustained soft tissue injuries including bruising to her right shin and chronic lower leg pain.

General damages: \$24,000

Elkaim, Mossop and Kennett JJ (16 December 2022)

LC (By His Litigation Guardian Ks) v Australian Capital Territory [2017] ACTSC 324

Plaintiff (male, age unknown) was admitted to Canberra hospital following a suicide attempt. He subsequently absconded from the emergency department and made his way to an above ground parking structure which he jumped off, injuring himself.

Injuries: Plaintiff suffered a comminuted, intra-articular fracture of the distal tibia/ankle bilaterally; a comminuted fracture of the posterior aspect of the talus bilaterally; a comminuted fracture of the posterior aspect of the right calcaneus with posterolateral displacement. Likely onset of post-traumatic osteoarthritis in bilateral ankles, but with no clinical support by way of radiology six years post injury.

General damages: \$95,000, (\$76,000 for past)

Burns J (3 November 2017)

Doolan v Belgravia Health and Leisure Group Pty Ltd [2011] ACTSC 202

Plaintiff (male, age unknown) sustained injuries at a public pool after his foot got stuck in a drain.

Injuries: Ongoing symptoms - he had extreme pain and an ache halfway between his ankle and knee which would become warm and swollen. He was no longer able to run and his walking ability was restricted. Plaintiff had a life expectancy of 17.5 years and the court believed that he was somewhat preoccupied with his injury.

General damages: \$35,000 (\$20,000 attributed to the past)

Besanko J (16 December 2011)

Hutchison v Fitzpatrick [2009] ACTSC 43

Plaintiff (male, age unknown) who was participating in a rugby match, was suddenly, and without warning, tackled from behind by the defendant and thrown to the ground.

Injuries: A fracture to the right femur. The fracture took 4-5 months to heal and he had to learn to walk again using a zimmer frame for six weeks. He had physiotherapy and hydrotherapy for eight weeks with fairly constant pain for the first two months, particularly if he placed any pressure on the right leg. The leg improved over time but remained painful for a number of months. The pain was always there at a moderate level but much worse on physical movement or pressure.

General damages: \$100,000 (\$50,000 attributed to the past)

Harper M (17 April 2009)

Elizabeth Cairns v Woolworths Ltd [2005] ACTSC 95

Plaintiff (female, age unknown) was walking through the common area of the plaza when she slipped on some potato chips and fell awkwardly to the floor. Her lower back, wrists and ankle were tender.

Injuries: Plaintiff did not return to work for a month, during that time she could barely walk and could not lift heavy objects. She had constant pain in her back and although she returned to her usual duties at work for three hours a day, her condition worsened. She also had sciatic pain down both legs and was unable to cope with household and gardening tasks and ceased to engage in social activities with friends.

General damages: \$50,000 (\$30,000 attributed to the past)

Harper M (30 September 2005)

Kempster v Healthscope Operations Pty Ltd [2019] ACTSC 248

Plaintiff, a 52-year-old woman, received a heparin injection into her left thigh by a nurse. The nurse inserted the needle at an angle which allowed it to penetrate deeper tissues overlying the applicant's left thigh muscle. After the injection, the plaintiff had pain in the left-hand side of the mid-thigh area. The next morning, the plaintiff noticed a lump on the left thigh in the area of injection. It was found that the injection was administered in a way that fell below the standard of care to be expected of a nurse.

Injuries: Damage to left lateral femoral cutaneous nerve.

General damages: \$95,000

Crowe AJ (6 September 2019)

Eye

Dryden v Bowditch [2008] ACTSC 131

Plaintiff was a 60-year-old female who had been working at the racing stables. She was attacked by a dog.

Injuries: Lacerations, abrasions and bruising to the right eye and face; lacerations, puncturing and bruising of the right arm; an injury to the right tear duct; abrasions to the right cornea; onset of headaches; and shock and psychological injury. The alleged disabilities were anxiety, blurred vision, a photo-sensitive eye, headaches, requirement to undergo two surgical procedures to the eye, scarring of the right arm, numbness in the face and post-traumatic stress. Good recovery with minimal residual nuisance in the eye and scarring at the site of the bite.

General damages: \$45,000 (\$30,000 for past)

Judge: Master Harper (19 November 2008)

Internal

Geddes v Taleni [2017] ACTSC 183

Plaintiff was a 34-year-old woman who was struck by a cyclist at speed. She was struck in the left hip and fell. She hit the back of her head on the concrete floor.

Injuries: Internal injuries and a concussion with minor cognitive defects (perceived or otherwise).

General damages: \$90,000

Elkaim J (24 July 2017)

Burns

D'Arcy v Caltex Australia Limited [2018] ACTSC 206

Plaintiff was a 44-year-old male. He and his team were re-lining an underground fuel tank with fibreglass at a petrol station when a fire broke out inside the tank.

Injuries: Serious burns, including partial and full thickness burns to his face, both arms and hands, and both legs. The burns covered 33 per cent of his total body surface area, and he required debridement. He also suffered inhalation burns causing breathing problems. He did, however, have good functional and cosmetic recovery and recovery from PTSD with minor residual PTSD symptoms.

General damages: \$300,000 (\$180,000 for past)

Plaintiff failed against Caltex but damages were still assessed.

Burns J (3 August 2018)

Multiple injuries

Mcintosh v Canberra Choral Society [2022] ACTMC 16

Plaintiff, a 71-year-old female, sustained injury when she fell into a hazardous gap created by the construction of a temporary stage on top of the altar at St Christopher's Cathedral.

Injuries: Displaced fracture of the plaintiff's left wrist, un-displaced fracture of the left knee, permanent aggravation of the left shoulder and a cut to the left hand.

General damages: \$120,000

Magistrate Stewart (15 July 2022)

Luongo v Clarke [2018] ACTSC 81

Plaintiff was a 55-year-old female who was hit by a pushbike being ridden by the defendant.

Injuries: Minimally displaced comminuted fracture of the nasal bones; a displaced commuted fracture of the right shoulder; significant facial bruising; undisplaced fractures in the jaw; a rib fracture; a soft tissue neck injury; aggravation of her right knee condition; and aggravation of pre-existing anxiety symptoms.

General damages: \$110,000

Elkaim J (29 March 2018)

Perry v Pese [2018] ACTSC 205

Plaintiff was a 44-year-old male who who was involved in a motor vehicle accident when the first defendant failed to give way to the him at a roundabout.

Injuries: Soft tissue injuries to his neck, mid back and left shoulder. He suffered emotionally from the accident, although this distress cannot be elevated to any identifiable psychological or psychiatric condition.

General damages: \$80,000

Elkaim J (1 August 2018)

Pasfield v Ugarkovich and Insurance Australia Limited t/as NRMA Insurance [2014] ACTSC 10

Plaintiff was a 24-year-old female who was involved in a motor vehicle accident. The defendant collided with a stationary car, pushing that car into the rear of the plaintiff's car.

Injuries: Neck and mid-back. She was unable to perform a number of household tasks, including lifting heavy kitchen pots and pans or bathing her eldest daughter.

General damages: \$80,000 (\$40,000 attributed to the past)

Harper M (5 February 2014)

Aitkenhead v Kauflin (No 3) [2014] ACTSC 83

Plaintiff was a 26-year-old man who sustained injuries in a motor vehicle accident.

Injuries: Back and neck. It was likely that he would suffer permanent back pain. The ongoing pain and suffering deprived him of the ability to undertake significant work or fitness-related activities. His life expectancy was also reduced to 54 years. Although the court found that the plaintiff failed to take reasonable care in driving on the left-hand side of the road, it did not amount to contributory negligence.

General damages: \$80,000 (\$40,000 attributed to the past)

Mossop M (9 May 2014)

Carolyn Daphne Becker v Queensland Investment Corporation [2009] ACTSC 134

Plaintiff (female, age unknown) was injured when a partition alongside the corridor she was walking along collapsed. She had previously had physiotherapy to help with back pain following an injury.

Injuries: Suffered from erratic sleep, ongoing back and shoulder pain, headaches and anxiety. The pain was partly caused by degenerative changes in her spine, the nature of her psychological condition was solely caused by the incident.

General damages: \$70,000 (\$52,500 attributed to the past)

Refshauge J (12 October 2009)

Omeara v Australian National University & Dominican Fathers [2002] ACTSC 115

Plaintiff (female, age unknown) fell from first floor balustrade of a balcony in a residential college. She was attending a sports dinner, had consumed alcohol and was wearing a ball gown and high heeled shoes. She had lifted herself onto a seating position on the balustrade when she fell backwards about five metres and was conveyed immediately to Canberra hospital for surgery. Assessment of damages would have been reduced by 60% for contributory negligence, had primary liability been made out.

Injuries: Facial fractures and head lacerations, fractures to right wrist and left elbow and requirement for multiple surgeries, scarring.

The court found liability in favour of the second defendant (the case against the first defendant having been settled prior to hearing), however, an assessment of damages was calculated at \$100,000 (\$50,000 attributed to the past).

Connolly M (15 November 2002)

Koznjak v Andresco-Hurl Refractory Services Pty Ltd [2000] ACTSC 10

Plaintiff (age unknown) was injured in a motor vehicle accident. The matter was heard for assessment of damages only.

Injuries: Multiple soft tissue injuries to the head and scalp, right chest and abdomen and right arm. There was also a liver laceration which did not require surgical intervention, and two fractured ribs in the right lateral chest associated with this. Plaintiff required a significant period of hospitalisation and recuperation but recovered to a large extent from many of these injuries.

General damages: \$55,000 (\$35,000 attributed to the past)

Connolly M (11 February 2000)

Massouras v Kone Elevators [2020] ACTSC 66

The four plaintiffs entered into a lift with the intention of alighting on the ground floor. The lift malfunctioned and stopped suddenly between two floors.

Injuries: Plaintiff 1: The incident weakened the cervical spine, and caused mild, chronic adjustment disorder, mild phobia of riding in lifts and moderate severity anxiety.

Plaintiff 2: Developed bilateral capsulitis and chronic pain syndrome with poor prognosis.

Plaintiff 3: Soft tissue injuries to the hip and shoulder, as well as injuries to her lower back and neck and post-traumatic stress disorder.

Plaintiff 4: Pain in neck and shoulders, temporary exacerbation of previous mechanical lumbar back pain.

Plaintiff 1: General damages assessed at \$90,000 (\$60,000 attributed to the past)

Plaintiff 2: General damages assessed at \$140,000 (\$70,000 attributed to the past)

Plaintiff 3: General damages assessed at \$35,000 (\$25,000 attributed to the past)

Plaintiff 4: General damages assessed at \$20,000

Burns J (3 April 2020)

Hall v Martin [2020] ACTSC 233

Plaintiff, a 50-year-old man, was injured while employed at a scrap metal business when he was knocked off the back of a truck by a crane.

Injuries: Comminuted fracture of left patella and aggravation of long-standing back complaints including Scheuermann's disease in the thoracolumbar region. There was also a significant prospect of the plaintiff needing an arthroscopy on his knee or a total knee replacement.

General damages: \$140,000 (\$70,000 attributed to the past)

Mossop J (26 August 2020)

Neck

Wattam v Jorgensen [2012] ACTSC 111

Plaintiff (age unknown) was the driver of a motor vehicle that was hit in the rear while stationary at an intersection by the defendant's vehicle due to the defendant's negligence.

Injuries: Whiplash injury to the cervical spine, pain and restriction of movement in the neck and upper back, headaches, restriction in ability to carry out employment or engage in previously enjoyed recreational activities. The neck pain was ongoing and required massage and physiotherapy.

General damages: \$70,000 (\$45,000 attributed to the past)

Burns J (20 July 2012)

Psychiatric injury

ND v AB (No 3) [2022] ACTSC 197

Plaintiff was sexually assaulted as a minor by her maternal uncle.

Injuries: Sexual assault and PTSD.

General damages: \$240,000

Mossop J (3 August 2022)

John XXIII College v SMA [2022] ACTCA 32

Student was sexually assaulted by a resident of the College while intoxicated.

Injuries: Sexual assault and PTSD.

General damages: \$90,000

Murrell CJ, Loukas-Karlsson J and McWilliam AJ (29 June 2022)

KS v Calvary Health Care (ACT) (T/As Calvary Hospital) [2018] ACTSC 84

Plaintiffs, a 38-year-old female and male (age unknown), were the mother and father of a stillborn child (conceived by IVF). The hospital nurse failed to realise the significance of abnormalities in the unborn child's heart rate.

Injuries: First plaintiff suffered from PTSD and depression with cognitive and behavioural issues. Second plaintiff suffered major depression of mild to moderate severity.

First plaintiff (mother) - general damages assessed at \$230,000 (\$115,000 for past)

Second plaintiff (father) - general damages assessed at \$200,000 (\$150,000 past)

Burns J (5 April 2018)

Skea v NRMA Insurance Ltd [2005] ACTCA 9

Plaintiff (age unknown) failed to maintain the vehicle properly and as a result, a failure occurred in the steering arm, which resulted in loss of control and the car overturning.

Injuries: Depression and associated post-traumatic stress disorder after witnessing the aftermath of a collision between two cars, one of which contained her husband, son and daughter, who were seriously injured.

General damages: \$80,000 (\$60,000 for the past)

Crispin P, Gray and Lander JJ (24 March 2005)

Winbank v Casino Canberra Ltd [2012] ACTCA 9

Plaintiff (female, age unknown) suffered a psychological injury resulting from an incident that occurred at the casino operated by the respondent, where the applicant worked. When she returned to work, the duties she was given did not take into account the recommendations provided by her treating doctor. She then suffered further psychological injury following a second incident involving an abusive and intoxicated customer.

Injuries: Post-traumatic stress disorder and major depressive disorder with anxiety.

General damages: \$50,000 (\$25,000 attributed for the past)

Harper M (9 November 2012)

Ivers v Mehdi [2020] ACTSC 112

Plaintiff sustained psychological injury when she saw a motor vehicle strike a pedestrian who died from the collision.

Injuries: Post-traumatic stress disorder, anxiety, hypervigilance and insomnia.

General damages: \$100,000 (\$70,000 attributed to the past)

Burns J (12 May 2020)

SMA v John XXIII College (No 2) [2020] ACTSC 211

Applicant was a resident in a college operated by the respondent. The applicant was intoxicated and was sexually assaulted by another student who also resided at the college. The applicant had no memory of the assault and discovered the fact from a friend. It was alleged that the college should not have allowed the excessive drinking to have occurred, and should not have directed students to leave the premises. Further, it was alleged that the college's manner of dealing with the applicant's complaint was inappropriate.

Injuries: Post-traumatic stress disorder with major depression.

General damages: \$90,000

Elkaim J (7 August 2020)

Shoulder

Papp v Finley & Insurance Australia Ltd [2015] ACTSC 74

Plaintiff (female, age unknown) claimed damages for personal injuries sustained by her as a result of a motor vehicle accident.

Injuries: Right hand and wrist and left shoulder. The prognosis for the injuries varied, there may have been some further improvement but no active treatment was prescribed. The plaintiff claimed to have restriction of movement and continued weakness in her left shoulder.

General damages: \$90,000

Cowdroy AJ (23 April 2015)

Scuderi v Raskurasingham [2017] ACTSC 41

Plaintiff (age unknown) was involved in a motor vehicle accident where the car driven by the respondent collided with the rear of the applicant's vehicle. The original award of general damages in the amount of \$15,000 was insufficient given the failure to recognise injury interference with domestic and work life over a closed period.

Injuries: Aggravation of pre-existing conditions of neck, back and right shoulder; rotator cuff pathology in right shoulder possibly associated with seatbelt injury.

General damages re-assessed on appeal at \$25,000

Mossop J (24 February 2017)

Wrist

Atherden v Caldipp [2019] ACTSC 29

Plaintiff was a 39-year-old male who had been working as a motor mechanic for the defendant. The plaintiff was diagnosing a car to repair by placing himself on top of the engine while the car ran. The plaintiff lost his grip and fell off the moving car.

Injuries: Serious injury to his wrist, involving a fracture, ligament damage and a torn cartilage requiring two bouts of surgical intervention and significant post-surgical rehabilitation. Residual pain in the wrist.

General damages: \$125,000 (\$50,000 for past)

Penfold J (15 February 2019)

Cornwall v Jenkins (As Trustee For The iSpin Family Trust) [2019] ACTSC 34

Plaintiff was a 27-year-old female who was participating in an 'aerial slings' class. While she was performing a particular manoeuvre, she fell from the sling and broke both of her wrists.

Injuries: Broken wrists bilaterally requiring internal fixation in the right wrist. Residual pain in the right wrist. Onset of significantly debilitating anxiety condition.

General damages: \$130,000 (\$65,000 for past)

Mossop J (21 February 2019)

Noble v O'Brien [2010] ACTSC 29

Plaintiff (age unknown) was involved in a motor vehicle accident where the car driven by the defendant collided with the rear of the plaintiff's vehicle. Liability was admitted.

Injuries: Wrist injury (post-traumatic right wrist arthralgia and post-traumatic arthritis of the distal radial ulnar joint), whiplash to neck and shoulders.

General damages: \$100,000 (\$60,000 for the past)

Harper M (9 April 2010)

Rhodin v Coles Supermarkets Australia Pty Ltd [2019] ACTSC 207

Plaintiff, a 53-year-old woman, was a shop assistant at Coles when she slipped on ice covering the floor. As a result of the slip, she crashed into a metal trolley, injuring her wrist. The defendant submitted that the plaintiff was contributorily negligent to the fall, but this was not accepted by the Court.

Injuries: Injury to the left wrist, irritation of the left ulnar nerve in the left wrist and lower arm, tear of left wrist cartilage and chronic soft tissue injury to the left elbow, depression, anxiety, impaired memory, impaired concentration, reduced quality and quantity of sleep and reduced capacity to perform pre-injury employment, domestic and recreational activities.

General damages: \$150,000 (\$50,000 attributed to the past)

Collier J (13 August 2019)

Uterus

Brus v Australian Capital Territory [2007] ACTSC 83

Plaintiff (female, age unknown) suffered a prolapse of the fallopian tube as a result of a negligently performed vaginal hysterectomy.

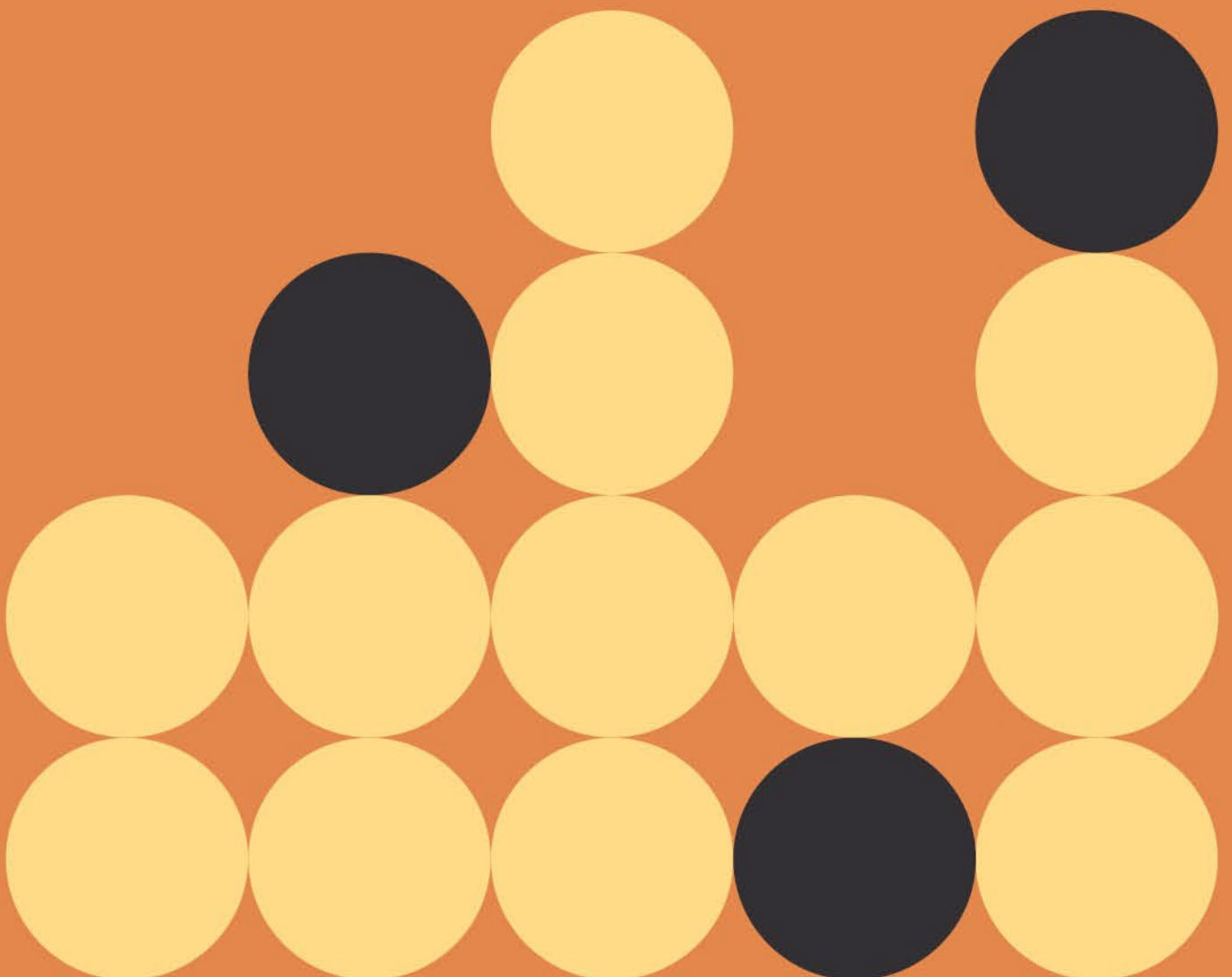
Injuries: Extreme pelvic pain and discomfort. Plaintiff required several corrective surgeries.

General damages: \$50,000 (inclusive of interest)

Connolly J (12 October 2007)

03

Victoria



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Wrongs Act 1958 (Vic)

Application

The *Wrongs Act 1958* (Vic) (**WA VIC**) modifies the common law of negligence in Victoria.

Under section 44, the WA VIC applies in most circumstances where negligence is alleged against a defendant resulting in physical injury or death, except for claims excluded under section 45 where a claim is made under the:

- *Workers Compensation Act 1958* (Vic);
- Part IV of the *Accident Compensation Act 1985* (Vic);
- Part 5 of the *Workplace Injury Rehabilitation & Compensation Act 2013* (Vic);
- Part 3, 6 or 10 of the *Transport Accident Act 1986* (Vic);
- Part V of the *Country Fire Authority Act 1958* (Vic);
- Part 4 of the *Victoria State Emergency Service Act 2005* (Vic);
- Part 6 of the *Emergency Management Act 1986* (Vic);
- *Police Assistance Compensation Act 1968* (Vic);
- Part 8 of the *Juries Act 2000* (Vic) or Part VII of the *Juries Act 1967* (Vic);
- Part 5.6 of the *Education and Training Reform Act 2006* (Vic);
- A claim for damages in respect of an injury that is a dust-related condition within the meaning of the *Administration and Probate Act 1958* (Vic); or
- A claim for damages in respect of an injury resulting from smoking or other use of tobacco products, within the meaning of the *Tobacco Act 1987* (Vic), or exposure to tobacco smoke.

Negligence - the elements

As with common law negligence, to establish negligence under the WA VIC a plaintiff must prove that the defendant:

- owed the plaintiff a duty of care (section 48);
- breached that duty of care; and
- caused the damage alleged (section 51).

Under Part III of the WA VIC, a person can claim for the death of a person caused by the wrongful act or neglect of another person. These actions can be pursued for the benefit of the dependents of a deceased in the name of the executor or administrator under section 17, or by beneficiaries if no proceedings have been commenced within six months after the death under section 18.

Duty of care

The absence of a duty of care means that a defendant will not be liable in negligence to a plaintiff. For a duty of care to be established, a plaintiff must establish that a reasonable person in the defendant's position would have known that it would not be unlikely (reasonably foreseeable) that the alleged negligent behaviour may result in injury to a person: *Chapman v Hearse* [1961] 106 CLR 112 and section 48(1) of the WA VIC. While reasonable foreseeability is necessary to establish a duty of care, it is not of itself sufficient.

For this reason, courts are concerned with identifying the salient features which might favour imposing or militate against imposing a duty of care. This involves the court looking to other similar cases to consider whether a duty was owed by looking at the factors which may be common to the present case.

A non-exhaustive list of common established duties of care in case law includes:

- manufacturer/consumer: *Donoghue v Stevenson*⁹¹
- occupier/visitor: *Australian Safeway Stores Pty Ltd v Zaluzna*⁹²
- employer/employee: *Smith v Leech Brain*⁹³
- doctor/patient: *Rogers v Whitaker*⁹⁴
- parent/child: *Smith v Leurs*⁹⁵

Section 59(1) defines a standard of care in circumstances where the defendant is a professional acting in his or her professional capacity. The section provides that a professional is not liable in negligence if it is established that the professional acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice in the circumstances. However, under section 50(2) a court will not be bound by peer professional opinion if the court considers that opinion to be irrational.

Despite the above, section 60 provides that section 59 will not apply to liability which arises in connection with the giving of (or the failure to give) a warning or other information in respect of a risk or other matter to a person, if the giving of the warning or information is associated with the provision by a professional of a professional service.

In *Grinham v Tabro Meats Pty Ltd & Anor*,⁹⁶ section 59 could not be relied upon in relation to an alleged failure by a doctor to provide more fulsome advice concerning the risk of infection without further treatment or investigation, due to the doctor's profession being so closely associated with the giving of warning or information.

In terms of duty of care for mental harm, section 72 requires that the foreseeability test be satisfied for a duty of care to exist. Section 72(1) states that a person does not owe a duty to another person to not cause that person pure mental harm unless the "defendant foresaw or ought to have foreseen that a person of normal mental fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken".

Breach

Section 48(1) of the WA VIC codifies the common law principles which apply to give rise to a duty of care. In determining whether a duty exists, the court is to determine whether:

- the risk was foreseeable;
- the risk was not insignificant (not far-fetched or fanciful under section 48(3)); and
- a reasonable person in the person's position would have taken those precautions.

Sections 48(1)(c) and 48(2) require an assessment of the response of a reasonable person to the perceived risk of harm. Section 48(2) provides a non-exhaustive list of factors that must be taken into account in making this assessment, including:

- the probability of the harm occurring if care was not taken;
- the seriousness of the harm;
- the burden of taking further precautions to avoid the harm; and
- social utility of the activity which creates the risk of harm.

Section 49(b) provides that the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done. Section 49(c) provides that the subsequent taking of action that would (if the action had been taken earlier) have avoided the risk of harm does not affect liability and does not constitute an admission of liability in relation to the risk.

⁹¹ *Donoghue v Stevenson* [1932] UKHL 100

⁹² *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479

⁹³ *Smith v Leech Brain* [1962] 2 QB 405

⁹⁴ *Rogers v Whitaker* (1992) 175 CLR 479

⁹⁵ *Smith v Leurs* (1945) 70 CLR 256

⁹⁶ *Grinham v Tabro Meats Pty Ltd & Anor* [2012] VSC 491

Causation and remoteness

In any claim for damages for negligence, a plaintiff will be required to prove, on the balance of probabilities (section 52), that the damage suffered was caused by the defendant's negligence.

Section 51(1) provides that a determination that negligence caused particular harm comprises proving the following two elements:

- That the negligence was a necessary condition of the occurrence of the harm (factual causation); and
- That it is appropriate for the scope for the negligent person's liability to extend to the harm so caused (scope of liability).

The reference to "necessary condition" in section 51(1)(a) requires the defendant's act to have been at least one event, which caused or materially contributed to the plaintiff's loss. Accordingly, there may be other events which contributed to the loss but the defendant's alleged act must be one of the necessary conditions. Section 51(1)(a) is demonstrated through considering whether "but for" the defendant's negligence, the claimant's loss would actually have occurred (*March v E & M H Stramare Pty Ltd*⁹⁷).

The "but for" test is necessary, but it is not a sufficient test for causation, particularly where there are two or more probable causes. Section 51(1)(b) seeks to address this by requiring the plaintiff to prove whether, as a matter of policy, the person alleged to be responsible should nevertheless be held not liable (scope of liability). This is achieved by identifying the "nature of the role which the conduct in question played": *Pledge v RTA*,⁹⁸ or if the alleged cause should properly be seen as having caused the relevant loss or damage (*Medlin v State Government Insurance Commission*⁹⁹).

Section 51(3) expands on the section 51(1)(a) requirement of factual causation by establishing its determination as a subjective test of what the plaintiff would have done if the negligence had not occurred.

Similarly, section 51(4) expands on the scope of liability requirements in section 51(1)(b) by establishing that it should be a normative question of whether liability should be imposed on the negligent party.

In rare cases, the evidence is not sufficient to establish that the alleged conduct was a "material" cause of the damage to the plaintiff. This is typically because of uncertainties surrounding the aetiology of injury. In such cases, the court may apply section 51(2) of the WA VIC and consider why responsibility for harm should be imposed on the negligent party. *Adeels Palace v Moubarak*¹⁰⁰ is the leading case which discussed the application of section 5D(2) of the CLA NSW, which is very similar in wording to section 51(2) of the WA VIC. In finding that section 5D(2) of the CLA NSW did not apply to the respondent, the High Court did not go so far as to define in what circumstances a matter would be considered "exceptional". Australian courts are yet to establish an "exceptional" case for section 5D(2) (or section 51(2)) to apply.

Once a plaintiff establishes that the defendant's conduct has caused the plaintiff's loss, the second element, "remoteness" will need to be satisfied. Remoteness concerns the extent of the damage for which a defendant will be liable. This is addressed by considering whether the damage that is alleged to have flowed from the breach was "reasonably foreseeable": *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd*.¹⁰¹

⁹⁷ *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506

⁹⁸ *Pledge v RTA* (2004) 205 ALR 56

⁹⁹ *Medlin v State Government Insurance Commission* [1995] 182 CLR 1

¹⁰⁰ *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48

¹⁰¹ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The "Wagon Mound" (No 1))* [1961] AC 388

"Defences" to negligence

Voluntary assumption of risk and obvious risks

Under the common law, the defence of *volenti non fit injuria* (voluntary assumption of risk), which is a complete defence, entails establishing that a plaintiff both knew of a risk and voluntarily agreed to incur the risk: *Imbree v McNeilley*.¹⁰²

Section 54(1) of the WA VIC provides that if a defence of voluntary assumption of risk is raised and the risk is an "obvious risk", the person who suffered harm is presumed to have been aware of the risk, unless the person proves on the balance of probabilities that the person was unaware of the risk. Section 54(2) provides that the section does not cover claims relating to professional services, health services or claims relating to risks associated with work. In these instances the common law continues to apply.

An "obvious risk" is defined in section 53(1) as a risk that, in the circumstances, would have been obvious to a reasonable person. An obvious risk, as defined in section 53, includes risks that:

- are patent or a matter of common knowledge (section 53(2));
- have a low probability of occurring (section 53(3));
- are not prominent, conspicuous or physically observable (section 53 (4)).

Section 53(5) provides that obvious risks do not include risks created by a failure on the part of a person to properly operate, maintain, replace, prepare or care for a thing, unless the failure itself is obvious.

If a court finds that a risk is an obvious one (as defined above), this means that pursuant to section 54(1) a person is presumed to be aware of that risk (subject to the person overturning that presumption). However, this does not lead to an automatic finding of no breach of duty. The presumption of obvious risk under section 54(1) simply makes it easier for a defendant to establish the common law defence of voluntary assumption of risk because at common law, a court must consider whether the plaintiff had actual knowledge of a risk: *Canterbury Municipal Council v Taylor*.¹⁰³

Recreational activities

In the WA VIC, there are no equivalents to the CLA NSW provisions in section 5L excluding liability for obvious risks of dangerous recreational activities and section 5M providing no duty of care for recreational activities where a risk warning has been given.

Inherent risks

Section 55(1) of the WA VIC provides that a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk. Under section 55(2), an inherent risk is one which cannot be avoided by the exercise of reasonable care. Section 55(3) provides that the section does not exclude the general duty to warn of risks under section 50.

Risk warnings

In *Rogers v Whitaker*,¹⁰⁴ it was found that a doctor had a duty to warn a patient of a material risk inherent in the proposed treatment. A risk was material if, in the circumstances of a particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it, or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.

Section 50 of the WA VIC was enacted after the decision in *Rogers v Whitaker* and provides that where a defendant owes a duty to a plaintiff to give a warning or other information to the plaintiff in respect of a risk or other matter, the defendant satisfies that duty of care if the defendant takes reasonable care in giving that warning or other information.

¹⁰² *Imbree v McNeilley* [2008] HCA 40

¹⁰³ *Canterbury Municipal Council v Taylor* [2002] NSWCA 24

¹⁰⁴ *Rogers v Whitaker* (1992) 175 CLR 479

In *Odisho v Bonazzi*,¹⁰⁵ no duty of care was owed by a gynaecologist to a patient to warn of the risks of the patient developing a thromboembolism due to the rareness of the condition developing from the course of treatment provided. On appeal in *Odisho v Bonazzi* [2014] VSCA 11, the court considered that a duty to give a warning did exist but did not determine the matter as it established that the lack of a warning did not cause the loss complained of.

In *Ozkan v St Vincent's Hospital (Melbourne) Limited (t/as St Vincent's Health)*,¹⁰⁶ the court dismissed a claim by a patient that she was not warned of the risks of developing psychiatric injuries as a result of undergoing a septoplasty and a rhinoplasty. This was because the court did not consider that the hospital owed the plaintiff a duty to warn as the risk of developing a psychiatric condition was not reasonably foreseeable.

Contractual waivers

There is no equivalent in the WA VIC to section 5N in the CLA NSW, which provides a waiver of contractual duty for recreational activities as a defence for claims in negligence.

Contributory negligence

Section 26 of the WA VIC provides that where a plaintiff suffers damage partly as a result of their own failure to take reasonable care and partly due to the wrong of another, the damages recoverable are reduced to the extent that a court thinks is just and equitable, having regard to the plaintiff's share in the responsibility of the damage.

Under section 62(2), in determining whether a plaintiff has been contributorily negligent in failing to take precautions against a risk of harm, the standard of care required of the plaintiff is that of a reasonable person in that position. The matter is also determined on the basis of what that person knew, or ought to have known at the time.

Under section 63, a court can determine that damages be reduced by 100% for contributory negligence. This can defeat a claim if the court thinks that it is just and equitable to do so.

Although often relied upon by defendants, courts are generally reluctant to allow a high percentage for contributory negligence. For example, in the decision of *Kigetzis v Roche*,¹⁰⁷ the plaintiff was only found to be 60% contributorily negligent for injuries sustained when he was hit by a vehicle when he walked into the road when the pedestrian sign was red and without looking to see if any vehicles were approaching.

Similarly in *Clarke v Greater Shepparton City Council*,¹⁰⁸ it was concluded that by jogging across the reserve to the point where he tripped and fell onto the stormwater pit, the plaintiff was not taking reasonable care for his own safety. Just 15% was apportioned to the plaintiff and the remaining 85% to the defendant.

Proportionate liability

Part IVA of the WA VIC deals with proportionate liability. A plaintiff's loss will frequently be the result of wrongdoing by more than one person (i.e. a concurrent wrongdoer).

In cases where the tortfeasors are not jointly and severally liable and the claim is apportionable, a concurrent wrongdoer, under section 24AH(1), is a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.

When determining whether there are concurrent wrongdoers, there are two questions for the court: What is the damage or loss that is the subject of the claim? Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss? (*Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*¹⁰⁹).

¹⁰⁵ *Odisho v Bonazzi* [2012] VCC 558

¹⁰⁶ *Ozkan v St Vincent's Hospital (Melbourne) Limited (t/as St Vincent's Health)* [2014] VCC 2263

¹⁰⁷ *Kigetzis v Roche* [2014] VSC 657

¹⁰⁸ *Clarke v Greater Shepparton City Council* [2016] VSC 542

¹⁰⁹ *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613

Under section 24AF(1), the proportionate liability regime applies only to:

- A claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care;
- A claim for damages for a contravention of section 18 of the ACL VIC - i.e. a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

Accordingly, under section 24AG(1) the proportionate liability regime specifically does not apply to personal injury claims.

If a claim is apportionable, a defendant is only liable for the loss or damage suffered by the plaintiff for which that defendant is responsible (section 24AI(1)). A court may not give judgment against the defendant for any more than that amount, irrespective of whether the other wrongdoer is a party to the proceedings.

Accordingly, should one of the concurrent wrongdoers be unable to pay the amount of damages awarded against it, the other defendants will not be required to indemnify that wrongdoer and pay any outstanding sum to a plaintiff (section 24AJ).

Pursuant to section 24AN, liability for contributory negligence is not affected.

Importantly, for a claim to be apportionable, it must be properly established that the loss or damage did in fact arise from a failure to take reasonable care. For example, in the decision of *Bartolic v Prestige Home Builders Pty Ltd*¹¹⁰ the defendant argued that the claim against it was an apportionable claim. They were, however, unsuccessful as the plaintiff's counsel referred to the language of section 24AF, and contended, correctly, that the claim made was not a claim for failure to take reasonable care, as it was a claim for breach of contract.

Intoxication and illegal activity

Section 14G(2) of Part IIB of the WA VIC provides that where a plaintiff brings a claim for damages in respect of death or personal injury against a defendant alleging negligence, the court will consider, among other things:

- Whether the plaintiff was intoxicated by alcohol or drugs voluntarily consumed and the level of intoxication;
- Whether the plaintiff was engaged in an illegal activity.

Section 14F provides that except as provided by section 14G, Part IIB of the WA VIC is not intended to affect the rules of common law applicable to negligence relating to intoxication and illegal activity.

The leading case in Australia which discussed the duty of care owed to intoxicated persons was *Cole v South Tweed Heads Rugby League Football Club Ltd*,¹¹¹ in which Colin Biggers & Paisley acted for the club and defeated the plaintiff's claim. In that case, the High Court held that in ordinary circumstances, no duty of care is owed by the licensee of premises to a person who is served alcohol, and, as a result of intoxication, is injured.

In determining whether a plaintiff has established a breach of the duty of care owed by the defendant, the court must consider, among other things, whether the plaintiff was engaged in an illegal activity.

It is also important to recognise the common law principle precluding criminals from the award of damages: *Henwood v The Municipal Tramways Trust (SA)*.¹¹² The decision of *Miller v Miller*¹¹³ suggests that no duty of care exists between participants in serious criminal activity. However, in that case the plaintiff was found to have withdrawn from the criminal enterprise prior to the damage, and was therefore owed a duty of care.

In the recent decision of *Captain v Wosomo*,¹¹⁴ the Supreme Court of Queensland dismissed a claim by a 14-year-old boy who was severely injured when the stolen vehicle in which he was a front seat passenger and

¹¹⁰ *Bartolic v Prestige Home Builders Pty Ltd* [2017] VCAT 1102

¹¹¹ *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469

¹¹² *Henwood v The Municipal Tramways Trust (SA)* (1938) 60 CLR 438

¹¹³ *Miller v Miller* [2011] HCA 9

¹¹⁴ *Captain v Wosomo* [2017] QSC 86

which was being driven by his 16-year-old friend crashed into a light post. The court found that because the parties were jointly engaged in a criminal activity, no duty of care was owed to the passenger.

Good samaritans and volunteers

Section 31B of the WA VIC provides immunity from civil liability for people who render assistance in an emergency to persons who are injured or at risk of injury. The immunity only applies where there is an emergency or accident in circumstances in which the person expects no financial reward for providing assistance.

Part IX deals with volunteer protection. Under section 35(1), a volunteer is defined as an individual who provides a service in relation to community work on a voluntary basis. Under section 35(2), a person is still a volunteer even if, in providing the service, he or she receives:

- remuneration that he or she would receive whether or not he or she provided that service; or
- out of pocket expenses incurred in relation to providing that service.

The following people are not volunteers under section 35(3):

- a volunteer officer or member under the *Country Fire Authority Act 1958*;
- a volunteer emergency worker under the *Emergency Management Act 1986*;
- a person who does community work under an order imposed by a court.

Under section 36(1), community work means work:

- for a religious, educational, charitable or benevolent purpose;
- for the purpose of promoting or encouraging literature, science or the arts;
- for the purpose of sport, recreation, tourism or amusement;
- for the purpose of conserving or protecting the environment;
- for the purpose of establishing, carrying on or improving a community, social or cultural centre;
- for a political purpose;
- for the purpose of promoting the common interests of the community generally or of a particular section of the community.

Under section 37(1), a volunteer is not liable in any civil proceeding for anything done, or not done, in good faith by them in providing a service in relation to community work organised by a community organisation. Under section 37(2), any liability that would attach to the volunteer instead attaches to the community organisation.

Under section 34, a "community organisation" is an incorporated association, municipal council, other body corporate, public entity or public service body that organises the doing of community work by volunteers.

Exceptions to the immunity which applies to volunteers are found in section 38(1) where:

- the volunteer knew they were acting outside the scope of the community work;
- the volunteer acted contrary to any instructions given by the community organisation; or
- the volunteer was impaired by drugs or alcohol.

Food donors

Section 31F(1) of the WA VIC provides immunity from civil liability for food donors in the event that death or injury results from the consumption of food. The circumstances covered by the immunity are detailed in section 31F(2) as follows:

- That the donor donated the food:
 - in good faith for a charitable or benevolent purpose; and
 - with the intention that the customer of the food would not have to pay for the food; and
- That the food was safe to consume at the time it left the possession or control of the food donor; and

- If the food was of a nature that required it to be handled in a particular way to ensure that it remained safe to consume after it left the possession or control of the food donor, that they informed the person they gave the food to of those handling requirements; and
- If the food only remained safe to consume for a particular period of time after it left the possession or control of the food donor, that they informed the person they gave the food to of that time limit.

Liability of public authorities

Section 84 of the WA VIC provides that a public authority will not be liable for breach of a statutory duty unless an act or omission (in relation to its capacity as a public authority) is considered unreasonable. An act or omission will be considered unreasonable only where no public authority having the functions of the public authority in question could properly consider the act or omission to be a reasonable exercise of its functions.

Section 84 does not apply to a statutory duty that it imposed as an absolute duty imposed on the public authority to do or not do a particular thing.

Section 85 provides that the fact that a public authority exercises or decides to exercise a function does not of itself indicate that the authority is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way.

Vicarious liability

Vicarious liability imposes liability on a person who has a non-delegable duty over the tortfeasor in ensuring that reasonable care is taken in connection with the performance of a task.

Vicarious liability is commonly imposed in the context of employment, where an employer may be found liable to third parties for tortious acts of its employees in the course of their work. In order for vicarious liability to be imposed, there must be a sufficient relationship between the defendant and the tortfeasor, and the negligence of the tortfeasor must be within the scope of employment (*Hollis v Vabu*¹¹⁵).

The acts of an employee must have been:

- actually or impliedly authorised by the employer; and
- undertaken in the course of employment while the employee is acting within the scope of their authority; and
- carried out in the course of employment duties or while the employee is acting incidental to his/her employment duties.

Under section 61(1) of the WA VIC, the extent of liability in tort of a defendant for breach of a non-delegable duty to ensure that reasonable care is taken by a person in carrying out any work or task entrusted to that person by the defendant is to be determined as if the defendant was vicariously liable for the negligence of the person.

Pursuant to the decision in *Blake v JR Perry Nominees Pty Ltd*,¹¹⁶ employers will not be liable for unauthorised actions of their employees, within the workplace, which are beyond their reasonable control.

In the decision of *Prince Alfred College Incorporated v ADC*¹¹⁷, in which vicarious liability was looked at in depth in the context of sexual abuse, the court discussed in obiter that the fact that a wrongful act is a criminal offence may not preclude the possibility of a finding of vicarious liability. The court discussed that it is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion. Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability. The above discussion, while not currently law, is likely to be the basis for a binding decision in the future.

In *CCIG Investments Pty Ltd v Schokman*¹¹⁸ the High Court recently considered the application of vicarious liability in circumstances where an intoxicated employee in shared accommodation urinated on the face of another employee. The Court considered the tortious act needed to be committed in the "course or scope of

¹¹⁵ *Hollis v Vabu* (2001) 207 CLR 21

¹¹⁶ *Blake v JR Perry Nominees Pty Ltd* [2012] VSCA 122

¹¹⁷ *Prince Alfred College Incorporated v ADC* (2016) 258 CLR 134

¹¹⁸ *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21

their employment" and required more than the employment provided the opportunity for the incident. The High Court found the employer was not vicariously liable for the actions of the employee, with the Court concluding "*Nothing in the present case points to the drunken act in question being authorised, being in any way required by, or being incidental to, the employment. In truth it had no real connection to it.*".

Vicarious liability in historic abuse cases in Victoria has been discussed in the recent cases of *DP v Bird*¹¹⁹ and *O'Connor v Comensoli*¹²⁰, both of which are on appeal to the High Court. In both cases, the court found the relevant church entity vicariously liable for the criminal actions of an assistant priest.

Mental harm

Part XI of the WA VIC applies in relation to the recovery of damages for mental harm or psychological/psychiatric injury as a result of negligence.

Section 67 provides the following definitions:

- mental harm - psychological or psychiatric injury;
- pure mental harm - mental harm other than consequential mental harm;
- consequential mental harm - mental harm that is a consequence of an injury of any other kind.

Recovery of damages for pure mental harm arising from shock (i.e. mental harm other than consequential mental harm) is only available in certain circumstances. Under section 73(2), these circumstances include:

- where the plaintiff witnesses, at the scene, a person being killed, injured or put in danger; or
- where the plaintiff is or was in a close relationship with the victim.

Further to this, section 72(1) provides that the defendant does not owe a duty to the plaintiff to take care not to cause the plaintiff pure mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care was not taken.

The circumstances of the case in section 72(2) include:

- whether or not the mental harm was suffered as a result of a sudden shock;
- whether the plaintiff witnessed, at the scene, a person being killed, injured or put in danger;
- the nature of the relationship between the plaintiff and any person killed, injured or put in danger;
- whether or not there was a pre-existing relationship between the plaintiff and the defendant.

Given the various forms of media, the requirement that the plaintiff "witness, at the scene" is somewhat unclear. At the scene would imply that the person is physically present at the time. The question then arises whether a plaintiff would be able to claim if they were, for example, watching live footage of the victim "being killed, injured or put in peril" on the internet. Witnessing the aftermath of an accident is in most circumstances insufficient for a plaintiff to recover for pure mental harm. In 2010, however, the High Court of Australia found in *Wicks v State Rail Authority of New South Wales*¹²¹ that "there are cases where death, or injury, or being put in peril takes place over an extended period, and this was such a case."

Section 74(1) of the WA VIC provides that a plaintiff is not entitled to recover damages for consequential mental harm unless:

- The defendant foresaw or ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken; or
- The defendant know or ought to have known, that the plaintiff was a person of less than normal fortitude and foresaw or ought to have foreseen that the plaintiff might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

¹¹⁹ *DP v Bird* [2021] VSC 850

¹²⁰ *O'Connor v Comensoli* [2022] VSC 313

¹²¹ *Wicks v State Rail Authority of New South Wales* [2010] HCA 22

Section 75 of the WA VIC precludes a court from awarding damages for economic loss for mental harm resulting from negligence unless the harm takes the form of a recognised psychiatric illness.

In the recent decision of *Optus Administration Pty Limited v Glenn Wright*,¹²² which dealt with the very similarly worded section 32 of the CLA NSW, the Court of Appeal overturned a lower court judgment and damages in excess of \$3.9 million in favour of the victim of an attempted murder, finding that the appellant occupier of the premises did not owe a duty of care to protect him from mental harm. The court found that it was only conduct which put the plaintiff's life in peril, that the appellant should have foreseen might cause a person of normal fortitude to suffer a psychiatric illness. Without a finding as to the foreseeability of such conduct, the appellant was under no duty to take reasonable care to prevent such conduct.

In the decision of *Wearne v State of Victoria*,¹²³ the Supreme Court of Victoria found in favour of a youth welfare case manager who suffered a mental breakdown at work, with the court awarding more than \$625,000 in damages, after finding that the State of Victoria owed a duty to take care to ameliorate the risk of psychiatric injury, and breached its duty of care owed. In this case, the State of Victoria was on notice of the vulnerability of the plaintiff to psychiatric illness as a result of bullying and did not act.

¹²² *Optus Administration Pty Limited v Glenn Wright* [2017] NSWCA 21

¹²³ *Wearne v State of Victoria* [2017] VSC 25

Assessment for damages of personal injury

The assessment of damages for personal injury claims in Victoria is governed by the WA VIC, unless the injuries are of a type that are excluded from the operation of Parts VA, VB and/or VBA of the WA VIC, such as workplace or transport accident injuries.

In particular, a plaintiff cannot be awarded general damages in Victoria in a public liability claim if the plaintiff does not satisfy the "significant injury" threshold (section 28LE). Generally, "significant injury" is to be determined in accordance with a strict procedure set by Part VBA of the WA VIC with a claimant's impairment arising out of the injury to be assessed in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment (Fourth Edition). The claimant will be assessed to have a significant injury if he/she meets the threshold level in section 28LB:

- In the case of a physical injury (other than a spinal injury), the claimant is assessed to have a permanent impairment arising out of the injury which is greater than 5%; or
- In the case of psychiatric injury, the claimant is assessed to have a permanent impairment arising out of the injury which is 10% or more; or
- In the case of a spinal injury, 5% or more.

Once the claimant has been assessed, his or her doctor will issue a certificate of assessment advising whether the claimant has met the threshold for a significant injury.

Under section 28LWE of the WA VIC, a defendant who is not satisfied that a plaintiff has met the threshold can refer the plaintiff to be assessed by the Medical Panel, which will assess the plaintiff and will issue its determination as to whether the plaintiff meets the threshold. Under section 28LZH, the court must accept the Medical Panel's determination that an impairment either does or does not meet the threshold.

Once a significant injury is established, then subject to the claimant establishing a liability on the part of another for causing injury, loss and damage to the claimant, the claimant can claim general damages for his or her pain and suffering, and loss of enjoyment of life.

Non-Economic Loss

Non-economic loss or general damages are available to compensate plaintiffs for pain and suffering, loss of amenities of life and loss of enjoyment of life (section 28LB).

Under section 28LE, damages may be awarded for non-economic loss if the plaintiff establishes that he or she suffered a "significant injury". Section 28LE is a preliminary step and requires the plaintiff to establish the existence of a significant injury before trial, unless the injury falls within the exclusionary provisions of section 28LC(2)(d) for claims in respect of compensation under the *Workers Compensation Act 1958 (Vic)* (*Multari v Amaca Pty Ltd*).¹²⁴

In order to establish a serious injury under section 28LF, the plaintiff needs an approved medical practitioner to provide a Certificate of Assessment stating that the plaintiff has:

- In the case of a physical injury (other than a spinal injury), the claimant is assessed to have a permanent impairment arising out of the injury which is greater than 5%; or
- A psychiatric injury resulting in a whole person impairment of 10% or more; or
- In the case of a spinal injury, 5% or more.

Upon service of the Certificate of Assessment on a defendant, the defendant has 60 days to refer the question to a Medical Panel for determination (section 28LW).

Exceptions to this requirement include situations including the loss of a foetus, the loss of a breast or the psychological or physical injury to a child due to an injury to the mother or foetus or child during or immediately after birth.

¹²⁴ *Workers Compensation Act 1958 (Vic)* (*Multari v Amaca Pty Ltd* [2014] VSC 277)

Section 28LZMA gives the court the power to stay any proceeding that has been commenced without a certificate of assessment having been served, until the claimant serves a certificate of assessment on the respondent.

Under section 28G of the WA VIC, the maximum amount of damages that may be awarded for non-economic loss is currently capped at 741,000.

When assessing a claimant's possible non-economic loss, consideration needs to be given to the severity of the claimant's injury to determine the amount of general damages likely to be awarded.

Pursuant to section 28HA of the WA VIC, the court may take into consideration earlier decisions of courts to determine what is an appropriate award in the circumstances.

On 30 October 2011, a jury in the Supreme Court of Victoria handed down an unprecedented award of general damages in the sum of \$730,000 in a mesothelioma claim. As asbestos-related conditions are not subject to the cap on damages found in section 28G of the WA VIC, the plaintiff was entitled to the full amount of the award. On appeal to the Court of Appeal of Victoria, *Amaca* submitted that the award for general damages was excessive and that "no reasonable jury properly instructed with all due attention to the evidence could arrive at it."

In considering the issues on appeal, Nettle, Ashley and Redlich JJA in *Amaca Pty Ltd (under NSW Administered Winding Up) v King*¹²⁵ reviewed other Australian awards of general damages in similar cases, all of which were considerably lower than \$730,000. In a joint judgment, the court stated that: "Admittedly, as far as we know, there has never before in this State been an award of damages as much as \$730,000 for loss of enjoyment of life and pain and suffering in a mesothelioma case. But, proportionately, the amount awarded in this case appears to accord with jury verdicts in previous cases."

Nettle, Ashley and Redlich JJA commented that over the last 10 to 20 years, "awards of damages have increased significantly" across all areas of litigation. Further, it was appreciated that while this particular award was inconsistent with awards for general damages in other states, their Honours were not persuaded that the sum of \$730,000 was unreasonable.

We refer you to the annexure entitled "Recent Decisions in Relation to Particular Injuries in Victoria" for further information, including various case examples outlining a variety of injuries and the non-economic loss damages awarded at page 143.

Out of pocket expenses

Out of pocket expenses are generally medical expenses incurred in order to treat the injuries and disabilities suffered as a result of the negligence of the defendant. These expenses are claimable as damages. Out of pocket expenses may take the form of past out of pocket expenses and future out of pocket expenses.

Past out of pocket expenses can generally be easily quantified by reference to government notices and with receipts from pharmacies and other medical service providers. Future out of pocket expenses are typically the subject of expert opinion and comment involving an assessment of the expenses associated with the plaintiff's claimed injury that are likely to be incurred in the future.

Economic loss - Section 28f

Pursuant to section 28F, damages awarded for economic loss include:

- Past economic loss due to loss of earnings or the deprivation or impairment of earning capacity; or
- Future economic loss due to deprivation or impairment of earning capacity; or
- The loss of expectation of financial support (capped at three times the total average weekly earnings of all employees in Victoria).

¹²⁵ *Amaca Pty Ltd (under NSW Administered Winding Up) v King* [2011] VSCA 447

Importantly, the cap applies to a plaintiff's pre-injury earnings before post-injury earnings are deducted and therefore a plaintiff will not be entitled to damages for economic loss in circumstances where their post-injury earnings exceed the cap (*Tuohey v Freemasons Hospital*¹²⁶).

When calculating damages for future economic loss (and all future heads of damage), a discount rate of 5% is to be applied pursuant to section 28I to account for the fact that a plaintiff is receiving a lump sum of money, which he or she would have received over many years into the future and will be able to invest the money now and make a return on that investment.

While technically separate from economic loss under section 28F, pursuant to the decision of *Fox v Wood*,¹²⁷ a plaintiff is entitled to recover the income tax paid in respect of refundable workers' compensation payments. This only applies, of course, if the plaintiff has made a claim for workers' compensation and has also received weekly payments.

Gratuitous care and services - Sections 28IA and 28ID

In circumstances where a person requires personal or domestic services as a result of the negligently inflicted injury, an amount can be awarded to compensate the plaintiff for the care that was provided. In order for damages to be awarded, it needs to be proven that there is or was a reasonable need for the services to be provided, and that the need arose solely because of the injury to which the damages relate (section 28IA(1)).

A gratuitous care service is one which is provided without pay by an injured person's family or friends, unlike a commercial service.

Under 28IA(2), no damages may be awarded for gratuitous care if the services are provided, or are to be provided for less than six hours per week, and for less than six months.

In *Alcoa Portland Aluminium Pty Ltd v Victorian WorkCover Authority*,¹²⁸ the court determined that the prohibition against damages claims for gratuitous services did not operate unless they were of a kind that fell within both paragraphs of section 28IA. Accordingly, where care was provided for less than six hours, but on an indefinite basis, damages for gratuitous attendant care were payable.

Section 28IE(1) also sets a monetary cap on the gratuitous attendant care services provided relative to the average weekly total earnings of all employees in Victoria.

Section 28ID(1) allows a court to award damages to a plaintiff for any loss of the plaintiff's capacity to provide gratuitous care to the plaintiff's dependents. Under section 28ID(2), the plaintiff had to have provided care to the dependents prior to the injury, the plaintiff's dependents cannot take care of themselves and there is a reasonable expectation that the gratuitous care would have been provided for at least six hours per week and for a period of at least six consecutive months.

¹²⁶ *Tuohey v Freemasons Hospital* [2012] 37 VR 180

¹²⁷ *Fox v Wood* (1981) 148 CLR 438

¹²⁸ *Alcoa Portland Aluminium Pty Ltd v Victorian WorkCover Authority* [2007] 18 VR 146

Child abuse

The *Limitation of Actions Amendment (Child Abuse) Act 2015* lifted limitations in respect of personal injury actions founded on physical or sexual abuse, and psychological abuse arising out of the abuse. The *Wrongs Amendment (Organisational Child Abuse) Act 2017* extended the Wrongs Act to impose a duty of care that forms part of a cause of action in negligence on organisations exercising care, supervision or authority over children to prevent the physical abuse or sexual abuse of those children committed by individuals associated with those organisations.

Duty of care

Part XIII of the Wrongs Act now imposes a prospective duty on organisations that wholly or partly hold responsibility over a child to prevent child abuse from occurring. This provision reverses the onus of proof in negligence by establishing a duty which the organisation must demonstrate it has adhered to by ensuring proper systems were in place and observed.

If child abuse occurs, there is a presumption that the organisation failed in its duty of care unless it can prove that reasonable precautions were taken to prevent the abuse. Factors that a court may take into consideration when determining if an organisation took reasonable care are contained in section 91.

Vicarious liability

The common law position is outlined by the High Court of Australia in *Prince Alfred College Incorporated v ADC*.¹²⁹ An organisation is vicariously liable for child abuse perpetrated by an employee if the employee took advantage of their special role that provided them the occasion to perpetrate the abuse. In determining if the employee's role provided the occasion for the abuse, a court is to take into account the authority, power or control over the child, the trust of the child and the ability to achieve intimacy with the child.

The High Court recently handed down judgment following an appeal from a decision of the Queensland Court of Appeal case of *CCIG Investments Pty Limited v Schokman* [2023] HCA 21¹³⁰. The appeal concerned whether an employer was liable for a tortious act committed by one employee against another in circumstances where the act occurred in shared staff accommodation in which the employees were required to live. The High Court found that the employer was not liable for the actions of their employee as the act in question was not considered to be in the course or scope of their employment. The High Court focused on the identification of what an employee was employed to do, and held out as being employed to do, as being central to any inquiry about the "course of employment".

Vicarious liability in historic abuse cases in Victoria has also been discussed in the recent case of *DP v Bird*¹³¹. Very recently, the High Court of Australia granted the Defendant in *DP v Bird* special leave to appeal the Court of Appeal's judgment.¹³² The appeal is expected to be heard in 2024. In *PCB v Geelong College*¹³³. The court found that vicarious liability did not extend to the "volunteer" abuser.

In *O'Connor v Comensoli*, the Defendant's application for leave to appeal to the Court of Appeal was refused (the grounds of appeal in that case were ultimately limited to quantum).

Proper defendant

The *Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (Legal Identity Act)* enables the appointment of a proper defendant with suitable assets for cases brought against an unincorporated association.

Prior to the enactment of the Legal Identity Act, a prospective plaintiff was not able to sue an institutional defendant that was an unincorporated association, because an unincorporated association is not recognised

¹²⁹ *Prince Alfred College Incorporated v ADC* [2016] HCA 37

¹³⁰ *CCIG Investments Pty Ltd v Schokman* [2022] HCATrans 156

¹³¹ *DP v Bird* [2021] VSC 850

¹³² *O'Connor v Comensoli* [2022] VSC 313

¹³³ *PCB v Geelong College* [2021] VSC 633

by law as a juridical entity. The inability to pursue such a claim in the context of church institutions is more commonly referred to as an 'Ellis Defence'.¹³⁴ This reform applies prospectively and retrospectively, and overcomes the impediment that plaintiffs could not previously bring proceedings against unincorporated associations because they do not exist as a juridical entity.

The Legal Identity Act was analysed in detail in two recent Supreme Court matters: *O'Connor v Comensoli*¹³⁵ and *RWQ v The Catholic Archdiocese of Melbourne & Ors*¹³⁶, which extended the operation of the Act to allow claims involving secondary victims.

Revisit claims and setting aside prior deeds

Recent amendments to the *Limitations of Actions Act 1958* (Vic) (**Limitations Act**) permit plaintiffs, in certain circumstances, to apply for a previous settlement or judgment to be set aside, overturning the finality of settlement - this is commonly referred to as a 'revisit claim'. Should a defendant rely on a prior settlement as a bar to proceedings, plaintiffs are able to apply to the Supreme Court seeking orders setting aside the prior settlement.

In determining whether it is 'just and reasonable' to set aside a settlement agreement, "it is relevant to consider whether the agreement constituted a just and fair resolution of the claim made by the plaintiff".¹³⁷

The relevant legislation

In 2015, amendments to the Limitations Act came into force. The amendments applied in respect of causes of action founded upon the personal injury of a person resulting from physical abuse or sexual abuse, committed when the person was a child. These amendments abolished the relevant limitation period for cases of this nature.

In July 2018, the Legal Identity Act was enacted. The main purpose of the Act was "to provide for child abuse plaintiffs to sue an organisational defendant in respect of unincorporated non-government organisations which use trusts to control their activities". The Act defines an NGO as a non-government organisation that is an unincorporated associated or body.¹³⁸

In September 2019, further amendments to the Limitations Act permitted setting aside prior judgments or settlement deeds. Specifically, section 27QD permits an application to the Supreme Court to set aside a settlement agreement.¹³⁹

Section 27QD of the Limitations Act provides that a Plaintiff may make an application to the Court for the settlement agreement and any judgment or order giving effect to the settlement of the previously settled cause of action, to be set aside. This applied to claims settled **prior to 1 July 2015**.

Whilst the limitation period was removed in 2015, between 2015 and 2018, there remained debate as to whether Plaintiffs in historic abuse claims, prior to the enactment of the Legal Identity Act, faced an impediment to pursuing common law damages. Accordingly, it was said that Plaintiffs who settled matters and signed Deeds of Release between 2015 and 2018, still faced a significant legal barrier in pursuing their claims that impacted on settlement levels during that period of time.

In response, further amendments were then made to the Limitations Act in 2020, such that a "previously settled cause of action" was amended to include a cause of action that was settled before **1 July 2018**, which was the date on which the Legal Identity Act was enacted. These amendments came into effect in 2021.

¹³⁴ *Gary Pearce v Missionaries of the Sacred Heart* [2022] VSC 697 [12]

¹³⁵ *O'Connor v Comensoli* [2022] VSC 313.

¹³⁶ *RWQ v Catholic Archdiocese of Melbourne & Ors* [2022] VSC 483.

¹³⁷ *DZY v Trustees of the Christian Brothers* [2023] VSC 124 [98].

¹³⁸ *Gary Pearce v Missionaries of the Sacred Heart* [2022] VSC 697 [4]

¹³⁹ *Gary Pearce v Missionaries of the Sacred Heart* [2022] VSC 697 [7] [9.]

There are similarities between an application to bring a claim after the expiration of a limitation period and an application to set aside a deed. Both require consideration of what is just and reasonable and import a wide discretion.¹⁴⁰

The case of *WCB v Roman Catholic Trusts Corporation for the Diocese of Sale (No 2)* [2020] VSC 639 was the first Victorian case to be heard following the September 2019 amendments, allowing deeds to be set aside "where it is just and reasonable to do so".

WCB initially brought proceedings in the County Court in 1996. The pleadings raised expiry of the limitation period. The barrier of time limits and the lack of a legal identity of an institution to be sued were identified as the two elements preventing a determination of claims on their merits.¹⁴¹

The decision in *WCB* was appealed. The Victorian Court of Appeal considered the proper statutory construction of the Act and the principles for the exercise of the discretion to set aside a prior deed.¹⁴² The court found that "if a Court is satisfied that it is 'just and reasonable to do so', it may, and ordinarily should, take into account that the order that is sought, would disturb the legal rights and obligations of the parties that are contained in the settlement agreement".

Case Review: *Gary Pearce v Missionaries of the Sacred Heart* [2022] VSC 697

This case concerned a settlement that post-dated the removal of the Victorian limitation period, but pre-dated the enactment of the Legal Identity Act. At the time of the settlement, the Plaintiff alleged that he faced a potential 'Ellis Defence' from the relevant church authority.

The Plaintiff alleged that he was sexually assaulted by two religious brothers at a Catholic School run by the Missionaries of the Sacred Heart (**MSCs**), whilst the Plaintiff was a student between 1977 and 1978.

In 2016, the Plaintiff engaged solicitors to seek compensation from the MSCs in respect of the abuse (**prior claim**). A settlement was reached in 2017. The Plaintiff received \$140,000.00, without formal court proceedings being issued, and a Deed was signed. The Deed of Release specifically made no allowance for Economic Loss.

At the time of making the prior claim, amendments to the Limitations Act made in 2015 removed any limitation period in respect of claims for personal injury as a result of physical or sexual abuse that occurred when a person was a minor. When the Plaintiff engaged his solicitors to resolve the prior claim, he faced no potential difficulty caused by an expired limitation period.¹⁴³

In 2021, the Plaintiff commenced a fresh claim for damages against the MSCs, issuing in the Supreme Court of Victoria. He sought to have the prior settlement from 2017 set aside.

The Legal Identity Act was also relevant in this case, as the Plaintiff had sued the MSCs (a non-government organisation, that is an unincorporated associated or body). The MSCs subsequently nominated the Corporation of the Society of the Missionaries of the Sacred Heart as the proper Defendant. It was this alleged impediment to bringing his claim, which was subsequently removed by the Legal Identity Act, that the Plaintiff relied on in his application to set aside the prior deed.¹⁴⁴

In his application to set aside the 2017 settlement, the Plaintiff submitted that it was just and reasonable that his prior deed be set aside because:

- (a) the Plaintiff himself believed he had no recourse to the Court because of the Ellis defence, and that he settled his claim for less than it was worth;
- (b) the Plaintiff's lawyers had advised him that the Ellis defence meant he could not take successful legal action;

¹⁴⁰ *Gary Pearce v Missionaries of the Sacred Heart* [2022] VSC 697 [95]

¹⁴¹ *Gary Pearce v Missionaries of the Sacred Heart* [2022] VSC 697 [83]

¹⁴² *Gary Pearce v Missionaries of the Sacred Heart* [2022] VSC 697 [79]

¹⁴³ *Gary Pearce v Missionaries of the Sacred Heart* [2022] VSC 697 [2]

¹⁴⁴ *Gary Pearce v Missionaries of the Sacred Heart* [2022] VSC 697 [15]

- (c) the MSCs lawyers believed that the Ellis defence was available, as they were seeking instructions on CCI's position;
- (d) the Plaintiff had sought to take legal action for pain and suffering and economic loss, but instead was required to participate in an ADR process and accept a settlement that did not reflect the true value of his legal claim;
- (e) a court in determining compensation can take account of compensation previously paid, if it was determined that the Plaintiff was entitled to further compensation;
- (f) setting aside the deed would be consistent with the purpose of the Act to remove legal barriers facing abuse survivors allowing their claim to be determined on its merit, where the Plaintiff's claim has never been decided on its merit;
- (g) the Plaintiff has excellent prospects of success and a reasonable prospect that successful damages would exceed the quantum of the settlement sum;
- (h) section 27QE of the Limitations Act is remedial and should be construed so as to give the fullest relief that a fair reading of its language will allow; and
- (i) the Plaintiff's legal argument that the institution is vicariously liable for the actions of individual members of the order is strengthened by recent decisions of this Court.

Court's reasoning

The Court considered that unlike *WCB*, the Plaintiff in this claim faced only one impediment to the "just and fair" resolution of his prior claim - the availability to the Defendant MSCs of an Ellis Defence as a complete bar to any claim he might commence before a court.¹⁴⁵

In setting aside part of the prior settlement agreement, the Court found that although the Ellis Defence was not raised as something to be pleaded or relied upon, it was accepted (based on the Plaintiff's evidence) that the Ellis Defence influenced the Plaintiff's decision to accept the final offer of settlement.¹⁴⁶

The Court did not accept the submission that the Plaintiff had available to him in 2017 a corporate entity that could be sued and held liable for the abuse.

The Court found that despite the fact that the Ellis Defence was not raised by any of the lawyers as something that would be pleaded or relied on, the Court was not persuaded that it was therefore irrelevant to the way in which the claim was negotiated.¹⁴⁷

Court's decision

Justice Forbes, in her ruling, held the following:

- The Court did not accept that the plaintiff had available to him in 2017 a corporate entity that could be sued and held liable for the abuse.
- The Court found it was just and reasonable to make an order pursuant to section 27QE, setting aside the **settlement agreement in part**, such that the plaintiff be permitted to bring his claim for damages as framed at the time of the prior claim; that is for general damages and special damages by way of past and future medical expenses. Insofar as the deed extinguished the plaintiff's claim for economic loss, the Court was not persuaded that it was just and reasonable to set aside the agreement entered into by both parties.¹⁴⁸

Case Review: *DZY v Trustees of the Christian Brothers* [2023] VSC 124

In this case, the Plaintiff entered into a settlement agreement by way of Deed of Release in 2012. He entered into a subsequent settlement by way of Deed of Release in 2015 (**prior Deeds**). Similar to *Pearce*, the prior Deeds did not make a claim for Economic Loss.

¹⁴⁵ *Gary Pearce v Missionaries of the Sacred Heart* [2022] VSC 697 [87]

¹⁴⁶ *Gary Pearce v Missionaries of the Sacred Heart* [2022] VSC 697 [93]

¹⁴⁷ *Gary Pearce v Missionaries of the Sacred Heart* [2022] VSC 697 [90 - 93]

¹⁴⁸ *Gary Pearce v Missionaries of the Sacred Heart* [2022] VSC 697 [111].

In 2023, the Plaintiff filed an application under section 27QD and section 27QE of the Limitations Act, to set aside the Deeds to the extent they were a bar to his current proceeding.¹⁴⁹

The judgment is about whether the Court should set aside the whole or only part of the Deeds. The Defendant submitted that the Court should set aside only part of the Deeds, which would allow the Plaintiff to continue his proceeding but bar him from claiming for Economic Loss. The Plaintiff argued that the Court should set aside the whole of the Deeds so that he can continue to pursue the entirety of his current proceedings, including his claim for Economic Loss.¹⁵⁰

The Defendant did not oppose the Deeds being set aside to the extent necessary to allow the Plaintiff's claim for general damages and/or medical expenses to proceed. The Defendant acknowledged the availability of a limitations defence and/or the Ellis Defence at the time of the Deeds may have affected the level of quantum reflected in the Deeds in relation to general damages.¹⁵¹ The Defendant submitted that there was nothing in the evidence before the Court to suggest that the Plaintiff's decision to forego an economic loss claim was affected by any previous legal barrier such as the availability of the limitation defence and/or the Ellis defence, but rather, arose from unrelated factors.¹⁵²

The Court found that it was just and reasonable to set aside the whole of the Deeds.

In setting aside both prior settlements the Court held that;

The Plaintiff's instructions not to pursue his economic loss claim should be viewed against all of the circumstances. In my view, it is not possible to find that the limitations and the Ellis defence issues had no material influence on the Plaintiff's decision not to pursue his economic loss claim.

In setting aside both prior settlements, the Court distinguished *DZY* from *Pearce*. Unlike in *Pearce*, *DZY* faced issues with both the limitations period, and the Ellis Defence.¹⁵³

In *Lonergan v Trustees of the Sisters of St Joseph* [2021] VSC 651, the Defendant did not press its prior settlement with the Plaintiff as a bar to his fresh claim. However, the Defendant argued that the \$28,000.00 received by the Plaintiff should be deducted from any compensation. The Court disagreed. In this case, the Plaintiff had maintained the confidentiality of the first settlement, but the then Bishop (mistakenly) breached that agreement when he communicated the details of the settlement to the Plaintiff's cousins.

Secondary victim claims

A secondary victim is a victim who suffers psychiatric injury by witnessing or becoming aware of a traumatic event.

Case Review: *RWQ v Catholic Archdiocese of Melbourne & Ors* [2022] VSC 483

The Plaintiff, RWQ (a pseudonym), claimed damages against the Diocese for nervous shock he alleged was founded on or arose from the sexual abuse of his late son, allegedly perpetrated by Cardinal George Pell. RWQ alleged he sustained the nervous shock injury after being informed of the alleged abuse, and by reason of his son's death which (allegedly) flowed from the impacts of the abuse. The Defendant denied that the claim made by the Plaintiff was a claim to which the Legal Identity Act applied, as it was not a claim "founded on or arising out of child abuse" due to the fact that RWQ was not a primary victim of the alleged abuse.

The Primary Judge found that interpreting the Act to restrict its application to claims brought by secondary victims would offend the overarching purpose of the Act, which was to limit the perceived unfairness associated with the legal defence that an unincorporated association that conducts its affairs by way of trusts cannot be held organisationally liable (otherwise referred to as the Ellis Defence).

¹⁴⁹ *DZY v Trustees of the Christian Brothers* [2023] VSC 124 [3]

¹⁵⁰ *DZY v Trustees of the Christian Brothers* [2023] VSC 124 [4]

¹⁵¹ *DZY v Trustees of the Christian Brothers* [2023] VSC 124 [89]

¹⁵² *DZY v Trustees of the Christian Brothers* [2023] VSC 124 [91]

¹⁵³ *DZY v Trustees of the Christian Brothers* [2023] VSC [118(a)]

The Defendant sought leave to appeal the Supreme Court's decision and on 25 August 2023, the Court of Appeal handed down its judgment.

In *The Catholic Archdiocese of Melbourne v RWQ (a pseudonym) & George Pell* [2023] VSCA 197, the Victorian Supreme Court of Appeal considered the application of the Legal Identity Act to the first defendant, and whether the Plaintiff, RWQ, who was a 'secondary victim' of abuse, was able to appoint the Diocese as a proper defendant under the Legal Identity Act.

The Victorian Supreme Court of Appeal ultimately found that a claim made by a 'secondary victim' of abuse is a claim 'founded on or arising out of child abuse' for the purposes of the Act, and on that basis, the Plaintiff's claim fell within the operation of the Act. The Court of Appeal's decision is limited to the application of the provisions of the Act extending to a plaintiff's ability to bring proceedings against an unincorporated association where the cause of action is by a 'secondary victim' making a claim arising out of alleged child abuse. The outcome of this decision in theory means that an allegation of child abuse is enough to extend the Act to apply to 'secondary victims' wanting to sue an unincorporated association.

There is a clear direction in Victoria that an NGO will not be able to raise the defence that it is an unincorporated association when faced with a prospective claim of a 'secondary victim' of alleged child abuse. This decision broadens the scope of section 4 and section 7 of the Legal Identity Act to an undefined class of secondary victims against unincorporated associations. Namely, potential plaintiffs can bring proceedings where there is sufficient proximity to an alleged instance of child abuse for the purpose of the Act, and an injury arises from the child abuse, but manifests in a secondary victim.

It is understood that the Appellant, the Archdiocese of Melbourne, is seeking Special Leave to Appeal the Court of Appeal's decision to the High Court.

Permanent stays

The granting of a permanent stay of proceedings remains an exceptional remedy, that turns on the unique circumstances of a case. The death of an alleged perpetrator and the unavailability of any other witnesses are key considerations in a defendant's inability to obtain a fair trial. Tendency evidence may not be able to overcome the prejudice a defendant faces in the absence of direct evidence of the allegations.

In *Grant v Bird* [2021] VSC 380, the Plaintiff sued the Bishop of Ballarat for alleged abuse by a Catholic Priest when the Plaintiff was an altar boy in or around 1980 - 1981. The priest died in 1985. The Plaintiff made a 'Towards Healing' claim in 2003. The Bishop at the time gave a written apology. Proceedings were then commenced in 2019, and the Defendant made an application for a permanent stay. Keogh J found a fair trial was no longer possible and that the Defendant was not bound by the previous written apology, not to be interpreted as an admission. A **permanent stay was granted**.¹⁵⁴

In *Phillips v Stanzer* [2022] VSC 355, the Victorian Supreme Court **granted a permanent stay** in respect of allegations of sexual abuse brought by two sisters against their deceased uncle's estate¹⁵⁵. In the two years prior to the uncle's death, police had commenced an investigation into the alleged abuse and were on the cusp of bringing formal charges. Although the sisters had a strong case against their uncle, the Court held that this was not determinative as to whether the case would be manifestly unfair.

Notably, 12 months prior to the uncle's death, police had recorded a phone call between him and the sisters, in which the allegations were put to him. However, given the uncle's ill health and declining mental state at the time of the phone call, the Court held that his response to the allegations was to be approached with caution.

In *YZ v Beit Habonim Pty Ltd* [2023] VSC 22, an appeal was brought following the refusal to stay the Plaintiff's civil damages proceedings, on either a permanent or temporary basis. The Defendant made an application to permanently stay the proceeding for two reasons. One, the Plaintiff's allegations involved significant inconsistencies which could not be investigated due to the passage of almost 50 years, and second, sought proceedings to be stayed until there was no longer a real risk that he would face criminal

¹⁵⁴ Personal Injury Law Manual NSW

¹⁵⁵ Personal Injury Law Manual NSW

prosecution in respect of the allegations. The Court did not grant a permanent, or temporary stay of proceedings in this matter.¹⁵⁶

The Court of Appeal in *YZ v Beit Habonim Pty Ltd* [2023] VSC 22 outlined the principles relevant to permanent stay applications:¹⁵⁷

1. The Court has a power to grant a permanent stay of proceedings if the administration of justice demands it.
2. The interests of justice will demand a permanent stay if the continuation of the proceedings will amount to an abuse of process.
3. In seeking a stay of the proceeding, the defendant bears a heavy onus.
4. A stay is ordinarily only granted in exceptional circumstances.
5. The power to grant a stay is discretionary. If proceedings are an abuse of process however, there is no discretion to refuse a stay.
6. The circumstances which constitute an abuse of process are not closed and cannot be exhaustively defined. Notwithstanding that the categories remain open, abuses of process usually fall into one of three categories:
 - a) the Court's procedures are invoked for an illegitimate purpose;
 - b) the use of the Court's procedures is unjustifiably oppressive to one of the parties; or
 - c) the use of the Court's procedures would bring the administration of justice into dispute.
7. The fundamental test is whether, in the circumstances, the proceeding would be manifestly unfair to the defendant or would otherwise bring the administration of justice into disrepute amongst right-thinking people.
8. The effects of the lapse of time may be such that a fair trial is no longer possible, and thus the continuance of the action may constitute an abuse of process.
9. If there is substantial lapse of time between the relevant alleged events and the time of trial, this can have effects on both the memory of witnesses and the quality of justice. Further, it can make it difficult to investigate and defend the plaintiff's allegations of sexual assault. This extends to making investigations into issues of causation and quantum more difficult.
10. Reasonable minds may differ as to whether it is 'unjustifiably burdensome' to allow a proceeding involving a substantial lapse of time to continue. The fact that on appeal a Court might take a different view from that of the lower court, is not a basis for overturning the primary judge's decision.

¹⁵⁶ Personal Injury Law Manual NSW

¹⁵⁷ *YZ v Beit Habonim Pty Ltd* [2023] VSC 22 [50]

Recent jury verdicts in Victoria

There have been two Jury Verdicts handed down in Victoria recently that have seen significant awards of damages made to Plaintiffs in the institutional liability space. We understand these decisions are to be appealed.

Case: *Adam Kneale v Footscray Football Club Ltd 2023 VSC 679*

In this proceeding, the Plaintiff claimed damages against the Footscray Football Club for injuries, loss and damage he suffered as a result of being sexually abused by Graeme Hobbs, who was a volunteer with the Club. Hobbs groomed the Plaintiff between 1984 and 1989, sexually abused him and trafficked him for abuse by others. The trial proceeded before a Judge and Jury in mid-October 2023.

We have summarised below the key concepts considered in this case.

The Jury found that there was negligence on the part of the Club, that was the cause of the Plaintiff's injuries. The Jury assessed damages in this proceeding as:

- \$3,250,000.00 for pain and suffering and loss of enjoyment of life;
- \$2,605,578.00 for past loss of earnings and loss of earning capacity; and
- \$87,573.00 for future medical and related expenses.

The Judge heard arguments on the Club's application for summary judgment in relation to the claim based on vicarious liability, and the claims for aggravated and exemplary damages. The Judge otherwise directed the Jury that damages for past loss of earnings should be calculated on the basis that past losses are indexed to their current value; and that damages for loss of future earning capacity should be discounted at the rate of 3%.

Aggravated damages

Aggravated Damages may be awarded to compensate a Plaintiff for increased suffering caused by the circumstances and manner of the wrongdoing. They may be awarded where the Defendant has acted with malice, or in an insulting or high-handed way, either in committing a tort or afterwards. Aggravated damages are compensatory, not punitive.¹⁵⁸

The Plaintiff made a claim for aggravated damages in this case. Having considered the evidence at Trial, the Judge found that there was no evidence on which the Jury could reasonably have awarded aggravated damages in this case. Justice Richards J opined that "*while I accepted that [the Plaintiff's] suffering was increased by the lack of any acknowledgement from the Club, it was impossible to characterise the Club's indifference as malicious, deliberate, insulting or high-handed*".¹⁵⁹

Exemplary damages

Exemplary damages may be awarded to denounce a Defendant's conduct and to deter its repetition, where a tort is committed in circumstances involving a deliberate, intentional, or reckless disregard of the Plaintiff's rights. Mere carelessness is not a sufficient reason to award exemplary damages. Exemplary damages are punitive, not compensatory.¹⁶⁰

The Plaintiff made a claim for exemplary damages in this case. Having considered the evidence at Trial, the Judge did not consider that there was any evidence on which the Jury could reasonably have awarded exemplary damages. Justice Richards J "*accepted that it was open to the Jury to find that the Club had been negligent, and that its negligence had caused profound injury to [the Plaintiff]. However, there was nothing to support a finding that the Club's negligence had been deliberate, or intentional, or involved in reckless disregard of [the Plaintiff's] welfare*".

¹⁵⁸ *Kneale v Footscray Football Club Ltd* [2023] VSC 679 [39]

¹⁵⁹ *Kneale v Footscray Football Club Ltd* [2023] VSC 679 [48]

¹⁶⁰ *Kneale v Footscray Football Club Ltd* [2023] VSC 679 [49]

Indexation on past losses

The purpose of an award of damages is to compensate the Plaintiff for the wrong they have suffered. Where the wrong is a tort, damages are to be assessed so as to put the Plaintiff in the position they would have occupied had the tort not been committed.¹⁶¹

In relation to the indexation on past losses, Justice Richards J found that "*indexation of past loss of earnings to allow for inflation gives effect to the 'cardinal concept' of compensation. In some other jurisdictions, this is achieved by legislation that allows the award of interest on damages between the date the loss was suffered and the date the damages are assessed. The fact that Victorian Legislation does not provide for this form of statutory interest does not modify or exclude the application of settled common law principles to the assessment of damages on past economic loss*".¹⁶²

In this case, the Plaintiff's economic loss extended back more than 30 years, and included a period when he was unable to work at all. Justice Richards J found that "*indexation of those losses to counter the effects of inflation achieved the purpose of compensation, while ignoring those effects would not have put [the Plaintiff] in the position he would have been in had his earning capacity not been impaired by the Club's negligence and the abuse*".¹⁶³

Justice Richards J ruled that **past loss of earnings should be indexed for inflation, so that damages assessed in today's money would reflect the value of past losses, and instructed the jury on that basis**.¹⁶⁴

Discount for future losses

A discount rate of 5% must be applied to an award of damages for future economic loss to which Part VB of the *Wrongs Act 1958 (Vic)* applies. If Part VB of the *Wrongs Act* does not apply, the appropriate discount rate is 3%.

When does Part VB of the Wrongs Act Apply?

Part VB of the *Wrongs Act* applies to an award of personal injury damages, except an award that is excluded by section 28C(2)(a), which provides that awards of damages are excluded from the operation of the relevant section, when an award where fault concerned is an intentional act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct.

In considering whether this section of the Act applied to this case, Justice Richards J considered the *PCB v Geelong College* decision, where Justice O'Meara J held that the exclusion of section 28C(2)(a) applied where the Defendant had been found liable in negligence for injuries caused by sexual abuse of the Plaintiff by a volunteer. In this case, Justice Richards J considered that O'Meara J's reasoning was consistent in relation to section 28(C)(2)(a) of the *Wrongs Act*.

On that basis, **the Judge instructed the jury that damages for loss of future earning capacity should be discounted at the rate of 3%**.

Vicarious liability

Vicarious liability was also in issue at Trial. If vicarious liability could arise on the relationship between the alleged offender (a volunteer) and the Club, there would be a separate question as to whether the Club was vicariously liable for the alleged offender's sexual abuse of the Plaintiff. In order to find that it was, the Jury would have to have been satisfied that the Club provided the opportunity and the occasion for the alleged offender's wrongdoing, because of some special role that the Club assigned the alleged offender, vis-à-vis the Plaintiff.¹⁶⁵ In considering the evidence, Justice Richards J found that there were three reasons why there was insufficient evidence on which the Jury could reasonably find the Club vicariously liable for the alleged offender's wrongdoing. The three reasons are summarised below:

¹⁶¹ *Kneale v Footscray Football Club Ltd* [2023] VSC 679 [58]

¹⁶² *Kneale v Footscray Football Club Ltd* [2023] VSC 679 [59]

¹⁶³ *Kneale v Footscray Football Club Ltd* [2023] VSC 679 [60]

¹⁶⁴ *Kneale v Footscray Football Club Ltd* [2023] VSC 679 [61]

¹⁶⁵ *Kneale v Footscray Football Club Ltd* [2023] VSC 679 [19]

- The Judge did not consider that the relationship between the sporting club and a volunteer was one to which vicarious liability could attach.¹⁶⁶
- The relationship between the Club and the alleged offender did not remotely resemble that between the Diocese and the assistant priest in *DP v Bird* (discussed above).¹⁶⁷
- There was simply no evidence that the Club assigned a role to the alleged offender vis-à-vis the Plaintiff, let alone a special role involving authority, power, trust, control or the ability to achieve intimacy with the victim.¹⁶⁸

Case: *TJ (a pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] 70

In this proceeding, the Plaintiff claimed damages against the Diocese of Wagga Wagga as a consequence of the negligence and vicarious liability of the Defendant in respect of grooming and sexual abuse by Fr Kiss, between 1972 and 1976. The Plaintiff's statement of claim included particulars of the claimed grooming and sexual abuse during the period, most of which was alleged to have occurred in New South Wales. The Statement of Claim referred to provisions of the *Civil Liability Act 2002* (NSW).

The trial proceeded before a Judge and Jury, in November 2023.

The Defendant admitted vicarious liability in this case. It was therefore common ground between the parties that the trial should proceed before a Jury in a manner reflecting the course adopted in the case of *SR v Trustees of the De la Salle Brothers* [2023] NSWSC 66,¹⁶⁹ specifically, that an assessment of damages 'at common law' be unaffected by the provisions of the *Civil Liability Act*. The Defendant otherwise denied that the Plaintiff was entitled to exemplary damages.¹⁷⁰

The Jury assessed damages in this proceeding as follows:

- \$1.1 million dollars for pain and suffering and loss of enjoyment of life;
- \$896,000.00 for past economic loss;
- \$69,000.00 for future economic loss; and
- \$1.3 million dollars for exemplary damages (after the Jury found that the Plaintiff was entitled to an award of exemplary damages).

Exemplary damages

The Judge subsequently heard the parties' submissions directed to the issue of exemplary damages. The Defendant addressed three grounds by which it was submitted that a finding of exemplary damages had not been 'open' to the Jury to make a finding on:

- (1) The *Civil Liability Act* was said to preclude an award of exemplary damages, specifically at section 21 of the *Civil Liability Act*;
 - (a) Section 21 of the *Civil Liability Act* provides that: in an action for the award of personal injury damages where the act or omission that caused the injury or death was negligence, a court cannot award exemplary or punitive damages in the nature of aggravated damages.
 - (b) The Defendant submitted that the proceeding 'falls within the Jurisdiction of New South Wales and therefore the *Civil Liability Act*' and that section 21 of the *Civil Liability Act* precludes any award of exemplary damages where the act or omissions was negligence.
 - (c) The Defendant also relied on the decision in *SR*: "the approach of the Court was that when considering a claim for exemplary damages in respect of the direct negligence of a Defendant, the Act applies such that a claim is precluded under section 21. Conversely, where there is a finding of vicarious liability, while exemplary damages are permitted under common law, such damages must only be considered by reference to the vicarious liability of the Defendant, as distinct from any other grounds such as direct negligence"; and

¹⁶⁶ *Kneale v Footscray Football Club Ltd* [2023] VSC 679 [35]

¹⁶⁷ *Kneale v Footscray Football Club Ltd* [2023] VSC 679 [36]

¹⁶⁸ *Kneale v Footscray Football Club Ltd* [2023] VSC 679 [38]

¹⁶⁹ *SR v Trustees of the De La Salle Brothers* [2023] NSWSC 66

¹⁷⁰ *TJ (a Pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704 [16].

- (d) In this case, the Plaintiff does not rely upon a finding of vicarious liability against the Defendant for the actions of Fr Kiss, in relation to his claim for exemplary damages.

The Defendant's first ground was rejected.

- (2) On the evidence, exemplary damages were not open to be awarded in respect of the relevant claim at paragraph 15(a) of the Plaintiff's further Amended Statement of Claim, as it amounted to a claim for exemplary damages as a consequence of the negligence of the Defendant, and so is precluded by section 21 of the Civil Liability Act.

The Defendant's second ground was rejected.

- (3) On the evidence, exemplary damages were not open to be awarded in respect of the relevant claim at paragraph 15(b) of the Plaintiff's further Amended Statement of Claim, as it amounted to a claim for exemplary damages as a consequence of the negligence of the Defendant, and so is precluded by section 21 of the Civil Liability Act

The Defendant's third ground was rejected.

The Plaintiff's submissions in relation to exemplary damages are otherwise summarised below:

"the Defendant seems to argue that the complicated provisions of the Civil Liability Act...so operate as to allow exemplary damages only in cases where vicarious liability is established (with which we agree) but further, can only be awarded on the basis of conduct for which the Defendant is vicariously liable - with which we disagree. We submit that once vicarious liability is found, and thus s.21 of the Civil Liability Act is excluded from the application, exemplary damages are awarded in accordance with common law principles".¹⁷¹

Judge's finding on exemplary damages

We summarise the Judge's findings on exemplary damages below:

It was ultimately common ground that the trial could proceed before a Jury, unaffected by the relevant provisions of the *Civil Liability Act*, including section 21. In adopting that common position, both parties acquired a benefit that very likely would not have been available to them without the forensic choice mutually made, that being a Jury trial.¹⁷²

It is not now open to the Defendant to abandon the common position pursuant to which the case was presented for determination by the jury. That common ground **disclaimed any reliance** upon the relevant provisions of the Civil Liability Act, including section 21.¹⁷³

Exemplary damages may embrace conduct occurring before or after the tort complained of, so long as the conduct concerned is sufficiently connected with it.¹⁷⁴ In this case, the manner in which the 'conduct' relied upon in connection with the claim for exemplary damages came later to be presented to the Jury. Justice O'Meara found that the failure of the Defendant to act upon the complaint made was essentially said to be connected with Fr Kiss being later able to groom and sexually abuse the Plaintiff (which the Defendant accepted that it was vicariously liable). In addition, the failure of the Defendant to clearly and promptly admit the abuse was essentially part of the Defendant's conduct of the proceeding concerning the tortious abuse.¹⁷⁵

Justice O'Meara J ultimately found that the Defendant's submissions that the 'conduct' was only relevant to the claim in negligence, and not to the tortious conduct for which the Defendant accepted vicarious liability, was rejected.¹⁷⁶

¹⁷¹ *TJ (a Pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704 [61].

¹⁷² *TJ (a Pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704 [65].

¹⁷³ *TJ (a Pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704 [66].

¹⁷⁴ *TJ (a Pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704 [78].

¹⁷⁵ *TJ (a Pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704 [82].

¹⁷⁶ *TJ (a Pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704 [83].

Interest

The Plaintiff submitted that interest was a substantive issue and should be calculated by reference to section 100(1) of the *Civil Procedure Act* 2005. The Plaintiff also relied on the decision of *Pfeiffer*, and in particular, the statement of Gleeson CJ, Gaudron, McHugh, Gummow, and Hayne JJ that "*all questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the lex loci delicti*".

Section 100(1) of the *Civil Procedure Act* 2005

- (1) In proceedings for the recovery of money (including any debt or damages or the value of any goods), the court may include interest in the amount for which judgment is given, the interest to be calculated at such rate as the court thinks fit:
 - (a) on the whole or any part of the money; and
 - (b) for the whole or any part of the period from the time the cause of action arose until the time the judgment takes effect.

Justice O'Meara J provided that interest is a kind of damages and therefore substantive. In that regard, there are plainly differences between section 100(1) of the *Civil Procedure Act* and section 60 of the *Supreme Court Act*. The Judge also provided that interest is a remedy contemplated in both statutes and is, therefore, not beyond contemplating in the *Supreme Court of Victoria*.¹⁷⁷

The Defendant submitted that the law of New South Wales does not apply in calculating interest on damages. In considering the relevant sections of the legislation, Justice O'Meara J did not accept the Defendant's submissions, and found that the Court was required to apply the substantive law of New South Wales.¹⁷⁸

Justice O'Meara J found that damages in the nature of interest should relevantly be assessed by reference to section 100 of the *Civil Procedure Act*.

Calculation of interest on damages

The Plaintiff attributed \$800,000.00 of the verdict of \$1,100,00.00 to the past and applies half of the conventional rate of 4% across a past period of 47 years, to reach the figure of \$752,000.00.¹⁷⁹

Justice O'Meara J ultimately found that it was appropriate to assess interest on past pain and suffering damages in the 'ordinary' way, but also adjusted to take account of the fact that, as the Plaintiff submitted, 'the loss was not evenly spread'.¹⁸⁰ Justice O'Meara J attributed 70% of the verdict to the past, which came to \$770,000.00.

Justice O'Meara J considered that it was more appropriate to discount the figure of \$770,000.00 by 40%, in order to take into account the variation in the suffering of the Plaintiff over time, as well as the Plaintiff's evidence in respect of periods of time in which he did not seem to have suffered. Justice O'Meara J assessed the figure for damages in the nature of interest on past pain and suffering damages, at \$462,000.00.¹⁸¹

Justice O'Meara J accepted the Plaintiff's submissions in relation to interest on past economic loss, and assessed damages in the nature of interest on past economic loss at \$390,353.00.

Whilst these jury verdicts are likely to be appealed, these awards will have an impact on how cases in Victoria are assessed in 2024.

¹⁷⁷ *TJ (a Pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704 [132].

¹⁷⁸ *TJ (a Pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704 [138].

¹⁷⁹ *TJ (a Pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704 [142].

¹⁸⁰ *TJ (a Pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704 [145].

¹⁸¹ *TJ (a Pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704 [148].

Institutional liability list

Over 500 new proceedings have been commenced in the Supreme Court in 2023, and the Institutional Liability List is expected to overtake the Personal Injuries List as the largest list in the Courts. The significant amount of cases has resulted in the County Court establishing an Institutional Liability List of its own, which was introduced at the end of 2023.

Dust diseases

Limitation periods

The *Limitations of Actions Act 1958 (LAA)* imposes time limits specifying the time in which an action for damages in relation to death or personal injury may be commenced.

However, pursuant to section 27B (2)(d) of the LAA, there is no limitation period applicable for actions for damages in respect of an injury that is a dust-related condition within the meaning of the *Administration and Probate Act 1958*.

Procedure - how a claim is instituted in each state

Proceedings for damages in respect of an injury that is a dust-related condition in Victoria are commenced in the Dust Diseases List of the Supreme Court of Victoria.

Unlike other personal injury claims, section 29(2A) of the *Administration and Probate Act 1958* allows an estate of a deceased person who died from a dust-related condition, to recover damages for:

- pain or suffering;
- bodily or mental harm suffered; and
- loss of expectation of life;

Provided proceedings had been commenced by the deceased and were pending at the time of his or her death.

Assessment of damages

Part VBA of the WA VIC outlines the thresholds that apply in relation to the recovery of damages for non-economic loss. Pursuant, to section 28LC(2)(e) of the WA VIC, the part does not apply to claims in respect of an injury that is an asbestos-related condition. The exclusion of claims for asbestos-related conditions means that there is no requirement for a person with an asbestos-related condition to obtain a certificate of assessment of a significant injury.

Further, asbestos-related conditions are not subject to the cap on damages awarded for non-economic loss, as specified in section 28G of the WA VIC.

Similarly, the limitations specified in sections 28ID and 28IE in relation to damages for gratuitous care services, do not apply to damages for dust-related conditions.

"Asbestos-related condition" is defined in section 3 of the *Asbestos Diseases Compensation Act 2008* as:

- asbestosis
- asbestos induced carcinoma
- asbestos-related pleural diseases
- mesothelioma.

Section 4 of the *Asbestos Diseases Compensation Act 2008*, permits damages for an asbestos-related condition to be awarded on a provisional basis, if it is proved that the injured person may at some future time develop another asbestos-related condition as a result of the act or omission giving rise to the cause of action. This allows the injured person to receive a subsequent award of damages at a future date if that person does develop another asbestos-related condition.

What is considered a dust related condition?

Section 3 of the *Administration and Probate Act 1958* defines a "dust-related" condition as:

- A disease specified in the First Schedule; or
- any other pathological condition of the lungs, pleura, peritoneum or sinus that is attributable to dust.
- The First Schedule of the *Administration and Probate Act* specifies the following dust-related conditions:
 - Aluminosis
 - Asbestosis
 - Asbestos induced carcinoma
 - Asbestos related pleural diseases
 - Bagossosis
 - Berylliosis
 - Byssinosis
 - Coal dust pneumoconiosis
 - Farmers' lung
 - Hard metal pneumoconiosis
 - Mesothelioma
 - Silicosis
 - Silico-tuberculosis
 - Talcosis

Significant cases regarding awards of damages

Mesothelioma

Amaca Pty Ltd (under NSW Administered Winding Up) v King [2011] VSCA 447

Plaintiff (age unknown) contracted mesothelioma after exposure to asbestos dust as a result of exposure to Amaca's products.

Injuries: Mesothelioma due to asbestos exposure.

General damages awarded: \$730,000 (jury)

Nettle, Ashley and Redlich JJA (22 December 2011)

Reid v Seltsam Pty Ltd [2021] VSC 653

Plaintiff (female, 69 years old) resided in close proximity to the Wunderlich asbestos factory for approximately 20 years between 1953 to 1971. She claimed the environmental exposure had caused her to develop an asbestos-related illness.

Injuries: Mesothelioma.

Compensation awarded:

Non-economic loss: \$580,000 (pain and suffering)

Loss of expectation of life: \$20,000

Section 28ID damages for the care of grandchildren: (past) \$24,093

Section 28Id damages for the care of grandchildren: (future) \$223,028

Past gratuitous care: \$66,836

Future gratuitous care: \$100,628

Forbes J (7 October 2021)

The type of industries that are affected

Many dust disease claims have a long latency period and may not arise until 40 or more years after the exposure. They can arise from the following circumstances:

- asbestos mining
- boiler workers
- building/construction - including home renovation
- carpenters
- cement plant workers
- electricians
- environmental exposure from living or working in the vicinity of a factory or mine
- excavators
- factory worker
- fire-fighters
- fitter and turner
- floor coverers
- in-direct or bystander exposure from a home renovation and washing of work clothes
- industrial workers - machine operators, machinists, welders, metal workers

- insulation installer/lagger
- mechanics
- naval workers
- painters
- plumbers
- power-plant workers
- railroad workers
- ship-yard workers
- stonemasons

Appendix

Recent decisions in relation to particular injuries in Victoria

Ankle

Walker v Smith [2022] VSC 188

Plaintiff (male, 36 years old) was struck by a vehicle while walking along the side of a road. The plaintiff's actions of walking on the road while intoxicated amounted to 70% contributory negligence.

Injuries: Left ankle fracture and a right shoulder and arm injury.

General damages awarded: \$600,000

Forbes J (18 April 2022)

Korlevski v Lea Group North (Vic) Pty Ltd & Ors [2011] VCC 1168

Plaintiff, a cleaner, suffered injury when he slipped on a wet step while mopping during course of his employment.

Injuries: Cartilage damage, requiring multiple minor surgeries (arthroscopies), and secondary psychological reaction.

General damages awarded: \$200,000 (pain and suffering past/present/future)

Hogan J (26 August 2011)

Sheila Savage v Monash University [2017] VCC 1774

Plaintiff rolled her ankle walking from a carpark at Monash University, where she worked as a security contractor. Leave to appeal refused 2018.

Injuries: Initially a minor strain of the ankle. Subsequent treatment by the performance of an arthroscopy resulted in the plaintiff's condition deteriorating such that she developed a condition of chronic pain disorder.

General damages awarded: \$275,000 (pain and suffering)

Judge Saccardo (1 December 2017)

Potter v Yeung & Anor [2019] VCC 10

Plaintiff (female, age unknown) slipped on the stairs at the rear of the property that she was renting and suffered a fracture to her right ankle.

Injuries: Right ankle fracture. Subsequently suffered a full-thickness tear to the supraspinatus tendon in the right shoulder from using crutches for the ankle injury.

General damages awarded: \$200,000 (pain and suffering)

O'Neill J (24 January 2019)

Back

Mill v Adgemis Investments Pty Ltd and Anor [2022] VCC 1892

Plaintiff (male, 55 years old) was installing pipe within a ceiling cavity when a manhole gave way, causing the plaintiff to fall on a concrete surface and injure back and head, and underwent emergency surgery.

Injuries: Injury to the cervical spine, fracture of T4 vertebral body, thoracic spine injury necessitating posterior fusion, injury to right little finger, psychological injury.

General damages awarded: \$265,000 (pain and suffering) with a 15% reduction in contributory negligence.

Judge Parish (8 November 2022)

Ottrey v Bedggood's Transport Pty Ltd [2022] VSC 59

Plaintiff (male, 38 year old), a former truck driver sustained two separate back injury. First from lifting trailer gates, second from long haul truck driving.

Injuries: First instance disc prolapse with surgery and second instance aggravation of back.

General damages: For first instance \$275,000, for second instance \$200,000 (pain and suffering)

J Forrest J (9 March 2022)

Trtovac v Total Mix Pty Ltd & Anor [2022] VSC 149

Plaintiff (male, 39 years old) suffered a back injury in the course of his employment as a concrete truck driver. The Plaintiff checked a load using a 'slump stand', which raised into the air, wobbled and then 'slammed down', immediately causing injury to the plaintiff's back.

Injuries: Back injury causing chronic pain, associated anxiety and reactive depression.

General damages awarded: \$200,000

O'Meara J (31 March 2022)

Perkins v R Slater and Sons Pty Ltd (ACN 005 863 187) [2021] VCC 2061

Plaintiff (male, 37 years old) suffered a back injury during the course of his employment due to attempting to lift a cast-iron bollard which was still attached to the ground by a single bolt, with a 'bear hug' method alone.

Injuries: Lumbar spine

General damages awarded: \$250,000

Judge Brookes (18 August 2022)

Damjanovic v Kah Australia Pty Ltd (trading as Bayview Eden) (ABN 51 052 003 139) [2017] VCC 1657

Plaintiff worked as a cleaner and housekeeper of hotel rooms, suffered injury from January 2003 to March 2010 due to the repetitive and fast-paced nature of her work.

Injuries: Injury to her cervical spine, upper limbs, left shoulder, including to the supraspinatus tendon, a SLAP lesion and aggravation of osteoarthritic change, left carpal tunnel syndrome and reactive anxiety and depression.

General damages awarded: \$235,000 (pain and suffering)

Judge O'Neill (16 November 2017)

Parr v Southern Colour (Vic) Pty Ltd & Ors [2017] VCC 337

Plaintiff suffered injury in the course of his employment when he fell preparing to scale a fence in order to gain access to the factory in which he worked.

Injuries: Pain and movement restriction to his neck and lower back. It was the opinion of doctors that the plaintiff's prognosis was poor and that he would continue to suffer ongoing neck and lower back pain.

General damages awarded: \$175,000

Carmody J (6 April 2017)

Wesfarmers Ltd v Linfox Australia Pty Ltd [2015] VSC 63

Plaintiff suffered psychological injury as a result of the termination of her employment by her employer, and a back injury while unloading a truck during her employment.

Injuries: Discogenic back condition with ongoing back pain. The court found that the injury also affected her psychological condition.

General damages awarded: \$225,000

J Forrest J (5 March 2015)

Victorian WorkCover Authority v The Australian Steel Company (Operations) Pty Ltd [2015] VSC 58

Plaintiff slipped on steps in the course of her employment as a cleaner and sustained injury. Injury exacerbated by subsequent work duties carrying bags.

Injuries: Back injury (lower back) and concussion. The back pain was exacerbated by the requirement of the plaintiff to continue to work and to carry heavy crates of milk up a set of stairs as part of her duties, resulting in further injury.

General damages awarded: \$120,000

Kaye J (3 March 2015)

Srbnovski v Americold Logistics Ltd [2015] VSCA 139

Plaintiff suffered back injury while lifting or twisting to lift a heavy box in the course of his employment. Differing histories given by experts was a key issue at trial. Appeal dismissed despite errors or stated inaccuracies in respondent's closing address.

Injuries: Lower back (lumbar spine), which allegedly prevented him from working and playing soccer.

General damages awarded: \$50,000

Warren CJ, Tate JA and Digby AJA (10 June 2015)

Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 7) [2014] VSC 542

Plaintiff, a cleaner, injured her back while cleaning up a vandalised soap dispenser at a regional secondary college. Plaintiff had previously existing back injuries and had undergone surgery for same. None of the pain and suffering consequences were challenged by the defendant on cross-examination.

Injuries: Back injury. Plaintiff underwent surgery (laminectomy, partial fusion at L4-L5 level and decompression procedure) and suffered complications, had a hip arthroscopy and was required to use a spine stimulator.

General damages awarded: \$350,000 - pain and suffering

Dixon J (20 November 2014)

Johnson v Box Hill Institute of TAFE [2014] VSC 626

Plaintiff suffered back injury after manual handling duties as a trade teacher. Also suffered depression resulting from conflict with employer following back injury.

Injuries: Muscular strain to back and neck. Depression following conflict with employer.

General damages awarded: \$125,000

J Forrest J (23 September 2014)

Delaney v Geelong Leather Pty Ltd (unreported, County Court of Victoria)

Respondent worker injured his lower back in the course of his employment with the appellant while stacking hides.

Injuries: Focal right posterolateral shallow disc protrusion impinging on right L5 nerve.

General damages awarded : \$385,000 (jury)

Brooks J (3 September 2013)

Ascher v State of Victoria [2013] VCC 249

Plaintiff (female, age unknown) suffered injury in the course of her employment as a senior court advice officer as a result of her cramped workstation.

Injuries: Aggravation of underlying degenerative change to cervical and lumbar spine, soft tissue injuries to right shoulder, adjustment disorder as a result of chronic pain.

General damages awarded of \$130,000

O'Neill J (23 March 2013)

Kiriwellage v Best & Less Pty Ltd [2012] VSC 620

Plaintiff (female, age unknown) was struck on the back by an object falling off a pallet that she was unloading.

Injuries: Spinal injury to two discs in her lumbar spine.

Damages awarded: \$832,000 (jury) (no split of damages for general damages)

Macaulay J (7 December 2012)

Popovic v ACN 098 054 678 Pty Ltd & Anor [2012] VSC 498

Plaintiff (age unknown) suffered a back injury while stocktaking.

Injuries: Disc prolapse at L5-S1 level, compression of left S1 nerve root, degenerative disc disease of lumbar spine, ongoing pain and disability to back. This was an aggravation of a previous injury.

General damages awarded: \$150,000

Kaye J (26 October 2012)

Hopgood v Wodonga Regional Health Service [2012] VSC 169

Plaintiff, a nurse (age unknown), injured her back while trying to roll heavy patient while rendering care.

Injuries: Plaintiff suffered T9/10 disc prolapses with continuing major consequences.

General damages awarded: \$400,000 (jury)

Beach J (2 May 2012)

Ball v Eldarin Services Metro Pty Ltd [2011] VCC 500

Plaintiff (age unknown) was injured while clearing out a drainage pit, requiring laminectomy and fusion.

Injuries: Prolapse of a disc, which caused ongoing severe pain in the plaintiff's back and legs, and tingling in the feet. It also caused a secondary psychological reaction in the form of major depression.

General damages awarded: \$225,000

Saccardo J (15 April 2011)

Pasqualotto v Pasqualotto [2011] VSC 550

Plaintiff (age unknown) was injured over a gradual process while undertaking tobacco harvesting work, following a previous back injury sustained in a car accident.

Injuries: Lumbar spine.

General damages awarded: \$400,000 (20% reduction for contributory negligence)

Kyrou J (27 October 2011)

Crowe v Trevor Roller Shutter Services Pty Ltd (No 2) [2011] VSC 28

Plaintiff (male, age unknown) suffered a back injury while moving a large number of metal springs in the course of his employment.

Injuries: Back injury causing a disc to prolapse. Plaintiff had a pre-existing degenerative disease. Following the prolapse, he underwent surgery but continued to suffer ongoing pain.

General damages awarded: \$250,000

Beach J (11 February 2011)

Franklin v Kone Elevators Pty Ltd [2011] VSC 108

Plaintiff (male, age unknown) suffered an injury to the lumbar spine from long-term heavy manual labour.

Injuries: Lumbar spine, eventually requiring spinal fusion. Plaintiff had ongoing pain in back, legs, numbness, and urinary and stomach dysfunction due to medication. Restricted ability to sit, stand, bend and twist.

General damages awarded: \$315,000

Macaulay J (28 March 2011)

Boehm v Strongback Pty Ltd [2011] VSC 463

Plaintiff was a 58-year-old male who fell from a ladder, suffering serious spinal injuries.

Injuries: Serious spinal injuries affecting his cervical, thoracic and lumbar spines. This caused a disk prolapse at C4/5, fracture at T6, and fractures at L1 and L2, requiring surgery. Plaintiff also suffered injury to the right shoulder.

General damages awarded of \$350,000

Beach J (20 September 2011)

Lao v Kantfield Pty Ltd [2021] VCC 685

Plaintiff (male, 59 years old) was employed by the defendant who manufactured pellets of plastic. The plaintiff suffered an injury to his lower back when he was attempting to insert two large screws weighing 28 kilograms into a barrel.

Injuries: Disc injury at L5-S1 accompanied by a secondary psychological condition.

General damages awarded: \$210,000 (pain and suffering)

Ginnane J (28 May 2021)

Reiersen v Homestead Shearing Contractors Pty Ltd & Ors [2020] VCC 1255

Plaintiff (male, age unknown) was employed as a shearer by the defendants. He had previously suffered from mild back pain. Plaintiff suffered an injury to his lower spine by lifting a sheep over some wool left on the shearing shed floor.

Injuries: Prolapse to a disc in his lower spine requiring surgery. Sustained referred pain through right leg.

General damages awarded: \$250,000 (pain and suffering)

O'Neill J (27 August 2020)

Brain

Victorian WorkCover Authority v Asixa Pty Ltd & Ors [2010] VSC 467

Plaintiff was a 21-year-old male worker who sustained a hypoxic brain injury when he was unloading a sheet of glass (which was packaged in a crate) from a truck using a forklift.

Injuries: Hypoxic brain injury. In the course of moving the crate, he stopped the forklift and walked around to the front of it, when the crate slipped off and crushed him. Unfortunately, the worker was not detected for at least 10 minutes, during which time he was unable to breathe.

General damages awarded: \$400,000

Kaye J (21 October 2010)

Breasts

Hooper v Efe [2010] VCC 880

Plaintiff (female, age unknown) suffered from medical negligence in breast reduction procedure.

Injuries: Plaintiff had a substantial disfigurement before the surgery occurred, and following the surgery the disfigurement was reduced but still prominent.

General damages awarded: \$125,000

Saccardo J (19 July 2010)

Elbow

Ferla v Piazzanova Piazza Pty Limited [2021] VCC 1951

Plaintiff (male, 44 years old) injured falling off bike (occupiers liability), falling through large drop, hidden stairs.

Injuries: Tennis Elbow, scarring to the facial tissues, injuries to his teeth and some degree of psychiatric sequelae

General damages awarded: \$100,000 reduced by 25% for contributory negligence

Judge Parrish (7 December 2021)

Victorian WorkCover Authority v Serco Australia Pty Ltd [2013] VCC 1191

Plaintiff (male, age unknown) sustained a tennis elbow injury in the course of his employment as a gardener using vibrating power tools such as a brush cutter and a ride on mower, which aggravated his elbow.

Injuries: Bilateral tennis elbow.

General damages awarded: \$50,000

Brookes J (20 August 2013)

Carrara v Polito [2010] VCC 1469

Plaintiff (female, age unknown) fell at a wedding while dancing, suffering injury to her left elbow requiring two surgeries.

Injuries: Intra-articular fracture of the left elbow with secondary elbow stiffness and secondary stiffness of the left shoulder.

General damages awarded: \$50,000

Parrish J (15 October 2010)

Eye

Bannerman v State of Victoria and Anor [2009] VSC 438

Plaintiff (age unknown) was sprayed in the eye with capsicum spray by a police officer.

Injuries: Experienced intense pain, as well as a corneal abrasion ulcer and stinging of short duration. Continued occasional headaches.

General damages awarded: \$40,000

Williams J (1 October 2009)

Hartwick v State of Victoria [2018] VCC 2187

Plaintiff (male, 45 years old) was being held in custody in a shared cell with another prisoner for an arrest in relation to an assault. The other prisoner stabbed the plaintiff with a butter knife multiple times.

Injuries: Permanent injury to the right trigeminal nerve causing numbness, recurrent pain and some difficulty with his right peripheral vision. Secondary neurological problems and headaches from the assault.

General damages awarded: \$125,000

Dyer J (21 December 2018)

Nezirevic v Lubura & Malenic [2011] VCC 1503

Plaintiff (male, 44 years old) was assaulted by the defendants in and outside a bar in Dandenong in 2007 suffering multiple injuries and going into a coma. The claim was undefended.

Injuries: Total loss of sight in right eye and now wears a prosthetic eye. This affected the plaintiff's balance and he is afraid of losing all sight. Further suffered avulsing of right ear and disfigurement to his face. Diagnosed with post-traumatic stress disorder and depression.

General damages awarded: \$250,000 with interest (pain and suffering)

Kings J (30 September 2011)

Face

Hookey v Paterno [2009] VSCA 48

Plaintiff (female, age unknown) suffered from medical negligence during a maxillofacial surgery.

Injuries: Permanent numbness in her lower lip, structurally altering her mouth.

General damages awarded: \$350,000

Nettle, Redlich and Neave JJA (19 March 2009)

Coughlan v United Precast (Vic) Pty Ltd [2020] VSC 671

Plaintiff (male, 39 years old) employed as a rigger by the defendant was struck in the face by a heavy steel chain as he operated a gantry crane. He then fell backwards and lost consciousness.

Injuries: Broken bones in nose, cheek, jaw and bony protrusion into the frontal lobe. He underwent cranial surgery to inset plates, lost virtually all sight in left eye, lost his sense of smell, most of his sense of taste and sensation over the left side of his face. Additionally, he suffered some memory impairment and mood effects.

General damages awarded: \$400,000 (pain and suffering)

Macaulay J (13 October 2020)

Foot

Russell v W Osborne & Son Pty Ltd [2022] VCC 425

Plaintiff (male, 52 years old), truck driver, suffered an injury at work when he slipped off a truck while replacing windscreen wiper blades.

Injuries: Foot fracture and fracture of the left ankle, injury to the cervical spine, visible scarring at the neck and left foot, injuries to both the plaintiff's hips resulting in an altered gait and aggravation of the injuries to the right and left shoulder and arms. In addition, the plaintiff developed a psychiatric condition of a major depressive disorder and anxiety that developed into a somatic symptom disorder, as well as a sleep disorder.

General damages awarded: \$325,000

Ginnane J (5 April 2022)

Victorian WorkCover Authority v Prolift Fleet Management Pty Ltd [2009] VSC 96

Plaintiff (male, age unknown) suffered crush injuries to his right foot.

Injuries: Complex regional pain syndrome. Plaintiff ended up undergoing a voluntary amputation and had subsequent pain associated with use of a prosthesis, with minimal capacity to walk.

General damages awarded: \$450,000

Kaye J (25 March 2009)

Zhang, Cong Sheng v Golden Tape Constructions Pty Ltd & The Intercon Group Pty Ltd [2009] VCC 547

Plaintiff fell from stairwell.

Injuries: Comminuted fracture (reduced to tiny fragments) of the lateral tibial condyle of the right knee and a comminuted fracture to the left leg. Repeated surgery. Consequential depression and anxiety.

General damages awarded: \$275,000

Saccardo J (3 April 2009)

Hand

Zycher v Pergl [2022] VCC 1801

Plaintiff (female, 69 years old) was bitten by defendant's dog while walking, suffering a deep laceration to her right arm and wrist.

Injuries: Laceration to right hand and wrist, psychiatric distress

General damages awarded: \$200,000 (pain and suffering)

Judge Clark (27 October 2022)

Surmon v Herald & Weekly Times [2011] VSC 628

Plaintiff (age unknown) suffered an injury to the hand as a result of repetitive work cutting and filing newspaper articles.

Injuries: Over time, this caused increased pain and cramping in both the hand and arm, as well as intermittent tremor of the hand. Plaintiff had a pre-existing rare condition that was exacerbated by workplace activity.

General damages awarded: \$180,000

Kaye J (8 December 2011)

Head

Kelly v Culakovski [2014] VSCA 305

Plaintiff (female, age unknown) sustained injuries when a marble façade fell on her head.

Injuries: Migraine headaches and neck soreness, although a CT scan of her brain following the incident revealed no abnormality.

General damages awarded: \$60,000

Neave, Beach and Kyrou JJA (26 November 2014)

Lam v Lieng [2012] VCC 2026

Plaintiff suffered injuries as result of an assault.

Injuries: Traumatic skull fracture, memory loss, abrasions and cuts, anxiety and shock.

General damages awarded: \$90,000

Kings J (20 December 2012)

Monty v Bayside City Council & Ors [2010] VCC 221

Plaintiff was a 25-year-old male who had a cycling accident.

Injuries: Compound depressed temporal skull fracture, fracture to the temporal bone (including the temporomandibular joint), direct injury to facial nerves and lacerations.

General damages awarded: \$200,000

Coish J (17 February 2010)

Watkins v The State of Victoria & Ors [2010] VSCA 138

Plaintiff was a 24-year-old male who was assaulted by police.

Injuries: Bruised lips, blood clots on his gums, oblique coronal fracture of tooth 12 from mid-palatal to labial, subgingivally, which exposed on the dental pulp, fracture involving the dentine to tooth 11, bruising to upper forehead, swelling, bruising, scratch marks and tenderness.

General damages awarded: \$95,000

Ashley, Mandie JJA and Beach AJA (11 June 2010)

Lindsay-Field v Three Chimneys Farm Pty Ltd [2010] VSC 436

Plaintiff (age unknown) suffered a blow to the face by a horse.

Injuries: Facial fractures, deep wounds, scarring above the eyebrow, subtle brain damage, nerve damage, head pain and psychological harm.

General damages awarded: \$250,000

J Forrest J (29 September 2010)

Hip

Waterfall v Antony [2012] VSC 458

Western Australian jurisdiction as injury occurred in that jurisdiction: motorcycle accident.

Injuries: Fracture and dislocation of hip.

General damages awarded of \$309,992 (60% reduction given for contributory negligence)

Beach J (4 October 2012)

Mould v ABM Plastics [2010] VCC 1346

Plaintiff (age unknown) suffered left hip and groin injury while attempting to realign a box of polymer sheets on a pallet which was being moved to the plate making room.

Injuries: Hip replacement surgery at a young age, further likely hip replacement, and psychological issues.

General damages awarded: \$150,000

Davis S (28 October 2010)

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

Plaintiff (female, 54 years old) slipped on popcorn and some liquid spilled on a cinema floor that was operated by the defendant.

Injuries: Fracture of the hip, requiring total hip replacement. Subsequently the plaintiff suffered a DVT, gluteal tendinopathy and trochanteric bursitis and a psychological response.

General damages awarded: \$230,000 (pain and suffering)

Bourke J (20 August 2019)

Knee

Taseska v MSS Security Pty Ltd [2016] VSC 252

Plaintiff was a 26-year-old female who injured her right knee during the course of her employment in or around 2001.

Injuries: Soft tissue injury to her right knee, which included damage to her meniscus with the associated development of osteoarthritis and a Baker's cyst. Plaintiff also suffered from pre-existing injuries to each of her hips (arthritis to her hips), which were not related to the incident. She also suffered from an unrelated liver condition and psychiatric illness. No discount was made in accordance with *Malec v JC Hutton Pty Ltd* for the prospect that the knee condition would have come on regardless of the incident.

General Damages: \$250,000

J Forest J (20 May 2016)

Wilson v Collingwood Store Pty Ltd (Unreported County Court of Victoria)

Plaintiff (female, age unknown) injured her right knee while attempting to catch a television as it was falling off a shelf while working as a retail assistant.

Injuries: Knee injury, plaintiff had a pre-existing condition and three prior dislocation injuries.

General damages awarded of \$65,000

O'Neill J (20 June 2013)

AMA v State of Victoria [2012] VCC 1453

Plaintiff (age unknown) suffered a knee injury while playing organised sport at school.

Injuries: Complete rupture of the anterior cruciate ligament with bone bruising, with psychological impacts following.

General damages awarded of \$175,000

Morrish J (1 October 2012)

Bainbridge v James, Jacotine & Liuzag Custodian Pty Ltd [2011] VCC 1393

Plaintiff (male, age unknown) was criminally assaulted by a youth who kicked him in the region of his right knee.

Injuries: Plaintiff had two prosthetic knees as a result of a pre-existing condition. The assault resulted in a loosening of the prosthesis and reversion surgery was conducted seven years earlier than expected. This caused severe pain.

General damages awarded: \$80,000

Smith J (13 December 2011)

Carter v Traralgon Greyhound Racing Club Inc & Anor [2011] VCC 1424

Plaintiff (male, age unknown) fell at the starting box of a greyhound race, injuring his knee.

Injuries: Knee injury requiring plaintiff to undergo surgery and hospitalisation with the prospect of premature arthritis. Forced to take ongoing medication for his injuries, and has suffered interruption to his sleep.

General damages awarded of \$100,000 (20% reduction for contributory negligence)

Carmody J (6 December 2011)

Meech v Ballan & District Soldiers Memorial Bush Nursing Hospital & Hostel Inc [2020] VCC 854

Plaintiff (female, 55 years old), employed as a nurse, slipped and fell on a wet outdoor landing at the defendant's hospital premises causing injury to her left knee.

Injuries: Articular damage requiring surgery. Eventually she underwent total left knee replacement surgery.

General damages awarded: \$110,000 (pain and suffering)

O'Neill J (19 June 2020)

Sampson v Thiess Pty Ltd & Anor [2020] VCC 1568

Plaintiff (male, 45 years old) was employed as a labourer by the defendants who were constructing a desalination plant in Wonthaggi. Plaintiff was carrying buckets of rubble down scaffold stairs, the height of which did not comply with the recommended height in the Australian Standard, and suffered injury to his left knee.

Injuries: Aggravated pre-existing partial subacute rupture of his anterior cruciate ligament (ACL). Treated with three surgeries, including a reconstruction of his ACL.

General damages awarded: \$120,000 (pain and suffering)

Tsalamandris J (15 October 2020)

Leg

VWA v Playcorp Pty Ltd and Kagan Bros Consolidated Pty Ltd [2011] VCC 138

Plaintiff (age unknown) tripped in the workplace and fractured left patella, subsequent fall.

Injuries: Fractured left patella, requiring surgery and resulting in residual knee weakness. The knee weakness caused a subsequent fall and fracture of the femur.

General damages awarded: \$200,000

Saccardo J (20 January 2011)

Pethybridge v D'Orsa [2010] VSC 90

Plaintiff was a 51-year-old male who, as a result of a transport accident, suffered injury to his right leg.

Injuries: Multiple fractures, including to his right distal femur, tibia, aggravation of previous knee injury, fracture of right toe, and fracture of middle finger. The injuries rendered him totally unfit for employment.

General damages awarded: \$285,000

Vickery J (26 March 2010)

Multiple injuries

McGiffin v Fosterville Gold Mine [2022] VSC 665

Plaintiff (male, 25 years old) injured when working in a mine and struck in the head by a large bolt attached to a boom.

Injuries: Chronic regional pain syndrome, adjustment disorder with anxiety and depression

General damages awarded: \$450,000

Moore J (4 November 2022)

Gartmann v Dominion Hotel Group Pty Ltd (ACN 135 105 887) [2022] VCC 1035

Plaintiff (female, 19 years old) slipped and fell on wet tiled floor during the course of her employment while working as a waitress/bar attendant and injuring her neck and shoulder.

Injuries: Neck, left shoulder, left arm, together with Chronic Regional Pain Syndrome Type 1, headaches, Chronic Adjustment Disorder with Mixed Anxiety and Depressed Mood, Somatic Symptom Disorder and Gastritis

General damages awarded: \$225,000 (pain and suffering)

Judge Parrish (14 July 2022)

Hooper v Citywide Service Solutions [2022] VSC 239

Plaintiff (female, 49 years old) was injured when running out to a moving street sweeper and becoming crushed between the sweeper and a wall.

Injuries: She suffered multiple injuries including pelvic fracture, rib fractures, vertebral fractures, superior end plate fracture, left thoracic transverse process fractures, right lumbar transverse process fractures, bilateral T2 to 10 lateral cutaneous nerve palsies, mild traumatic brain injury resolved with no ongoing impairment, left-sided cranial nerve five palsy, right-sided sacral plexopathy, right-sided sacral levels one and two (S1, S2) radiculopathy, left supraclavicular nerve palsy, bilateral numbness in hands, loss of sensation in the left sided chest, left eyelid sustained closure occurring three times per week, occasional bladder incontinence, constipation requiring manual aid, loss of sensation below waist, extensive scarring, emotional impact including suicidal thoughts and issues with condition regarding memory and concentration.

General damages awarded: \$550,000

O'Meara J (19 May 2022)

Meli v Ceva Logistics (Australia) Pty Ltd & Anor [2017] VSC 739

Plaintiff (male, age unknown) was injured when eight metal load securing gates in the rear of a trailer fell on him.

Injuries: He suffered multiple injuries including post-traumatic stress disorder, chronic pain syndrome and exhibits symptoms of complex regional pain syndrome, fractured pelvis comprised of fractures through the superior and inferior pubic rami. Ongoing severe lower back pain, shoulder pain and pelvic/hip pain.

General damages awarded: \$598,360

McDonald J (12 December 2017)

Brook v Kempton & Ors [2017] VSC 661

Plaintiff was a 21-year-old male who was the victim of a serious and unprovoked assault by the three defendants while walking with friends to a nightclub.

Injuries: Plaintiff suffered a comminuted fracture and subluxation of the right condylar process of the mandible, treated conservatively; mild mixed high frequency hearing loss on the right side with blood in the right external ear canal and behind the ear drum; and laceration of the chin.

General damages awarded: \$165,000

Keogh J (27 October 2017)

Clarke v Greater Shepparton City Council [2016] VSC 542

Plaintiff was a 53-year-old who was jogging and fell on a manhole. Plaintiff had pre-existing injuries from drag racing in 1996, which had caused a permanent incapacity for employment.

Injuries: Suffered injuries to the left hip, left knee and lower back. Plaintiff underwent total left hip replacement surgery.

General damages awarded: \$275,000 reduced to \$233,750 for 15% contributory negligence

Keogh J (8 September 2016)

Scott v Wanklyn [2016] VSC 382

Plaintiff (male, age unknown) went to respondent's house to pick up a chair and tripped and fell when he stepped into a trench dug on the respondent's property.

Injuries: Subcapital left femoral neck fracture requiring left hemiarthroplasty and left hip injury resulting in restriction of movement and left leg wasting. Plaintiff was 100% fit before the accident and now had restricted ability to walk, including a permanent limp.

General damages awarded: \$110,000

Keogh J (8 July 2016)

Sahin v Victorian WorkCover Authority [2016] VCC 829

Plaintiff (female, age unknown) suffered soft tissue injury to her right wrist in the course of her employment when she was attempting to push a box, packed with oranges, from a packing bench onto a conveyor belt.

Injuries: Chronic regional pain syndrome and a major depressive disorder (with attempted suicide), together with ulcerative colitis.

General Damages awarded: \$225,000

O'Neill J (22 June 2016)

Clark v Tieman Industries Pty Ltd [2011] VSC 500

Plaintiff (age unknown) suffered injuries following a fall from a truck at work.

Injuries: Fractures to hip and pelvis, burst fractures of two vertebrae, fractures of traverse processes of the spine, spinal fusion and aggravation of cirrhosis of the liver resulting from increased alcohol intake.

General damages awarded: \$300,000

Kyrou J (4 October 2011)

Mayhew v Lewington's Transport Pty Ltd [2010] VSCA 202

Plaintiff (male, age unknown) fell from a trailer at work.

Injuries: Injuries to his back and right leg.

General damages awarded: \$325,000

Warren CJ, Neave JA and Beach AJA (12 August 2010)

Shirreff v Elazac Pty Ltd [2010] VSC 381

Plaintiff (age unknown) fell off a ladder in a lift shaft while at work.

Injuries: Open compound fracture, dislocation of right ankle with development of osteomyelitis, septic arthritis, plantar fasciitis, dysfunction and deformity, injury to right hand with tendon damage, wrist fracture, spinal injuries and loss of function of vertebrae 1-5, damage to hip, foot (with ankle fracture), shoulder injury, consequential knee injury causing constant pain, significant restriction on recreational activities, psychological trauma, depression, anxiety, attempted suicide and suicidal feelings.

General damages awarded: \$400,000

Robson J (1 September 2010)

Victorian WorkCover Authority v Asixa Pty Ltd & Ors [2010] VSC 467

Plaintiff was a 21-year-old male who suffered crush injuries.

Injuries: Persistent vegetative state, eventually progressing to minimally conscious state. Severe limitation of insight and some loss of expectation of life.

General damages awarded: \$400,000

Kaye J (21 October 2010)

Cruse v State of Victoria [2019] VSC 574

Plaintiff was a 19-year-old male who was injured in a police raid on his home.

Injuries: Cuts and bruises to face, neck and upper body.

General damages awarded: \$200,000

Richards J (22-25, 29 July, 27 August 2019)

Bucic v Arnej Pty Ltd [2019] VSC 330

Plaintiff (male, age unknown) was injured when he fell from scaffolding onto bricks. Respondent was a sole-trader and breached duty of care as occupier of premises.

Injuries: Back, right arm, chest, lungs and neurological and psychiatric injuries.

General damages awarded: \$300,000

Zammit J (20 May 2019)

Love v TAC (No 2) [2017] VSC 584

Plaintiff (age unknown) was injured in a motor vehicle accident due to negligence of an unidentified driver.

Injuries: Back injuries, knee pain, post-traumatic stress disorder symptoms.

General damages awarded: \$342,000

Zammit J (28 September 2017)

Muller v Klosed Pty Ltd & Ors [2021] VSC 360

Plaintiff (male, 65 years old) was employed by the first defendant to operate a prime mover towing two tautliner trailers. He moved a large steel gate, as required to do so to unload the trailers, which fell hitting him on his left shoulder and causing him to fall backwards.

Injuries: Acute on chronic left hip pain secondary to prolapsed intervertebral disc L3 and L4 with L3 nerve root compression causing severe pain in low back and left leg.

General damages awarded: \$275,000 (pain and suffering)

Keogh J (23 June 2021)

West v Rosenlis [2021] VSC 41

Plaintiff (male, 45 years old) was driving a jet ski on the Goulburn River near Nagambie in 2016 when the defendant, also driving a jet ski, collided with him. Defendant previously sentenced on one charge of driving in a manner dangerous causing serious injury. Plaintiff suffered multiple injuries.

Injuries: Plaintiff suffered leg fracture in multiple places, rib fractures, collapsed lung, lacerated spleen and fractured thumb. Secondary psychiatric condition.

General damages awarded: \$300,000 (pain and suffering)

Keogh J (23 June 2021)

Skinner v Royal Children's Hospital [2020] VCC 1359

Plaintiff (male, 64 years old) was employed as a psychiatric nurse at the defendant's hospital. Over the course of 19 months he suffered three assaults, including being struck with a metal chair, kneed and punched and tackled.

Injuries: Psychological injuries, including chronic adjustment disorder with depression and chronic pain syndrome. The physical injury suffered from the assaults was the aggravation of cervical spondylosis.

General damages awarded: \$150,000 (pain and suffering)

Pillay J (3 September 2020)

Stavrakijev v Ready Workforce & Anor [2018] VSC 690

Plaintiff (male, age unknown) was employed by the defendants as a labourer at a concrete pipe manufacturing plant. He slipped and fell downstairs leading to the factory floor that had water, debris and oil on them from manufacturing process.

Injuries: Partial thickness tear of the right Achilles tendon, subluxating right bicep tendon, a partial tear of the supraspinatus tendon. As well as aggravation to mild degenerative changes affecting his lumbar spine.

General damages awarded: \$220,000 (pain and suffering)

Keogh J (13 November 2018)

Kigetzis v Roche [2014] VSC 657

Plaintiff (male, 36 years old) was a pedestrian crossing an intersection when he was struck by a vehicle driven by the defendant.

Injuries: Left shoulder fracture, dislocation, fracture of knee and ruptured ligaments.

General damages awarded: \$335,000 (pain and suffering)

Rush J (19 December 2014)

Mesothelioma

Amaca Pty Ltd (under NSW Administered Winding Up) v King [2011] VSCA 447

Plaintiff (age unknown) contracted mesothelioma after exposure to asbestos dust as a result of exposure to Amaca's products.

Injuries: Mesothelioma due to asbestos exposure.

General damages awarded: \$730,000 (jury)

Nettle, Ashley and Redlich JJA (22 December 2011)

Reid v Seltsam Pty Ltd [2021] VSC 653

Plaintiff (female, 69 years old) resided in close proximity to the Wunderlich asbestos factory for approximately 20 years between 1953 to 1971. She claimed the environmental exposure had caused her to develop an asbestos-related illness.

Injuries: Mesothelioma.

General damages awarded: \$580,000 (pain and suffering)

Forbes J (7 October 2021)

Psychological Injury

Biggs v O'Connor [2021] VSC 826

Defendant drove a motorcycle home under the influence and lost control resulting in the death of the plaintiff's husband. Claim for psychiatric injury by spouse of deceased pillion passenger. Nervous shock.

Injuries: Chronic PTSD, chronic major depressive disorder with anxious distress and an unresolved chronic grief reaction.

General damages awarded: \$275,000 (pain and suffering)

Keogh J (13 December 2021)

Bell v Nexus Primary Health [2022] VSC 605

Plaintiff (female, 45 years old) employed by defendant as a family violence outreach worker and was attacked off work premises and outside work hours

Injuries: Psychiatric injury including posttraumatic stress disorder.

General damages awarded: \$375,000

O'Meara J (13 October 2022)

Elisha v Vision Australia Ltd [2022] VSC 754

The plaintiff (male, 41 years old) suffered psychological injuries as a result of a breach of contract and in tort arising from the termination of his employment with the defendant, resulting from an incident with hotel staff.

Injuries: Psychiatric injuries

General damages awarded: \$400,000

O'Meara J (13 December 2022)

O'Connor v Comensoli [2022] VSC 313

Plaintiff (male, 11 years old) while a student at the Catholic primary school in Kilmore, served as an altar boy at the local church. Between 1968 and 1970, the plaintiff was sexually abused on three occasions by Desmond Gannon, a Catholic priest in the Archdiocese of Melbourne.

Injuries: Plaintiff diagnosed with depressive disorder, complex post-traumatic stress disorder with associated personality disruption, alcohol dependence and abuse, grief reaction, cognitive impairment and social adjustment disorder.

General damages awarded: \$525,000

Keogh J (9 June 2022)

PCB v Geelong College [2021] VSC 633

Plaintiff (male, 46 years old) while a student at the defendant's school was sexually abused by an individual, taken to be an employee of the school, between late 1988 and mid-1990.

Injuries: Plaintiff diagnosed with post-traumatic stress disorder and a generalised anxiety disorder.

General damages awarded: \$300,000

O'Meara J (1 October 2021)

Lonergan v Trustees of the Sisters of Saint Joseph & Anor [2021] VSC 651

Plaintiff (male, aged 60) alleged he was sexually and physically abused by the parish priest in 1973 and 1974 while he was an altar boy at a Church managed by the defendants.

Injuries: Plaintiff sustained psychiatric injury, persistent depressive disorder and some episodes of major depressive disorder.

General damages awarded: \$250,000

Keogh J (7 October 2021)

DP v Bishop Paul Bernard Bird [2021] VSC 850

Plaintiff (male, aged 55) alleged he was sexually assaulted by the parish priest in 1971 (at age 5) at his parents' home.

Injuries: Plaintiff sustained psychiatric injury, including complex post-traumatic stress disorder, chronic anxiety disorders, chronic depressive disorder and enduring personality change.

General damages awarded: \$200,000

Forrest J (22 December 2021)

Perez v Reynolds & State Of Victoria [2020] VSC 537

Plaintiff alleged historical childhood sexual abuse by a teacher at his primary school. Liability was admitted and the case proceeded as an assessment of damages.

Injuries: Complex post-traumatic stress disorder, chronic dysthymic disorder.

General damages awarded: \$265,000 (pain and suffering)

Forbes J (26 August 2020)

Kozarov v State of Victoria [2020] VSC 78

Plaintiff suffered psychiatric injuries due to nature of cases exposed to as an Office of Public Prosecutions solicitor.

Injuries: Chronic post-traumatic stress disorder, major depressive disorder.

General damages awarded: \$200,000 (pain and suffering)

Dixon J (12 February 2020)

Tomasevic v Dept Of Education & Early Childhood Development (Formerly Known As Dept Of Education) (VIC) [2020] VSC 415

Plaintiff suffered psychiatric injury as a result of unproved allegations made by the principal of the school where he worked as a Physical Education teacher. Defendant (State of Victoria) admits negligence by the principal. Plaintiff then became obsessed with pursuing justice.

Injuries: Panic attacks, anxiety, depression, weakness.

General damages awarded: \$425,000 (pain and suffering)

Keogh J (9 July 2020)

Vlaming v Von Marburg [2020] VSC 340

Negligent surgery caused severe injury to plaintiff's inner ear and facial nerve after attending hospital presenting with an earache and discharge. Defendant (surgeon) did not enter a defence, judgement obtained in default.

Injuries: Symptoms of post-traumatic stress disorder, mild, chronic adjustment disorder with depressed mood. Embarrassment and difficulty communicating. Psychological injuries caused by physical injuries. Physical injuries: total loss of hearing in right ear, severe injury to inner ear and facial nerve, partial ptosis of his upper right eyelid and compromise of the protective mechanism of the cornea. Mild sight impairment.

General damages awarded: \$280,000 (for pain and suffering and loss of enjoyment of life) (considered *Waks v Cyprys* in general damages award)

Clayton JR (10 June 2020)

Waks v Cyprys [2020] VSC 44

Plaintiff suffered psychological damage as a result of sexual abuse by a teacher at his school when he was thirteen. Judgement entered in default of defence. Perpetrator subsequently convicted in relation to charges relating to the plaintiff and others.

Injuries: Lowered mood, intrusive thoughts, somatic anxiety, major depressive episode, anger and substance abuse issues.

General damages awarded: \$200,000

Forbes J (17 February 2020)

Hand v Morris and Anor [2017] VSC 437

Plaintiff was a 51-year-old male who claimed damages in respect of sexual abuse inflicted upon him by the first defendant in 1974. Plaintiff was in grade 4 when the abuse occurred. The first defendant was his teacher and the second defendant operated the school and employed the first defendant.

Injuries: Plaintiff sustained psychiatric injury, depression and anxiety.

General damages awarded: \$260,000

Zammit J (11 August 2017)

Rawlings v Rawlings [2015] VSC 171

Plaintiff (male, age unknown) sought damages against his employer for psychiatric injury sustained during his employment.

Injuries: Diagnosed with depression. This was only partly considered to be as a result of the employer's conduct.

General damages awarded: \$50,000

Dixon J (5 May 2015)

Doulis v State of Victoria [2014] VSC 395

Plaintiff (male, age unknown) sustained chronic severe major depressive condition after being repeatedly exposed to highly stressful circumstances in his work environment, which his employer was aware of and failed to control.

Injuries: Severe major depressive disorder.

General damages awarded: \$300,000

Ginnane J (5 September 2014)

Dawson v Department of Justice [2013] VCC 2000

Plaintiff (female, age unknown) commenced proceedings against her former employer as a Senior Corrections Officer at Warrnambool, where she claimed she was allegedly repeatedly bullied by another employee.

Injuries: Plaintiff alleged that as a result of the bullying, she sustained psychiatric injury (chronic adjustment disorder with depressed mood, anxiety, depression and a major depressive disorder).

General damages awarded: \$125,000

Bourke J (19 December 2013)

Swan v Monash Law Book Co-Operative [2013] VSC 326

Plaintiff (female, age unknown) was subjected to harassment, intimidation and bullying from other employees in the course of her employment.

Injuries: Psychological injury, with initial features similar to post-traumatic stress disorder (although there was no diagnosis of PTSD). This led to anxiety and depression, as well as somatic symptoms, including joint dysfunction, insomnia, migraine and headache, high blood pressure and rash irritations.

General damages awarded: \$300,000

Dixon J (26 June 2013)

Vivoda v Kealy, Gundrill & State of Victoria [2013] VCC 130

Plaintiff (male, age unknown) was punched by police while in custody.

Injuries: Psychiatric injury. He had a pre-existing psychological injury, including binge drinking and benzodiazepam dependence. His condition was held to be caused 50% by the incident.

General damages awarded: \$65,000

O'Neill J (28 February 2013)

Karamesinis v Australian Crowd Control Services Pty Ltd [2012] VCC 507

Plaintiffs (female and male, ages unknown) were the mother and father of a victim who was fatally assaulted by police.

Injuries: Both suffered psychiatric injury. Both had pre-existing psychiatric conditions.

General damages awarded: \$175,000 (each plaintiff)

Saccardo J (1 May 2012)

Hosny v Victoria Racing Club & Anor [2012] VCC 661

Plaintiff (male, age unknown) was assaulted by a guest at a racecourse marquee during the course of his employment as a shuttle bus driver working at Flemington Racecourse. Prior to the assault, he had no history of psychiatric conditions and a solid work history.

Injuries: Developed post-traumatic stress syndrome, depression and anxiety, leading to his marriage breaking up, inability to work, suicidal thoughts, increase in alcohol consumption (binge drinking), twofold increase in amount he smoked and homelessness.

General damages awarded: \$300,000

Davis S (6 June 2012)

VWA v A B Oxford Cold Storage Company Pty Ltd [2012] VCC 2021

Plaintiff (male, age unknown) suffered psychological injury after he caused the death of a co-worker in the course of his employment. The victim had walked in front of him while he was driving a forklift, forcing the plaintiff to brake suddenly and causing the forklift's load to fall off and crush the victim. When the worker was shown a video of the incident he relapsed.

Injuries: Psychological injury, trauma.

General damages awarded: \$175,000

Brookes J (20 December 2012)

GGG v YYY [2011] VSC 429

Plaintiff (male, age unknown) was repeatedly sexually assaulted by his uncle when he was a boy.

Injuries: Ongoing psychological injury and loss of enjoyment of life.

General damages awarded: \$200,000

Osborn J (2 August 2011)

Willett v State of Victoria [2011] VSC 354

Plaintiff (female, age unknown) suffered workplace discrimination in the course of her employment in the form of bullying, harassment, and exclusion.

Injuries: Suffered psychiatric illness as a result.

General damages awarded: \$108,000 (jury)

Williams J (29 July 2011)

Respiratory

Karam v Palmone Shoes Pty Ltd [2010] VSCA 253

Plaintiff (male, age unknown) alleged toxic fumes in the workplace caused him to develop asthma and psychological injury.

Injuries: Asthma and psychological injury.

General damages awarded: \$150,000

Mandie and Harper JJA, Beach AJA (29 September 2010)

Shoulder

Atmis v Consolidated Property Services (Australia) Pty Ltd [2022] VCC 2056

Plaintiff (male, 50 years old) suffered an injury to his low back and subsequently right shoulder during the course of his employment as a cleaner. The plaintiff was required to engage in multiple 'high force' which the plaintiff attributed to causing the back injury. Found to not have proved negligence. Plaintiff claimed he injured his shoulder while lifting a heavy bin liner.

Injuries: Right shoulder pain and surgery, unrelated degenerative back injury,

General damages awarded: \$230,000, minus 10% contributory negligence.

Ginnane J (30 November 2022)

Ly v Australian Pharmaceutical Industries Limited [2022] VCC 1772

Plaintiff (male, 66 years old) injured at work due to hazardous manual handling, particularly heavy lifting over football height.

Injuries: Aggravation of cervical spondylosis and an aggravation of degenerative change in the right AC joint.

General damages awarded: \$200,000

Judge Clayton (28 November 2022)

Viher v Miles Transport Pty Ltd [2019] VCC 1008

Plaintiff (male, age unknown) was employed by the defendant, a rolling cage pallet ran into him while he was working resulting in a crush injury to his right shoulder.

Injuries: Plaintiff sustained injury to right shoulder, including loss of range of motion and adhesive capsulitis.

General damages awarded: \$25,000 (pain and suffering)

Misso J (11 July 2019)

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

Plaintiff (female, age unknown) fell and suffered injury to her right shoulder while walking along a corridor at work.

Injuries: Full thickness tear of the supraspinatus and infraspinatus tendons in the right shoulder.

General damages awarded: \$250,000

Keogh J (29 November 2016)

Ventrice, Lina v Joneal Pty Ltd (Trading as Melrose Reception & Convention Centre) [2009] VCC 463

Plaintiff (female, age unknown) fell at a venue.

Injuries: Soft tissue injuries to her right shoulder and spine, as well as aggravating degenerative changes and tearing a tendon in her right shoulder.

General damages awarded: \$45,000

Davis S (19 May 2009)

Whiplash

Becka v Tuppen & Anor [2022] VCC 1378

Plaintiff (male, 51 years old) was driving a motor vehicle and encountered a build-up of traffic, caused by a primary collision. The plaintiff applied the brakes, causing a loss of control and subsequently collided with a bridge, before flipping the vehicle onto its passenger side.

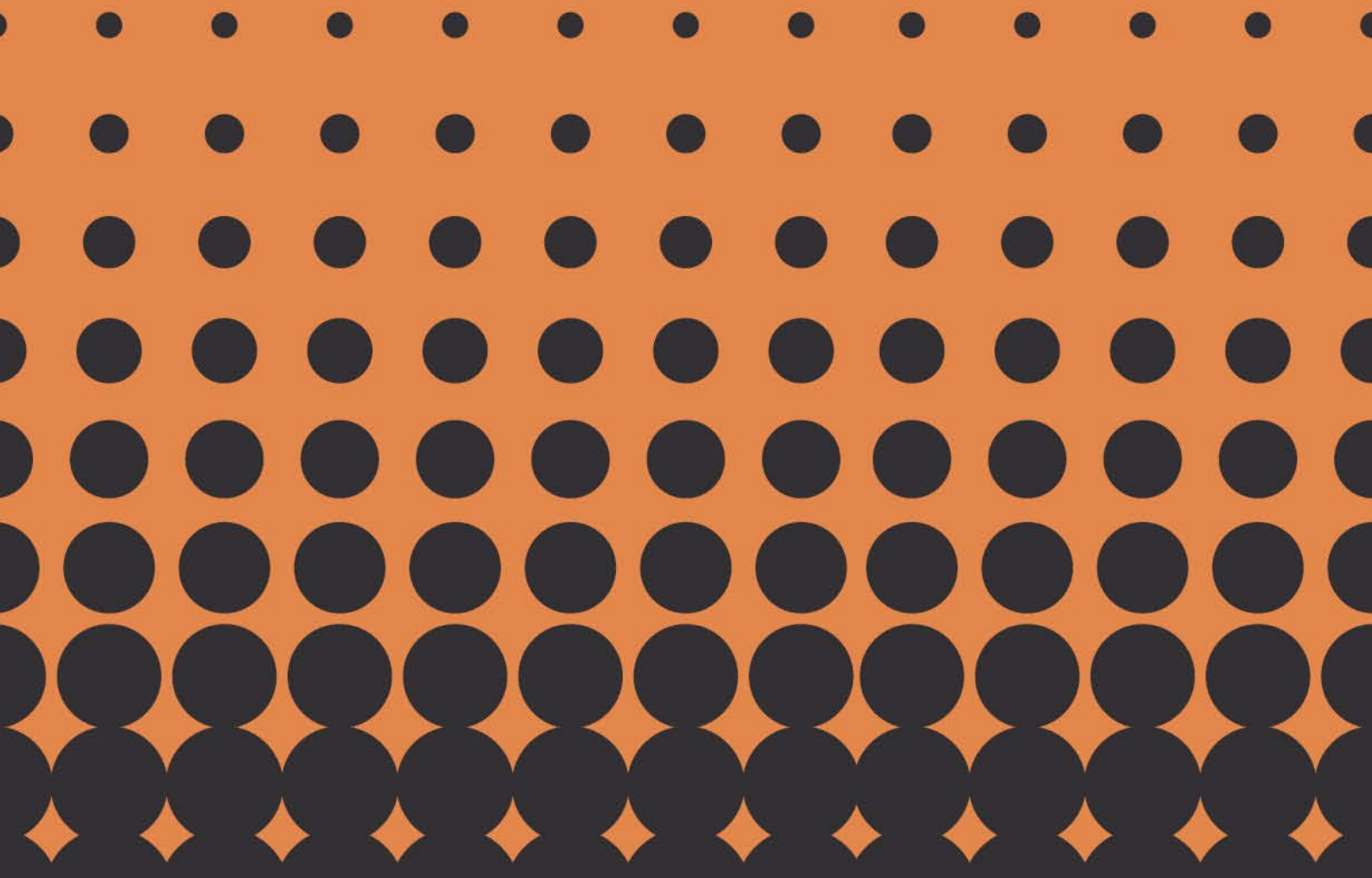
Injuries: Multi-level spinal fractures in thoracic spine, back pain and neck pain.

General damages awarded: \$135,000 (pain and suffering) (plaintiff found to be 50% contributory negligence)

Misso J (31 August 2022)

04

Tasmania



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Civil Liability Act 2002 (TAS)

Application

In Tasmania, the common law of negligence is modified by the *Civil Liability Act 2002 (Tas)* (**CLA TAS**).

The CLA TAS applies to most, but not all circumstances where negligence is alleged against a defendant. Specifically, section 3B provides that the CLA TAS will not apply to:

- Civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct;
- Civil liability relating to an award of damages for personal injury or death where the injury or death concerned resulted from smoking or other use of tobacco products;
- Civil liability relating to an injury to which Part III of the *Motor Accidents (Liabilities and Compensation) Act 1973* applies, except for the provisions relating to intoxication (Part 2), recovery by criminals (Part 3), structured settlements (Part 5), provisional damages (Part 5A), breach of duty - except for dangerous recreational activities and professional negligence - (Divisions 1, 2, 3, 4 and 7 of Part 6), assessment of damages (Part 7) and mental harm (Part 8);
- Civil liability relating to an injury to which Division 2 of Part X of the *Workers Rehabilitation and Compensation Act 1988* applies; or
- Liability for compensation under the *Workers Rehabilitation and Compensation Act 1988*, the *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011*, the *Criminal Injuries Compensation Act 1976* or the *Anti-Discrimination Act 1998* or a scheduled benefit under the *Motor Accidents (Liabilities and Compensation) Act 1973*.

Negligence - the elements

To establish negligence under the CLA TAS, a plaintiff must show that:

- the defendant owed the plaintiff a duty of care;
- the defendant breached that duty of care; and
- the damage suffered by the plaintiff was caused by that breach.

Duty of care

For a detailed discussion on circumstances in which a duty of care may arise, and a non-exhaustive list of commonly established duties of care in case law, please refer to the New South Wales section of this handbook.

Breach

Section 11 under the CLA TAS codifies the common law principles which enliven a duty of care.

In considering whether a defendant owes a duty to a plaintiff, section 11(1) requires a court to determine whether:

- the risk was foreseeable;
- the risk was not insignificant; and
- a reasonable person, in the person's position, would have taken those precautions.

A foreseeable risk is defined as that which the person knew or ought reasonably to have known (section 11(1)).

The test for whether a risk of harm can be reasonably considered to be foreseeable is discussed in *Wyong Shire Council v Shirt*.¹⁸² A foreseeable risk is one that should not be "far-fetched or fanciful". The foreseeability of a risk of harm is not governed by probability or likelihood of the harm occurring. Even an unlikely risk of harm can still be foreseeable.

The "not insignificant" provision sets the foreseeability threshold a little higher for plaintiffs: *Dodge v Snell*.¹⁸³ This requirement did not exist at common law, and clarity over what the test actually entails is yet to be found. New South Wales case law seems to indicate that "not insignificant" is intended to reference to probability of the risk occurring and it must be considered subjectively: *Benic v State of New South Wales*.¹⁸⁴

Section 11(2) states that in determining whether a reasonable person would have taken precautions against risk of harm, the court is to consider:

- the probability of harm absent care;
- seriousness of harm;
- burden of taking precautions; and
- social utility of the activity which creates the risk of harm.

Pursuant to section 12, the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done. Furthermore, the subsequent taking of action that (had the action been taken earlier) would have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute evidence of liability in connection with the risk.

Section 22 of the CLA TAS defines the standard of care owed by professionals. The standard stipulated in section 22 of the CLA TAS applies in most circumstances, but does not apply to liabilities arising in connection with the giving of (or the failure to give) a warning, advice or other information in relation to the risk of harm associated with the provision by a professional of a professional service to a person.

Pursuant to section 22(1), a professional does not breach a duty arising from the provision of a professional service if it is established that he or she acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

Relevantly, peer professional opinion:

- cannot be relied on for the purpose of section 22 if the court considers that the opinion is irrational (section 22(2));
- does not have to be universally accepted to be considered widely accepted (section 22 (4)).

Causation and remoteness

In any claim for damages for negligence, a plaintiff will be required to prove, on the balance of probabilities (section 14), that the damage suffered was caused by the defendant's negligence.

Section 13(1) provides that a determination that negligence caused particular harm comprises proving the following two elements:

- that the negligence was a necessary element of the occurrence of the harm (factual causation); and
- that it is appropriate for the scope for the negligent person's liability to extend to the harm so caused (scope of liability).

The reference to "necessary element" in section 13(1)(a) requires the defendant's act to have been at least one event, which caused or materially contributed to the plaintiff's loss. Accordingly, there may be other events which contributed to the loss but the defendant's alleged act must be one of the necessary

¹⁸² *Wyong Shire Council v Shirt* (1980) 146 CLR 40

¹⁸³ *Dodge v Snell* [2011] TASSC 19

¹⁸⁴ *Benic v State of New South Wales* [2010] NSWSC 1039

conditions. Section 13(1)(a) is demonstrated through considering whether "but for" the defendant's negligence, the claimant's loss would actually have occurred (*March v E & M H Stramare Pty Ltd*).¹⁸⁵

The "but for" test is necessary, but it is not a sufficient test for causation, particularly where there are two or more probable causes. Section 13(1)(b) seeks to address this by requiring the plaintiff to prove whether, as a matter of policy, the person alleged to be responsible should nevertheless be held not liable (scope of liability). This is achieved by identifying the "nature of the role which the conduct in question played": *Pledge v RTA*,¹⁸⁶ or if the alleged cause should properly be seen as having caused the relevant loss or damage (*Medlin v State Government Insurance Commission*).¹⁸⁷

Section 13(3)(a) expands on the section 13(1)(a) requirement of factual causation by establishing its determination as a subjective test of what the plaintiff would have done if the negligence had not occurred.

Similarly, section 13(4) expands on the scope of liability requirements in section 13(1)(b) by establishing that it should be a normative question of whether liability should be imposed on the negligent party.

In rare cases, the evidence is not sufficient to establish that the alleged conduct was a "material" cause of the damage to the plaintiff. This is typically because of uncertainties surrounding the aetiology of injury. In such cases, the court may apply section 13(2) of the CLA TAS and consider why responsibility for harm should be imposed on the negligent party. *Adeels Palace v Moubarak*¹⁸⁸ is the leading case which discussed the application of the very similarly worded section 5D(2) of the CLA NSW. In finding that section 5D(2) did not apply to the respondent, the High Court did not go so far as to define in what circumstances a matter would be considered "exceptional". Australian courts are yet to establish an "exceptional" case for section 5D(2) (or section 13(2)) to apply.

Once a plaintiff establishes that the defendant's conduct has caused the plaintiff's loss, the second element, "remoteness" will need to be satisfied. Remoteness concerns the extent of the damage for which a defendant will be liable. This is addressed by considering whether the damage that is alleged to have flowed from the breach was "reasonably foreseeable": *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd*.¹⁸⁹

¹⁸⁵ *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506

¹⁸⁶ *Pledge v RTA* (2004) 205 ALR 56

¹⁸⁷ *Medlin v State Government Insurance Commission* (1995) 182 CLR 1

¹⁸⁸ *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48

¹⁸⁹ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* (The "Wagon Mound" (No 1)) [1961] AC 388

"Defences" to negligence

Voluntary assumption of risk and obvious risks

The concept of "obvious risk" is relevant to establishing the common law complete defence of *volenti non fit injuria* (no wrong is done to one who is willing) and whether an activity is a recreational activity (discussed below).

The common law defence of *volenti non fit injuria* entails establishing that a plaintiff both knew of a risk and voluntarily agreed to incur the risk: *Imbree v McNeilley*.¹⁹⁰ In contrast to the common law position, section 16 of the CLA TAS imposes a presumption on a plaintiff that they were aware of obvious risks. An obvious risk, as defined in section 15, includes risks that:

- are patent or a matter of common knowledge;
- have a low probability of occurring;
- are not prominent, conspicuous or physically observable.

Under section 15, a risk is not an obvious risk merely because a warning about the risk has been given.

If a court finds that a risk is an obvious one (as defined above), this means that pursuant to section 16 a person is presumed to be aware of that risk. However, this does not lead to an automatic finding of no breach of duty. The finding of obvious risk simply makes it easier for a defendant to establish the common law defence of voluntary assumption of risk because at common law, a court must consider whether the plaintiff had actual knowledge of a risk: *Canterbury Municipal Council v Taylor*.¹⁹¹

Section 17 also assists defendants. It states that a defendant will not owe a duty to warn of an obvious risk unless:

- the plaintiff has requested advice or information from the defendant;
- there is a requirement for the defendant to warn the plaintiff; or
- the defendant is a professional.

Recreational activities

Where personal injury results from an obvious risk relating to a dangerous recreational activity engaged in by the plaintiff, a defendant will not be liable even if the plaintiff was not aware of the risk (section 20).

The concept of "obvious risk" is discussed immediately above. However, the inquiry into whether an activity is a "dangerous recreational activity" requires consideration of whether a "recreational activity" involves "a significant risk of physical harm" (section 19). According to section 19, a "recreational activity" may include any one of the following:

- any sport (whether or not the sport is an organised activity);
- any pursuit of activity engaged in for enjoyment, relaxation or leisure.

Case law reflects the broad definition, suggesting that a recreational activity can be an activity either purely for recreational purposes or for exercise and wellbeing. Recreational activities include running down a sand dune, cycling and attending a gym class (see *Kelly v State of Queensland*;¹⁹² *Simmons v Rockdale City Council*¹⁹³). Contrastingly, courts have taken a restrictive approach on what constitutes a "dangerous" recreational activity. Extreme sports such as air gliding will be deemed "dangerous" (*Echin v Southern*

¹⁹⁰ *Imbree v McNeilley* [2008] HCA 40

¹⁹¹ *Canterbury Municipal Council v Taylor* [2002] NSWCA 24

¹⁹² *Kelly v State of Queensland* [2013] QSC 106

¹⁹³ *Simmons v Rockdale City Council* [2013] NSWSC 1431

*Tablelands Gliding Club*¹⁹⁴), while more common activities such as riding a motorcycle or boarding a chair lift will not be sufficient (see *Nair-Smith v Perisher Blue Pty Ltd*¹⁹⁵).

Accordingly, in circumstances where a plaintiff has engaged in a dangerous recreational activity and, as a result of an obvious risk, is injured, a defendant may rely on the common law defence of voluntary assumption of risk (discussed above). At common law, the defence of voluntary assumption of risk has been applied in a number of circumstances. *Rootes v Shelton*¹⁹⁶ held that participants in a sport or a game voluntarily assume risks inherent in the activity. That is to say, there is no liability for any damage suffered that occurs reasonably within the parameters of the game, although this will not serve as a defence if the injury occurs during the game, but far outside the rules of the game.

Inherent risks

The CLA TAS does not include provisions dealing with inherent risks and accordingly, this is dealt with under common law in Tasmania.

In *Rootes v Shelton*, Chief Justice Barwick said: "By engaging in a sport or pastime the participants may be held to have accepted the risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are."

The current analysis may be that apart from a duty to warn, there is no liability on the materialisation of an inherent risk.

Inherent risks may give rise to a duty to warn, but apart from that, they are risks that exist despite taking reasonable care. Other than upon a failure to warn, if an inherent risk comes to fruition, the injury does not give rise to a liability to pay damages.

A risk may be classed as an inherent risk where "the harm suffered by the appellant resulted from the materialisation of a risk that could not be avoided by the exercise of reasonable care and skill" as explained in *Paul v Cooke*.¹⁹⁷

In *Dodge v Snell*,¹⁹⁸ the court considered what a reasonable jockey in the defendant's position would have done by way of response to the risk. In assessing what was reasonable, it was necessary to take into account all the circumstances. The circumstances included the fact that the jockeys were engaged in a sport, that the sport of horse-racing had inherent risks and that the rules and the imperative that every jockey must use his best endeavours to win.

Risk warnings

Section 39 of the CLA TAS provides that there is no duty of care owed to a plaintiff for a recreational activity where a risk warning has been provided. Although a risk warning may be given orally or in writing and it need not be understood by the person receiving it, it does need to warn of the general nature of the particular risk and the risk warned of must be inherent or incidental to the activity.

In *Action Paintball Games Pty Ltd (in liquidation) v Barker*,¹⁹⁹ no duty of care was owed to a child who tripped in bushland while playing laser tag, as a risk warning of the perils of running through the bushland had been provided. However, in *Alameddine v Glenworth Valley Horse Riding Pty Ltd*,²⁰⁰ a risk warning was found to be ineffective where a quad bike instructor rode much faster than his inexperienced participants who tried to keep up. This resulted in the plaintiff falling and the fall was not found to be a risk inherent or incidental to the quad bike riding activity.

¹⁹⁴ *Echin v Southern Tablelands Gliding Club* [2013] NSWSC 516

¹⁹⁵ *Nair-Smith v Perisher Blue Pty Ltd* [2013] NSWSC 727

¹⁹⁶ *Rootes v Shelton* (1967) 116 CLR 383

¹⁹⁷ *Paul v Cooke* [2013] NSWCA 311

¹⁹⁸ *Dodge v Snell* [2011] TASSC 19

¹⁹⁹ *Action Paintball Games Pty Ltd (in liquidation) v Barker* [2013] NSWCA 128

²⁰⁰ *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219

Contractual waivers

There is no equivalent in the CLA TAS to section 5N in the CLA NSW, which provides a waiver of contractual duty for recreational activities as a defence for claims in negligence.

Contributory negligence

The standard for determining contributory negligence is set out in section 23 of the CLA TAS and the *Wrongs Act 1954* (Tas).

Pursuant to section 23 of the CLA TAS, the principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent.

Section 4 of the *Wrongs Act 1954* provides that where a person suffers damage partly as the result of that person's wrongful act, and partly as the result of the wrongful act of any other person, an action in respect of that damage is not defeated by reason of the wrongful act of the person suffering the damage. However, the damages recoverable in respect thereof shall be reduced to such extent, up to 100%, as the court thinks just and equitable, having regard to the plaintiff's share in the responsibility for the damage.

For the purpose of apportioning liability under section 4 of the *Wrongs Act 1954*, section 23(2) of the CLA TAS provides that:

- the standard of care required of the person who suffered harm is that required of a reasonable person in the position of that person; and
- the matter is to be determined on the basis of what that person knew or ought to have known at the time.

Proportionate liability

A plaintiff's loss will frequently be the result of wrongdoing by more than one person (i.e. a concurrent wrongdoer). A concurrent wrongdoer is a person who is one of two or more persons whose acts or omissions cause, independently of each other or jointly, the damage or loss that is the subject of the claim.

In such cases, the CLA TAS provides a means to allocate (apportion) responsibility as between the various wrongdoers (Part 9A). Section 43B allows the court to consider the role and responsibility of concurrent wrongdoers without those wrongdoers being joined to the proceedings. Section 43A applies to the following claims:

- a claim for economic loss or damage to property in an action for damages arising from a failure to take reasonable care but not including any claim arising out of personal injury; and
- a claim for economic loss or damage to property in an action for damages under section 236 of the *Australian Consumer Law 2010* (Tasmania).

Pursuant to section 43B, if a claim is apportionable, a defendant is only liable for the loss or damage suffered by the plaintiff for which that defendant is responsible. A court may not give judgment against the defendant for any more than that amount, irrespective of whether the other wrongdoer is a party to the proceedings.

Intoxication and criminal activity

Intoxication of a person is generally irrelevant to either the existence of the duty of care, however, in Tasmania it is relevant to the issue of contributory negligence. A person under the influence of alcohol or a drug is intoxicated within the meaning of section 5(5) of the CLA TAS. Section 5(6) clarifies that a person who has taken a drug for a medicinal purpose is not to be taken to be intoxicated, provided they are able to satisfy the court that they were not aware of the effect of the drug taken.

Pursuant to section 5(1) of the CLA TAS, a person will be presumed to have been contributorily negligent if they are intoxicated. Damages will be reduced by 25%, or a greater or lesser percentage determined by the court to be appropriate in the circumstances (section 5(2)). The onus will be on the plaintiff to satisfy the court that damages ought to be reduced by a percentage of less than 25% on account of contributory negligence (section 5(3)).

Section 5 will not apply where the court is satisfied that the intoxication was not self-induced.

The leading case in Australia which discussed the duty of care owed to intoxicated persons was *Cole v South Tweed Heads Rugby League Football Club Ltd*,²⁰¹ in which Colin Biggers & Paisley acted for the club and defeated the plaintiff's claim. In that case, the High Court held that in ordinary circumstances, no duty of care is owed by the licensee of premises to a person who is served alcohol and, as a result of intoxication, is injured.

Section 6(1) of the CLA TAS provides that no damages are to be awarded if at the time of an incident resulting in death, injury or damage (which is the subject of proceedings), the plaintiff engaged in conduct that constituted a serious offence and that conduct contributed materially to the risk of the death, injury or damage that was suffered.

Section 6(3) defines "serious offence" as an offence that results in a sentence of greater than six months of imprisonment.

Despite these provisions, which exclude damages for plaintiffs engaged in criminal activity that is punishable by imprisonment for greater than six months, it is important to recognise the common law principle precluding criminals from the award of damages (*Henwood v The Municipal Tramways Trust (SA)*²⁰²). The case of *Miller v Miller*²⁰³ suggests that no duty of care exists between participants in serious criminal activity. However, in this case, the claimant was found to have withdrawn from the criminal enterprise prior to the damage, and was therefore owed a duty of care.

Good samaritans and volunteers

Pursuant to section 35B(1) a good samaritan is an individual who provides assistance, advice or care to another person in relation to an emergency or accident in circumstances in which:

- he or she expects no money or other financial reward for providing the assistance, advice or care; and
- as a result of the emergency or accident the person to whom, or in relation to whom, the assistance, advice or care is provided is ill, is at risk of death or injury, is injured, is apparently ill, is apparently at risk of death or injury or is apparently injured.

Under section 35B(2), a good samaritan is not liable in any civil proceeding for anything done or not done by him or her in good faith and without recklessness:

- in providing assistance, advice or care at the scene of the emergency or accident; or
- in providing advice by telephone or by another means of communication to a person at the scene of the emergency or accident.

Under section 35B(3), subsection (2) applies even if the emergency or accident was caused by the good samaritan and under section 35B(4), subsection (2) does not apply to an act or omission of the good samaritan that occurs before the assistance, advice or care is provided by the good samaritan.

Pursuant to section 47(1) of the CLA TAS, a volunteer does not incur civil liability for anything that the volunteer has done in good faith while undertaking community work.

Under section 45(1), a volunteer is defined as an individual who does community work on a voluntary basis, but does not include a worker for the purposes of the *Workplace Rehabilitation and Compensation Act 1988* (Tas) or the *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011* (Tas). Under section 45(2), a person does community work on a voluntary basis if the person:

- receives no remuneration for the work other than remuneration that the person would receive whether or not the person did the work or the reimbursement of reasonable expenses incurred by the person in doing that work; or
- receives remuneration that is not greater than the amount, if any, prescribed by the regulations.

²⁰¹ *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469

²⁰² *Henwood v The Municipal Tramways Trust (SA)* (1938) 60 CLR 438

²⁰³ *Miller v Miller* [2011] HCA 9

Under section 45(3), a person is not to be regarded as doing community work on a voluntary basis if the person is doing that work under an order imposed by the court.

The immunity from civil liability under section 47 does not apply in cases of defamation or in respect of the death or personal injury caused by a motor vehicle if, at the time of the death or personal injury, the vehicle was owned or being driven by a person who, but for section 47(1), would incur liability in respect of the death or personal injury.

The protection given by section 47(1) does not apply to a volunteer:

- who knew or ought reasonably to have known that, at the relevant time, he or she was acting:
 - outside the scope of the community work organised by the community organisation; or
 - contrary to instructions given by the community organisation.
- whose ability to do the community work in a proper manner was, at the relevant time, significantly impaired by alcohol or drugs.

Under section 48(1), a community organisation incurs civil liability that would, but for the operation of section 47(1), be incurred by a volunteer when doing community work organised by the community organisation.

Section 49 provides that an agreement or arrangement has no effect to the extent that it provides for a volunteer to give a community organisation an indemnity against, or to make a contribution to a community organisation in relation to civil liability that a volunteer would incur but for section 47(1) and that the community organisation incurs under section 48(1).

Food donors

Section 35D of the CLA TAS protects those who distribute food that may be donated by others, without payment or reward. A person incurs no civil liability in respect of death or personal injury caused due to the consumption of the donated food if:

- the food donor donated the food:
 - in good faith for a charitable or benevolent purpose; and
 - with the intention that the consumer not pay.
- the food was safe for consumption when it left the donor's possession;
- the food donor informed the person delivering the food about how to handle the food and its potential deterioration; and
- the food donor informed the distributor that the food would remain safe for consumption only for a particular duration of time.

Public and Other Authorities

Part 9 of the CLA TAS applies to claims of any kind for damages for personal injury or death or damage to property resulting from a breach of duty, except civil liability that is excluded by section 3B (discussed above).

Section 39(1) provides that a public authority does not owe a duty of care to a person who engages in a recreational activity to take care in respect of a risk of the activity if a risk warning was provided to the person. Under section 39(2), if a disabled person is engaged in a recreational activity, the authority may rely on the risk warning if it was given to another person (who was not disabled) who accompanied the disabled person, or if the risk warning was provided to the parent of the disabled person.

Section 40 provides that a public or other authority exercising (or failing to exercise) a function of the authority, will not be in breach of a statutory duty unless it was so unreasonable that no authority having the functions of the public authority in question, could properly consider the act or omission to be a reasonable exercise of its functions.

The decision in *Roads and Maritime Services v Grant*²⁰⁴, which dealt with the very similarly worded section 43 of the CLA NSW, clarified that this defence will be available in road authority cases relating to the erection

²⁰⁴ *Roads and Maritime Services v Grant* [2015] NSWCA 138

of road signs, as well as other circumstances. It is consistent with the decision in *Curtis v Harden Shire Council*²⁰⁵, where Harden Shire Council was liable for failing to install signage to indicate roadwork.

However, in *Pyrenees Shire Council v Day*²⁰⁶, it was found that as the council had no knowledge of circumstances which would create a risk of fire, they could not be under a statutory duty to take action to prevent such risk eventuating.

Additionally, section 41 removes the liability of public or other authorities for failure to exercise a regulatory function if the authority could not have been required to exercise the function in proceedings instituted by the plaintiff.

Non-Delegable Duties and Vicarious Liability

Tasmania has not reformed the issue of vicarious liability or non-delegable duty of care. Both are common law based.

For non-delegable duty, the following requirements must be satisfied:

- control/responsibility - the defendant must have had some control over the plaintiff or the plaintiff's property; and
- vulnerability - the plaintiff must have been unable to protect himself and was forced to rely on the defendant's requisite standard of care.

Examples of relationships of the above are: employer/employee, hospital/patient and school/pupil (*Burnie Port Authority v General Jones P/L*²⁰⁷; *New South Wales v Lepore*²⁰⁸; *Kondis v State Transport Authority*²⁰⁹).

An employer can be found vicariously liable for wrongful, unauthorised or negligent acts carried out by an employee during the course of his or her employment. The negligent act or omission takes place during employment when the employee is authorised to undertake the tortious act under the control of the employer. This principle has been endorsed by the High Court in the case of *New South Wales v Lepore*²¹⁰.

In order for vicarious liability to be imposed, there must be a sufficient relationship between the defendant (employer) and the tortfeasor, and the negligence of the tortfeasor must be within the scope of employment *Hollis v Vabu*²¹¹.

The acts of an employee must have been:

- actually or impliedly authorised by the employer; and
- carried out in the course of employment while the employee was acting within the scope of their authority; and
- carried out in the course of employment duties or while the employee was acting incidental to his/her employment duties.

An employer may still be liable for acts of an employee despite the fact that an employee has acted against company directions.

A contractor may also be considered an employee, in which case the employer will be held liable for any tortious act the contractor has undertaken *Hollis v Vabu Pty Ltd*²¹².

In the recent decision of *Prince Alfred College Incorporated v ADC*²¹³, in which vicarious liability was looked at in depth in the context of sexual abuse, the court discussed in obiter that the fact that a wrongful act is a

²⁰⁵ *Curtis v Harden Shire Council* [2014] NSWCA 314

²⁰⁶ *Pyrenees Shire Council v Day* (1998) 192 CLR 330

²⁰⁷ *Burnie Port Authority v General Jones P/L* (1994) 179 CLR 520

²⁰⁸ *New South Wales v Lepore* (2003) 212 CLR 511

²⁰⁹ *Kondis v State Transport Authority* (1984) 154 CLR 672

²¹⁰ *New South Wales v Lepore* (2003) 212 CLR 511

²¹¹ *Hollis v Vabu* (2001) 207 CLR 21

²¹² *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21

²¹³ *Prince Alfred College Incorporated v ADC* (2016) 258 CLR 134

criminal offence may not preclude the possibility of a finding of vicarious liability. The court discussed that it is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion. Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability.

In *CCIG Investments Pty Ltd v Schokman*²¹⁴ the High Court recently considered the application of vicarious liability in circumstances where an intoxicated employee in shared accommodation urinated on the face of another employee. The Court considered the tortious act needed to be committed in the "*course or scope of their employment*" and required more than the employment provided the opportunity for the incident. The High Court found the employer was not vicariously liable for the actions of the employee, with the Court concluding "*Nothing in the present case points to the drunken act in question being authorised, being in any way required by, or being incidental to, the employment. In truth it had no real connection to it.*"

Finally, in *Bird v DP*²¹⁵, the High Court confirmed that, in the absence of a relationship of employment between the Diocese and the offending priest in that case, Father Gregory Coffey, the Diocese could not be held vicariously liable for Coffey's assaults committed against DP. The case was "*the first time [the High Court] has been asked to consider whether, absent a relationship of employment between a wrongdoer and a defendant, a diocese or a bishop may be held vicariously liable for the unlawful actions of a priest who sexually abuses a child*".

The High Court maintained its refusal to follow the approach taken in overseas jurisdictions, particularly in the United Kingdom and in Canada, where vicarious liability has been expanded in recent years. The High Court noted the uncertainty created in those jurisdictions by the imposition of vicarious liability outside of strict employment relationships.

*"The redrawing of the boundaries in Canada and the United Kingdom of the relationships between a tortfeasor and one who may be liable for the conduct of the tortfeasor under the rubric of "vicarious liability" has previously been rejected by this Court on a number of occasions at a level of principle. Moreover, subsequent history has also shown that the expansion adopted by those countries has not been without difficulty."*²¹⁶

The High Court stated that the approaches adopted in the United Kingdom and in Canada "do not reflect the current state of the law in Australia".

The High Court further stated that it is for the legislatures to expand vicarious liability.

In a separate judgment, Justice Gleeson dissented from the majority, concluding at [176] that the "*relationship between Coffey and the Diocese is fairly described as 'akin to employment' by reason of its characteristics that are relevant to the justifications for the imposition of strict liability, and because Coffey cannot be classified as an independent contractor*". However, Justice Gleeson held that the primary judge and the Court of Appeal erred in finding that the assaults were committed by Coffey in the course of his relationship with the Diocese.

Mental harm

Although a person is able to recover for pure mental harm (i.e. where there are no physical disabilities), this is only available in certain circumstances.

Section 29 of the CLA TAS provides the following definitions of mental harm:

- consequential mental harm means mental harm that is a consequence of a personal injury of any other kind;
- mental harm means impairment of a person's mental condition;
- pure mental harm means mental harm other than consequential mental harm.

Section 31 provides that in any civil proceeding a plaintiff is not prevented from recovering damages merely because the personal injury arose wholly or in part from mental or nervous shock.

²¹⁴ *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21

²¹⁵ *Bird v DP (a Pseudonym)* [2024] HCA 41

²¹⁶ *Bird v DP (a Pseudonym)* [2024] HCA 4 [50]

Under section 32, in order to recover damages for pure mental harm the plaintiff must establish that:

- they witnessed, at the scene, the victim being killed, injured or put in peril or the immediate aftermath of the victim being killed or injured; or
- they are a close member of the family of the victim.

For a plaintiff to be considered a "close member of the family" they must be:

- a parent of the victim or other person with parental responsibility for the victim;
- the spouse or partner of the victim;
- a child or stepchild of the victim or any other person for whom the victim has parental responsibility; or
- a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim.

Given the various forms of media, the requirement that the plaintiff "witness, at the scene" is somewhat unclear. At the scene would imply that the person is physically present at the time. The question then arises whether a plaintiff would be able to claim if they were, for example, watching live footage of the victim "being killed, injured or put in peril" on the internet. Witnessing the aftermath of an accident is in most circumstances insufficient for a plaintiff to recover for pure mental harm. In 2010, however, the High Court of Australia found in *Wicks v State Rail Authority of New South Wales*²¹⁷ that "there are cases where death, or injury, or being put in peril takes place over an extended period, and this was such a case."

Section 33 provides that a defendant is only liable for a "recognised" psychiatric illness.

Section 34(1) provides that the defendant does not owe a duty to the plaintiff to take care not to cause the plaintiff mental harm unless a reasonable person in the position of the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care was not taken.

The circumstances of the case in respect of pure mental harm in section 34(2) include:

- whether or not the mental harm was suffered as a result of a sudden shock;
- whether or not there was a pre-existing relationship between the plaintiff and the defendant.

In the recent decision of *Optus Administration Pty Limited v Glenn Wright*,²¹⁸ which dealt with the similarly worded section 32 of the CLA NSW, the Court of Appeal overturned a lower court judgment and damages in excess of \$3.9 million in favour of the victim of an attempted murder, finding that the appellant occupier of the premises did not owe a duty of care to protect him from mental harm. The court found that it was only conduct which put the plaintiff's life in peril, that the appellant should have foreseen might cause a person of normal fortitude to suffer a psychiatric illness. Without a finding as to the foreseeability of such conduct, the appellant was under no duty to take reasonable care to prevent such conduct.

²¹⁷ *Wicks v State Rail Authority of New South Wales* [2010] HCA 22

²¹⁸ *Optus Administration Pty Limited v Glenn Wright* [2017] NSWCA 21

Assessment of damages for personal injury

General damages (non-economic loss)

Non-economic loss or general damages are addressed in section 27 of the CLA TAS.

On or before 1 July each year, the Minister is to publish a notice in the Gazette specifying the amounts that are Amount A and Amount B for the financial year commencing on that 1 July.

"Amount A" is calculated with the following formula and rounded off in accordance with section 27(5) of the CLA TAS:

$$A = A_0 \times \frac{C}{D}$$

A is the value in dollars of Amount A for the relevant financial year;

A₀ is \$4,000;

C is the value of the CPI figure for Hobart for the March quarter immediately preceding the financial year in which the threshold amount is to apply;

D is the value of the CPI figure for Hobart for the March quarter 2003; and

"Amount B" is five times Amount A.

For the period 1 July 2024 to 30 June 2025, Amount A is \$7,000 and Amount B is \$35,000.

Damages are not awarded unless the amount of non-economic loss is assessed to be more than Amount A.

If the amount of non-economic loss is assessed to be more than Amount A but not more than Amount B, damages awarded for economic loss are calculated as follows:

$$\text{Amount awarded} = 1.25 \times (\text{amount assessed minus Amount A})$$

If the amount of non-economic loss is assessed to be more than Amount B, damages awarded for non-economic loss are an amount equal to the amount assessed.

There is no cap on damages for non-economic loss, however, in determining such damages, under section 28 a court may refer to earlier decisions of that or other courts of any jurisdiction within Australia, for the purpose of establishing the appropriate award in the proceedings. For that purpose, the parties to the proceedings may bring the court's attention to awards of damages for non-economic loss in those earlier decisions.

In the recent decision of *ZAB v ZWM* the Tasmanian Supreme Court awarded over \$5 million in damages for abuse of the plaintiff by his father (who was in prison and did not defend the matter) from the ages of 10 to 15 and ostracized from his family and harassed by his father when he disclosed the abuse. The decision includes an evaluation of the assessment of damages in historical abuse cases.²¹⁹ The plaintiff completed a law degree and was employed at a large commercial firm as a clerk. The Court's assessment of economic loss relied on the more modest scenario of career legal earnings calculated by a forensic accountant which saw the Plaintiff earning at least \$300,000 gross per annum, for a total of over \$1.5 million for past and over \$2 million for future loss with a discount of 3%. Although the Court considered that a zero adjustment for past contingencies would be appropriate in the matter, his Honour Chief Justice Blow awarded a prejudgment interest on past economic loss at 4% equating to \$577,000. This case highlights the Court's broad discretion in awarding prejudgment interest, setting interest rates and what it takes into consideration including how the claim is defended in granting aggravated damages.

²¹⁹ *ZAB v ZWM* [2021] TASSC 64.

Out of pocket expenses

Out of pocket expenses are generally medical expenses incurred in order to treat the injuries and disabilities suffered as a result of the negligence of the defendant. These expenses are claimable as damages. Out of pocket expenses may take the form of past out of pocket expenses and future out of pocket expenses.

Past out of pocket expenses can generally be easily quantified by reference to government notices and with receipts from pharmacies and other medical service providers. Future out of pocket expenses are typically the subject of expert opinion and comment involving an assessment of the expenses associated with the plaintiff's claimed injury that are likely to be incurred in the future.

Economic loss

Damages for loss of earning capacity are provided for under section 26 of the CLA TAS. Section 26(1) provides that where a person is entitled to damages for loss of earning capacity, a court must not award damages on the basis that the person was, or may have been capable of, earning income at greater than three times the adult average weekly earnings as last published by the Australian Bureau of Statistics before damages are awarded.

Where economic loss arises as a consequence of mental harm, section 35 (as discussed above) provides that no award of damages will be given unless the harm consists of a recognised psychiatric illness.

While technically separate from economic loss under section 26, pursuant to the decision of *Fox v Wood*²²⁰, a plaintiff is entitled to recover the income tax paid in respect of refundable workers' compensation payments. This only applies, of course, if the plaintiff has made a claim for workers' compensation and has also received weekly payments.

Section 25(1) provides that the maximum amount of damages that can be awarded for economic loss due to the loss of superannuation contributions is the relevant percentage of damages payable for the deprivation or impairment of the earning capacity on which the entitlement to those contributions is based. This means that a plaintiff can only recover lost superannuation at the compulsory contribution rate on the damages actually awarded for economic loss.

Gratuitous care and services

Damages for gratuitous assistance are addressed in sections 28B and 28BA of the CLA TAS.

Gratuitous services are defined in section 3 of the CLA TAS to include services of a domestic nature or services relating to nursing or attendance provided to a person for which that person does not pay or is not liable to pay.

A person will only be entitled to damages for gratuitous services if those services are required as a result of injuries to that person caused by the negligence of another.

Section 28B(2) restricts the circumstances where a plaintiff can be awarded gratuitous domestic assistance. Damages will only be awarded to a plaintiff for gratuitous assistance if the services have been or are to be provided to that person for more than six hours per week and for more than six 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: section 28B(3).

Pursuant to section 28BA of the CLA TAS, damages may also be recovered due to a loss of capacity to provide gratuitous services to another. An entitlement to such damages will only arise if those services have been provided or are to be provided for more than six hours per week for six consecutive months.

Discount rate

If an award for damages is made under the CLA TAS and it includes a component assessed as a lump sum for future loss, section 28A applies a discount rate to that sum. The discount rate is 5%.

²²⁰ *Fox v Wood* (1981) 148 CLR 438

Exemplary damages

There are no provisions that allow or prohibit the awarding of exemplary damages. Tasmanian courts can still award exemplary damages in certain circumstances, however, they do so with restraint, generally only when compensatory damages are insufficient to punish, deter or condemn the conduct of the defendant.

In cases of negligent conduct, the award of exemplary damages is rare. The High Court case of *Gray v Motor Accidents Commission*²²¹ held that for an award of exemplary damages, there must be conscious wrongdoing in scornful disregard of another's rights.

²²¹ *Gray v Motor Accidents Commission* (1998) 196 CLR 1

Child abuse

The *Limitation Amendment Act 2017* (Tas) amended the *Limitation Act 1974* (Tas) (**Limitation Act**) to lift limitations in respect of personal injury actions founded on sexual or serious physical abuse and psychological abuse that arises from the sexual or physical abuse of a child.

The *Justice Legislation Amendment (Organisational Liability for Child Abuse) Act 2019*, as at 1 May 2020, amended the CLA TAS in relation to the liability of organisations for personal injury child abuse actions, and the Limitation Act Division 2, 5C in relation to setting aside previous settlements if the court is satisfied it is in the interests of justice to do so.

Duty of care

The CLA TAS now imposes a prospective duty on organisations that wholly or partly hold responsibility over a child to prevent child abuse from occurring. This provision reverses the onus of proof in negligence by establishing a duty which the organisation must demonstrate it has adhered to by showing reasonable precautions were taken and ensuring proper systems were in place and observed (see section 49H).

If child abuse occurs, there is a presumption that the organisation failed in its duty of care unless it can prove that reasonable precautions were taken to prevent the abuse. Factors that a court may take into consideration when determining if an organisation took reasonable care are contained in section 49H(4) of the CLA TAS.

Vicarious liability

The common law position is outlined by the High Court of Australia in *Prince Alfred College Incorporated v ADC*.²²² An organisation is vicariously liable for child abuse perpetrated by an employee if the employee took advantage of their special role that provided them the occasion to perpetrate the abuse. In determining if the employee's role provided the occasion for the abuse, a court is to take into account the authority, power or control over the child, the trust of the child and the ability to achieve intimacy with the child.

The High Court recently handed down judgment following an appeal from a decision of the Queensland Court of Appeal case of *CCIG Investments Pty Limited v Schokman* [2023] HCA 21²²³. The appeal concerned whether an employer was liable for a tortious act committed by one employee against another in circumstances where the act occurred in shared staff accommodation in which the employees were required to live. The High Court found that the employer was not liable for the actions of their employee as the act in question was not considered to be in the course or scope of their employment. The High Court focused on the identification of what an employee was employed to do, and held out as being employed to do, as being central to any inquiry about the "course of employment".

Vicarious liability is now codified in the CLA TAS at section 49J in addition to the common law along the lines of the Prince Alfred College case, and holds that an organisation is vicariously liable for child abuse by an employee, looking at the authority, power, control, trust and ability to achieve intimacy.

Vicarious liability in historic abuse cases in Victoria has been discussed in the recent cases of *DP v Bird*²²⁴ and *O'Connor v Comensoli*²²⁵. In both cases, the court found the relevant church entity vicariously liable for the criminal actions of an assistant priest. In *O'Connor v Comensoli*, the Defendant's application for leave to appeal to the Court of Appeal was refused (the grounds of appeal in that case were ultimately limited to quantum). As noted earlier in this chapter, the High Court (in November 2024) confirmed that in the absence of a relationship of employment between the Diocese and the offending priest in that case, Father Gregory Coffey, who the Trial Judge found was not employed by the Diocese, Diocese could not be held vicariously liable for Coffey's assaults committed against DP.

²²² *Prince Alfred College Incorporated v ADC* [2016] HCA 37

²²³ *CCIG Investments Pty Ltd v Schokman* [2022] HCATrans 156

²²⁴ *DP v Bird* [2021] VSC 850

²²⁵ *O'Connor v Comensoli* [2022] VSC 313

In *PCB v Geelong College*²²⁶, the court found that vicarious liability did not extend to the "volunteer" abuser.

Prospectively, section 48(1) of the CLA TAS provides that community organisations *may* be liable for torts committed by volunteers carrying out community work in good faith.

Proper defendant

Section 49M-R of the CLA TAS enables the appointment of a proper defendant with suitable assets for cases brought against an unincorporated association.²²⁷

Prior to that amendment to the CLA TAS, a prospective plaintiff was not able to sue an institutional defendant that was an unincorporated association, because an unincorporated association is not recognised by law as a juridical entity. The inability to pursue such a claim in the context of church institutions is more commonly referred to as an 'Ellis Defence'.

This reform applies prospectively and retrospectively, and overcomes the impediment that plaintiffs could not previously bring proceedings against unincorporated associations because they do not exist as a juridical entity.

Revisit claims and setting aside prior deeds

Recent amendments to limitations in the *Justice Legislation Amendment (Organisational Liability for Child Abuse) Act 2019* (Tas) permit plaintiffs, in certain circumstances, to apply for a previous settlement or judgment to be set aside, overturning the finality of settlement - this is commonly referred to as a 'revisit claim'. Should a defendant rely on a prior settlement as a bar to proceedings, plaintiffs are able to apply to the Supreme Court seeking orders setting aside the prior settlement.

A previously settled claim may be set aside by a Court "on the grounds that it is in the interest of justice to do so". Matters to be taken into account by the Court include the amount of the agreement, the relative strengths of the bargaining position of the parties, the conduct of the parties as it relates to the agreement and whether the Court considers it to have been oppressive. If a settlement or judgment is set aside, the Court can still take into account any amount previously paid.²²⁸

In the recent decision of *Steen v Trustees of Diocese of Tasmania*,²²⁹ the Court held a deed of settlement was to be set aside largely on the basis that the Defendant's denial of liability in 1994 was found to be oppressive. The Court made note of the conflict raised between Defendant's denials in 1994 and the acceptance of responsibility in the current proceeding, a course available to the Church in negotiations at the time. In arriving at his decision, his Honour Justice Brett considered the disparity in bargaining positions between the Plaintiff and Defendant, which were exacerbated during the previous negotiation by the personal circumstances of the Plaintiff including his young age and poor psychological health.

The recent decision of *Steen* provides insight into the considerations taken in awarding damages by the Court in an institutional case. The Court considered the following factors in award of an additional \$125,000 in aggravated damages:

- (a) the nature and circumstances of the sexual abuse;
- (b) the Church's prior knowledge of the perpetrator's propensity to commit sexual abuse against children and negligence in leaving him in a position with direct access to children;
- (c) failure of Bishop Newell to arrange or put in place any personal support or counselling for the Plaintiff;

²²⁶ *PCB v Geelong College* [2021] VSC 633

²²⁷ Valid from 1 May 2020

²²⁸ Section 5(C) *Limitation Act 1974*

²²⁹ *Steen v Trustees of Diocese of Tasmania* [2024] TASSC 3

- (d) previously mentioned oppressive factors surrounding negotiation for the 1994 settlement;
and
- (e) the serious and ongoing effects of the abuse perpetrated by the Priest against the Plaintiff and its ongoing effects not being properly appreciated by the Defendant.

In addition the Court made an award of \$100,000 in exemplary damages due to the particular factors of the Church's contumelious behaviour previously in mentioned in subparagraphs *B to C*. Applying the 'broad brush' approach, the Court awarded a sum of \$350,000 in loss of earning capacity. Notably, no deduction of the amount paid under the deed was ordered as the Court noted the Defendant did not contribute at all to the 1994 settlement sum and commented on the Defendant's conduct in utilising this fact in effort to reduce the settlement amount.

Commission of inquiry into the Tasmanian Government's responses to child sexual abuse in institutional settings

The Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (**The Commission of Inquiry**) was in response to growing concerns over child sexual abuse in Tasmanian Government institutions prompted by media reports of incidents of abuse and inadequacies in the Government's response.²³⁰

The Commission of Inquiry was informed by over 143 submissions, 132 consultations with Commissioners and over 150 site visits, research, hearings and roundtables. The Commission of Inquiry primarily focused on responses to child sexual abuse since 2000 as the National Royal Commission in 2020 thoroughly examined abuses in institutions prior to this period. The institutions of focus consisted of school, health services, youth detention and out of home care.

The following recommendations were provided by the Commission:

1. Establishing a new Commission for Children and Young People be established with the focus on protecting and monitoring children's rights amongst in organisations whilst acting a source of information and guidance for Tasmanian organisation on children's safety;
2. Encouraging the Tasmanian Government to establish a coordinated statewide response and action plan to address to child sexual abuse and harmful sexual behaviours which places a focus on prevention strategies;
3. Increased involvement of children, young people and adult victim survivors of child sexual abuse in the Tasmanian Government's policy development and decision making surrounding government institutions;
4. Implementing stronger mechanisms for institutions to protect children from adults who pose a risk to them particularly surrounding responses to allegations of staff perpetrated abuse and resulting disciplinary actions;
5. Showcasing greater care, compassion and investment in protecting and healing marginalised children specifically through comprehensive historical audits of all relevant records held by the Tasmanian Government to assist the identification of all allegations of child abuse;
6. Ensuring staff and volunteers working with Children undergo the appropriate training and ongoing professional development to maintain and improve upon the knowledge and skills needed to work with children and young people;
7. Developing a workforce strategy for the Tasmanian Child and Family Welfare which continually invests in the development of specialist child care skills and recognises the importance of staff working in the child safety and youth justice systems;

²³⁰ *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings* (Report, August 2023) vol 1

8. Constructing an independent Child Sexual Abuse Reform Implementation Monitor to oversee and report on the Tasmanian Government's progress on implementing the Commission of Inquiry's recommendations.

In summary, the Commission of Inquiry's report was to provide further understanding of the risks of sexual abuse across Tasmanian Government institutions which the National Royal Commission did not specifically address. The Commission found that while progress has been made by the Tasmanian Government in response to allegations and incident of child sexual abuse in institutions, further guidance and direction on effective management of risks and extended care to children at risk & survivors should be a focused area for improvement. In improving responses, a greater attention to child safety needs to be embedded into the decision making and common practices of government departments.

Dust diseases

The limitation period for claiming damages

The *Limitation Act 1974* (Tas) section 5A (3) imposes the limitation of 3 years commencing on the date of discoverability of the illness. A judge may extend the period of limitations to 6 years commencing the date of discoverability (section 5A(5)).

Procedure - how a claim is instituted

It is intended that all workers with a compensable disease must go through the statutory scheme prior to commencing Common Law action (*Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011* (Tas) Bill).

Tasmania operates under an asbestos compensation scheme, governed by *the Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011* (Tas). This scheme entitles workers who were exposed to asbestos and family members of a deceased worker who has died due to an asbestos-related disease to compensation.

The scheme has the following limitation periods. Following the diagnosis of an asbestos-related disease, if life expectancy is less than 2 years there is a 12 month limit to apply for compensation. If life expectancy is more than 2 years there are no time limits to apply for compensation.

Once diagnosed, if the individual has a non-imminently fatal disease, they are assessed by the impairment assessor. Over 10% whole person impairments are referred onto the medical panel, and under 10% impairments are not entitled to compensation.

The asbestos compensation commissioner receives medical panel determinations, and determines most claims within 28 business days. Rejected applicants may refer to the Tasmania Civil Administrative Tribunal.

Payment for an asbestos-related disease with less than 2 years of life expectancy is up to 360 compensation units, which in 2021 was approximately \$343,519.20. Those over 80 years of age are not entitled to compensation. If diagnosed with a non-imminently fatal disease, the lump sum payment is based on the level of impairment. Individuals who have under 10% impairment are not entitled to compensations.

Plaintiffs who have already received damages through common law are not entitled to compensation. If individuals have received a determination from the Asbestos Compensation Commissioner (**ACC**) under the compensation scheme they may still take action at common law but must notify the ACC within 20 business days of commencing the action.

For Common Law claims, Tasmania allows for provisional damages for asbestos related conditions and, if the person develops a different dust-related condition, damages at a future date (*Civil Liability Act 2002* (Tas) section 8B (1)).

What is considered a dust related condition?

Section 8B(2) of the *Civil Liability Act 2002* (Tas) defines a dust-related disease as –

- (a) any of the following diseases:
 - (i) aluminosis;
 - (ii) asbestosis;
 - (iii) asbestos-induced carcinoma;
 - (iv) asbestos-related pleural diseases;
 - (v) bagassosis;
 - (vi) berylliosis;
 - (vii) byssinosis;
 - (viii) coal dust pneumoconiosis;
 - (ix) farmers' lung;
 - (x) hard metal pneumoconiosis;
 - (xi) mesothelioma;
 - (xii) silicosis;
 - (xiii) silico-tuberculosis;
 - (xiv) talcosis; or
- (b) any other pathological condition of the lung, pleura or peritoneum that is attributable to dust.

Significant cases

There have been no reported dust disease cases in Tasmania.

The type of industries that are affected

According to the *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011* (Tas), workers who were exposed to asbestos are able to lodge a claim with the statutory compensation scheme (section 12). Division 2 of the act described individuals who were or were not workers.

Appendix

Recent decisions in relation to particular injuries in Tasmania

Back

Scattergood v Commonwealth [2022] TASSC 21

Plaintiff was a 46-year-old female who suffered a whiplash injury and adjustment disorder as a result of a motor vehicle incident where her vehicle was hit from behind. Her symptoms worsened after she was involved in a subsequent motor vehicle incident less than three months later.

Injuries: Whiplash causing back and neck injuries. It also caused a secondary psychiatric reaction in the form of an adjustment disorder with a depressed mood.

General damages: \$100,000

Blow CJ (13 April 2022)

Spaulding v Eirth [2016] TASFC 5

Plaintiff was a 35-year-old male who suffered injury to his back and right foot as a result of a motor vehicle accident.

Injuries: Injury to back and right foot.

General damages: \$90,000, increased from \$75,000

Blow CJ, Wood and Pearce JJ (7 September 2017)

O'Neill v Rhodes [2016] TASSC 17

Plaintiff was a 37-year-old male who was in a motor vehicle when he was struck from behind.

Injuries: Plaintiff suffered injury to his lower back with some pain and discomfort in his neck, left shoulder and left wrist.

General damages: \$60,000

Porter J (30 March 2016)

Keller v Phillips [2019] TASSC 35

Applicant with pre-existing injuries relating to lumbar back pain, suffered further injury after collision with respondent in motor vehicle. Applicant was riding motorcycle at time of collision, causing permanent and disabling aggravation of applicant's thoracolumbar spine. Respondent's negligence caused the collision. Request for special damages denied.

Injuries: Permanent and disabling aggravation of applicant's thoracolumbar spine.

General damages: \$90,000

Estcourt J (21 August 2019)

Hand

Dann v Port Sorell Bowls Club Inc [2020] TASSC 47

Plaintiff (male, 50 years old) was a volunteer at the Port Sorell Bowls Club Inc and was operating a barbeque to cater for a barefoot bowlers evening. The fat from the barbeque was collected by using a ceramic mug positioned under the barbeque plate. The mug caught fire and the fat spilt burning the plaintiff's hand.

Injuries: Partial thickness burns involving the three middle fingers and the dorsum of his right hand (dominant hand) causing significant pain, extensive scarring and restriction of movement. Secondary psychiatric illness (anxiety, depression and alcohol abuse disorder).

General damages: \$80,000

Wood J (28 August 2020)

Cooper v Neubert [2017] TASSC 33

Plaintiff (female, age unknown) was shot in the hand while attempting to stop a murder, sued for battery and negligence.

Injuries: Suffered significant impairment with the loss of two fingers.

General damages: \$175,000

Estcourt J (26 May 2017)

Multiple injuries

Hendrex v Keating [2016] TASSC 20

Plaintiff (age unknown) suffered brain, wrist and shoulder injuries while replacing the roof cladding of a residence. The plaintiff was paid for this work by the defendant who lived at the residence. The plaintiff attempted to descend a ladder after working on the roof but fell and landed on a concrete driveway.

Injuries: Suffered brain, wrist and shoulder injuries.

General damages: \$210,000

Blow CJ (13 April 2016)

Raper v Bowden [2016] TASSC 35

Plaintiff, a 24-year-old female, fell from a quad bike in the course of working on a farm. The plaintiff was not wearing a helmet at the time of the incident, had not been adequately trained and the quad bike had inoperative rear brakes.

Injuries: She suffered brain damage causing her to be in a minimally conscious state with no functional movement of limbs, requiring 24 hour care.

General damages: GBP 250,000 (approximately AUD \$420,000 at time of judgment (2016))

Estcourt J (15 July 2016)

Public Trustee as Administrator of the Estate of Mathew Leonard v Atilio [2023] TASSC 33

Mr Leonard, a 28 year old male was involved in an altercation with a 'crowd controller' outside a Hobart nightclub. It is described that after Mr Leonard was escorted out of the venue due to intoxication, he shortly returned and hit the first defendant. The first defendant then struck Mr Leonard causing him to fall backwards and hit his head on the road.

Injuries: He suffered a traumatic brain injury, causing limited mobility, loss of brain function, bladder dysfunction and post traumatic erectile and ejaculatory function. He is in need of 24 hour care due to both his physical and mental disability.

General Damages: \$350,000 (pain and suffering, loss of amenities)

Note significant awards were provided for care and loss of earning. Total damages of proceeding exceeded \$13,600,000

Munting v Pollard [2024] TASSC 30

The Plaintiff alleged that when she was a student at a State run secondary institution between the ages of 14 and 15, she was sexually abused by Marcus Pollard, a teacher employed by the State of Tasmania, through the auspices of the Education Department. The State accepted it was vicariously liable for Pollard's tortious conduct.

General Damages Significant awards were made against Pollard and the State for general damages and for a loss of Munting's earning capacity totalling \$2.1 million.

Garling v Patiniotis [2024] TASSC 29

Plaintiff, (female, aged 67 at trial) underwent a surgical procedure for treatment of haemorrhoids. The plaintiff alleged as a result of the medical practitioners negligence, the procedure caused nerve damage resulting in permanent physical and psychological injury. Some of which were an aggravation of pre existing conditions.

Injuries: The plaintiff suffered from a number of pre existing psychological traumas, including sexual and domestic violence. Her previous medical history showed a significant history of rectal pain/issues.

The plaintiff suffers rectal and perianal pain, vomiting and difficulties with bowel function, constipation, proctalgia (anal pain) and tenesmus (a sensation to defecate, but an inability to do so), psychological injuries.

General Damages: \$75,000

**Colin
Biggers
& Paisley**

05

Queensland

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<i>Before 1 July 2024, these monetary amounts were indexed by the making of regulations to prescribe the amount for each new financial year. From 1 July 2024, this indexation will now be made by the Civil Liability Indexation Notice 2024 (Qld) rather than by regulation. The formula for the calculation of the indexation remains the same.</i>	219
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Civil Liability Act 2003 (Qld)

Application

The *Civil Liability Act 2003* (**CLA Qld**) modifies the common law of negligence in Queensland. It does not codify the law relating to claims for damages arising out of negligence.

The CLA Qld applies to many, but not all, claims made in Queensland for damages for personal injury. In the majority of cases, it works in conjunction with the *Personal Injuries Proceedings Act 2002* (**PIPA Qld**) and in some cases the *Motor Accident Insurance Act 1994*.

Subject to the below exclusions, the CLA Qld applies to any civil claim for damages for harm. A "civil claim" can include breach of contract, breach of statutory duty and torts against persons or property. However, the CLA does not create or confer any cause of civil action for the recovery of damages.²³¹

Importantly, the following claims are excluded:²³²

- any injury for which compensation is payable under the *Workers' Compensation and Rehabilitation Act 2003* (WCRA Qld), whether or not compensation is actually claimed;²³³
- any injury that is a "dust related condition" (i.e. asbestos claims); or
- any injury resulting from smoking or other use of tobacco products, or exposure to tobacco smoke.

Where there is a concurrent PIPA Qld/WCRA Qld claim, the effect is to preclude the PIPA Qld respondent from the benefit of the CLA Qld (which would otherwise place restrictions on certain heads of damage).

In addition, by reason of sections 4, 61 and 62 of the CLA Qld, certain specified sections or parts of the CLA Qld only apply to breaches of duty and/or injuries happening on or after certain dates.

This is particularly relevant given the introduction of section 11A of the *Limitation of Actions Act 1974* (Qld) on 1 March 2017, which removed limitation periods "in actions for damages relating to the personal injury of a person resulting from the sexual abuse of the person when the person was a child".

Prior to those amendments, section 4 of the CLA Qld would have been of little relevance or importance given the relatively short limitation periods applying to most classes of actions and the limited bases for extending any limitation period.

Given the particular relevance of these "carve outs" for historical claims arising from sexual abuse of persons when a child, we separately deal with the implications of the sections, particularly to the assessment of damages, under a discrete heading below.

Unlike its southern counterparts, claims for damages due to intentional torts are not excluded and the CLA QLD instead applies to "any" civil claim for damages for harm (interpreted narrowly by *Newberry v Suncorp Metway Insurance Ltd*²³⁴).

Queensland has not included in its CLA Qld any provision relating to liability for mental harm. This is to be assessed by reference to comparable case law.²³⁵

However, notably, chapter 2 part 2A CLA Qld, which provides for liability of institutions for child abuse (both sexual abuse or serious physical abuse), does extend to liability for psychological abuse of the child perpetrated in connection with sexual abuse or serious physical abuse. Further, in this respect, section 33E reverses the onus of proof in claims against institutions where there has been abuse of a child by a person associated with the institution while the child is under the care, supervision, control or authority of the institution. In those circumstances, the institution is taken to have breached such duty unless it proves it took all reasonable steps to prevent the abuse.

²³¹ Section 7(1) CLA Qld

²³² Section 5 CLA Qld

²³³ Section 5(2)(a) WCRA Qld

²³⁴ *Newberry v Suncorp Metway Insurance Ltd* [2006] 1 Qd R 519

²³⁵ *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317

Negligence - the elements

Consistent with the common law, in order to establish negligence under the CLA Qld, a claimant must prove that the respondent:

- owed the claimant a duty of care;
- breached that duty of care;²³⁶ and
- caused the damage allegedly sustained by the claimant.²³⁷

Duty of care

Whether a respondent owes a duty of care to the claimant is a question for common law. Most duties and relationships are long established. As a general rule, a person must take reasonable care and skill not to act in a way that might cause loss or injury to another.

Breach of duty

In determining whether a respondent has breached a duty of care to take precautions against a risk of harm, consideration is to be given as to whether:²³⁸

- The risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
- The risk was "not insignificant" (according to *Meandarra Aerial Spraying Pty Ltd & Anor v GEJ Geldard Pty Ltd*,²³⁹ a more demanding analysis than the test "not far-fetched or fanciful" as per the common law decision of *Wyong Shire Council v Shirt* [1979] 29 ALR 217); and
- In the circumstances, a reasonable person in that person's position would have taken precautions against the risk of harm. To decide this, the court takes into account:
 - the probability that the harm would occur if care were not taken;
 - the likely seriousness of the harm;
 - the burden of taking precautions to avoid the risk of harm; and
 - the social utility of the activity that creates the risk of harm.

In considering the standard of care of a "professional", sections 21 and 22 of the CLA Qld must be read in conjunction with the *Professional Standards Act 2004* (Qld), which provides an opportunity for professionals to limit their liability.

A doctor will not breach his or her duty of care owed to a patient for failing to warn of the risk of medical treatment, unless that warning would be required by a reasonable person to make an informed decision and the doctor ought reasonably to have known the patient in question required the information.²⁴⁰

A professional does not breach his or her duty arising from the provision of a professional service if, at the time of providing the service, the professional acted in a way that was widely accepted by peer professional opinion as being competent professional practice. However, such peer professional opinion will be irrelevant if the court considers such opinion to be irrational or contrary to a written law²⁴¹ ("irrational" being defined as "reasons that are illogical, unreasonable or based on irrelevant considerations"²⁴²).

²³⁶ Section 9 CLA Qld

²³⁷ Section 11 CLA Qld

²³⁸ Section 9 CLA Qld

²³⁹ *Aerial Spraying Pty Ltd & Anor v GEJ Geldard Pty Ltd* [2013] 1 Qld R 319

²⁴⁰ Section 21 CLA Qld

²⁴¹ Section 22 CLA Qld, analogous to section 50 in the New South Wales *Civil Liability Act 2002* (NSW) and section 59 in the Victorian *Wrongs Act 1958* (Vic)

²⁴² *Hope v Hunter and New England Area Health Service* [2009] 10 DCLR (NSW) 63

Causation

The CLA Qld alters the common law test for causation. Prior to the CLA Qld, the claimant needed to establish that the respondent's breach caused or materially contributed to its harm. Causation was to be determined by applying a "common sense" test to the facts of each particular case.

In order to establish causation, the claimant must now prove that:²⁴³

- the respondent's breach of duty was a necessary condition of the occurrence of the harm (factual causation), and
- the harm comes within the scope of the negligent person's liability (scope of liability).

The plaintiff in *State of Queensland v Nudd*²⁴⁴ failed to prove factual causation because, although there was a breach of duty on the part of the defendant, this was not causative of the accident. Section 11(3)(b) of the CLA Qld makes any statement by the injured person about what he or she would have done inadmissible except to the extent (if any) that the statement is against his or her own interest.

To decide on the scope of liability and breach, the court needs to consider whether or not and why responsibility for the harm should be imposed on the party in breach.²⁴⁵

The onus is on the claimant to prove any fact relevant to the issue of causation.²⁴⁶

²⁴³ Section 11 CLA Qld

²⁴⁴ *State of Queensland v Nudd* [2012] QCA 281

²⁴⁵ Sections 11(2) and (4) CLA Qld

²⁴⁶ Section 12 CLA Qld

"Defences" to negligence

Voluntary assumption of risk and obvious risks

An "obvious risk" is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.²⁴⁷ It can include risks that are patent or a matter of common knowledge.²⁴⁸ A risk can be obvious even though it has a low probability of occurring²⁴⁹ and is not prominent, conspicuous or physically observable.²⁵⁰ However, a risk is not "obvious" if the risk is created by a failure on the part of a person to properly operate, maintain, replace or care for something.²⁵¹

In determining whether a risk is obvious, a court considers a number of factors, including the claimant's age, experience and personal characteristics. In *Thompson v Woolworths (Qld) Pty Ltd* [2005] 221 CLR 234, the High Court found that a risk was so obvious that reasonableness required no response. This reasoning was followed in *Liverpool Catholic Club v Moor* [2014] NSWCA 394.

On the other hand, in *Kelly v State of Queensland*²⁵² (**Kelly decision**), the court decided a risk was not obvious based on the plaintiff's age, inexperience and perception of the same activity being performed by others without incident (*c/f Great Lakes Shire Council v Dederer* [2006] NSWCA 101). As a result of the Kelly decision, the Queensland Government has passed legislation providing civil liability protection to the state relevant to its publicly managed land.

A person will be deemed to be aware of an "obvious risk" unless that person can prove he or she was not aware of it, the onus being on the claimant.²⁵³

There is no proactive duty to warn another of an obvious risk.²⁵⁴ However, this section does not apply where:

- the claimant has requested advice or information about the risk from the respondent;
- the respondent is required by a written law to warn the claimant of the risk; or
- the respondent is a professional (other than a doctor) and the risk is a risk of the death of or personal injury to the claimant from the provision of a professional service by the respondent.²⁵⁵

A respondent is not liable for harm suffered as a result of the materialisation of an inherent risk. An inherent risk is defined as a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill. This section does not operate to exclude liability in connection with a duty to warn of a risk.²⁵⁶

Recreational activities

A complete defence is provided where personal injury is suffered due to an obvious risk occasioned by a "dangerous recreational activity". It is applicable whether or not the person who suffered the harm was aware of the risk.²⁵⁷ The onus of establishing this defence rests with the respondent.

"Dangerous recreational activity" is broadly defined in section 18 of the CLA Qld as an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person.²⁵⁸

²⁴⁷ Section 13(1) CLA Qld

²⁴⁸ Section 13(2) CLA Qld

²⁴⁹ Section 13(3) CLA Qld

²⁵⁰ Section 13(4) CLA Qld

²⁵¹ Section 13(5) CLA Qld

²⁵² *Kelly v State of Queensland* [2014] QCA 27

²⁵³ Section 14 CLA Qld

²⁵⁴ Section 15 CLA Qld; *Pollard v Trude* [2008] QSC 119

²⁵⁵ Section 15(2) CLA Qld

²⁵⁶ Section 16 CLA Qld

²⁵⁷ Section 19 CLA Qld

²⁵⁸ Section 18 CLA Qld

It is first necessary to prove that the activity engaged in was a "recreational activity"²⁵⁹ and then show that such activity attracts a significant degree of risk of physical harm²⁶⁰ thereby lifting it to the "dangerous" category.

The claimant need not be injured by the risk which made the activity dangerous.²⁶¹ Whether a recreational activity poses a significant risk of physical harm is to be determined on a case-by-case basis, objectively and prospectively, applying the test of whether the degree of risk is trivial or likely to occur and taking into account the claimant's own conduct.²⁶²

There is much inconsistency in the courts' reasoning as to why some injuries are caused by "dangerous recreational activities"²⁶³ and others are not.²⁶⁴

Contributory negligence

Sometimes a claimant will have caused or contributed to his or her own loss. When deciding whether the claimant has been guilty of contributory negligence in failing to take precautions against the risk of harm, the ordinary principles relating to breach of duty (discussed above) will apply. The standard of care is that of a reasonable person on the basis of what they know, or ought reasonably to have known, at the time the harm was suffered.²⁶⁵

The onus is on the respondent to show the claimant's actions were a causative factor of the incident resulting in the injury. Mere inadvertence may be insufficient to prove this.

A court may decide on a 100% reduction for contributory negligence if it considers this just and equitable²⁶⁶ (section 24), although this is rare. Where liability is first established against the respondent, contributory negligence is not often found at more than 25% to 50% (e.g. *Ellis v Uniting Church in Australia Property Trust*²⁶⁷).

Importantly, there may be an automatic reduction for contributory negligence in certain cases involving criminal behaviour²⁶⁸ and intoxication.²⁶⁹

If a person's conduct gives rise to an indictable offence and such conduct materially contributed to the risk of the harm suffered by him or her, he or she may be precluded from seeking civil damages. If a civil claim is allowed, the claim will be reduced by at least 25% for contributory negligence.

Likewise, there is a presumption of contributory negligence (of at least 25%) if the injured person is intoxicated at the time the injury was sustained. This presumption can only be rebutted if the claimant proves that the intoxication did not contribute to the respondent's breach of duty or the intoxication was not self-induced.

Proportionate liability

Often a claimant's loss will be caused by the wrongdoing of more than one person and there will be "concurrent wrongdoers". A "concurrent wrongdoer" is a person who is one of two or more persons whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim.

²⁵⁹ *Mikronis v Adams* [2004] 1 DCLR (NSW)

²⁶⁰ *Falvo v Australian Oztog Sports Association & Anor* [2006] NSWCA 17

²⁶¹ *Fallas v Mourlas* [2006] NSWCA 32

²⁶² *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200

²⁶³ *Jaber v Rockdale City Council* [2008] NSWCA 98; *Vreman and Morris v Albury City Council* [2011] NSWSC 39

²⁶⁴ *Edwards v Consolidated Broken Hill Ltd* [2005] NSWSC 301; *Smith v Perese* [2006] NSWSC 288; *Wilson v Lambkin* [2010] QDC 254

²⁶⁵ Section 23 CLA Qld

²⁶⁶ Section 24 CLA Qld

²⁶⁷ *Ellis v Uniting Church in Australia Property Trust* [2008] QCA 388

²⁶⁸ Section 45 CLA Qld

²⁶⁹ Sections 46 and 47

In certain types of claims, the CLA Qld allows a court to apportion responsibility between each concurrent wrongdoer. The proportionate liability regime in Chapter 2, Part 2 of the CLA Qld will only apply if the claim is an "apportionable claim".

An "apportionable claim" is one which is:²⁷⁰

- a claim for economic loss or damage to property in an action for damages arising from a breach of a duty of care; or
- a claim for economic loss or damage to property in an action for damages in contravention of section 18 of the *Australian Consumer Law*.²⁷¹

Claims arising out of personal injury or made by consumers are not apportionable claims and the proportionate liability regime will not apply. "Consumer" is defined as an individual whose claim is based on rights relating to goods or services in circumstances where the goods and services are being acquired for personal, domestic or household use or consumption.²⁷²

If a claim is apportionable and there are concurrent wrongdoers, a respondent's liability will be limited to the amount that reflects the extent of the concurrent wrongdoer's responsibility for the claimant's loss and damage.²⁷³ In apportioning liability between the concurrent wrongdoers, a court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceeding, and may enter a judgment against that concurrent wrongdoer.²⁷⁴ Where a concurrent wrongdoer is found liable for damages and is found to have committed fraud, that concurrent wrongdoer is severally liable for the damages awarded against any other concurrent wrongdoer to the apportionable claim.²⁷⁵

A respondent cannot be required to contribute to the damages recoverable from another concurrent wrongdoer and cannot be required to indemnify another concurrent wrongdoer.²⁷⁶ However, there is a controversial argument that this may not extend to contractual indemnities, as there should have been clear legislative intent (as in the case of other states) if this prohibition was meant to affect existing agreements between concurrent wrongdoers.

Local authority defences

A public or other authority is the Crown, a local government or any other public authority constituted under an Act.

The below sections must be read in conjunction with section 9 of the CLA Qld (discussed earlier).

Section 35 of the CLA Qld provides for principles concerning resources and responsibilities. It notes the authorities' functions are limited by available financial and other resources, with the allocation of such resources not being open to challenge. To defeat a claim, the authority may be able to rely on evidence of compliance with its general procedures and systems to prove it has properly exercised its functions. However, proof of the resources, how they're used and the "weight" of the evidence is a matter for the courts.²⁷⁷

In response to the *Kelly v State of Queensland*²⁷⁸ decision, the Queensland Government introduced the *Nature Conservation and Other Legislation Amendment Act (No. 2) 2013*, which now limits the state's exposure to liability in Queensland Parks and Wildlife Service managed areas. This legislation was passed in November 2013 but has not yet been tested by the courts.

Section 36 of the CLA Qld provides that where a claimant alleges that a public or other authority has failed to exercise a function or has wrongfully exercised that function, the act or omission of the authority does not

²⁷⁰ Section 28 CLA Qld

²⁷¹ Schedule 2 to the *Competition and Consumer Act 2010* (Cth)

²⁷² Section 29 CLA Qld

²⁷³ Section 31(1)(a) CLA Qld

²⁷⁴ Section 31(3) CLA Qld

²⁷⁵ Section 32D CLA Qld

²⁷⁶ Section 32A CLA Qld

²⁷⁷ *Turner v AAMI Ltd and the RTA of NSW* [2006] NSWSC 1292 re: comparable section 42 of the NSW CLA

²⁷⁸ [2014] QCA 27

constitute a wrongful exercise or failure unless that act or omission was, in the circumstances, so unreasonable that no public or other authority could properly consider that act or omission to be a reasonable exercise of its functions. However, this is only applicable to proceedings based on a breach of the authority's statutory duty and not to a claim in negligence.²⁷⁹

The *Review of the law of negligence*²⁸⁰ intended that section 36 of the CLA Qld only apply to a claim for damages for personal injury or death where a "policy decision" had been made. However, in practice, it also applies to claims for economic loss and does not require consideration to be given to "policy decisions".

Section 37 of the CLA Qld provides that any public or other authority is not liable for any failure to repair a road, to keep a road in good repair or to inspect a road for the purpose of deciding whether it needs to be repaired, unless the authority had actual knowledge of the particular risk that materialised to cause the claimant's loss.

Emergency assistance

Sections 26 and 27 of the CLA Qld provide immunity from civil liability for people (and some entities) who render first aid or assistance in an emergency to persons who are in distress. A person in distress includes a person who is injured, apparently injured or at risk of an injury, or a person who is suffering, or apparently suffering, from an illness. To claim this immunity, the person must have provided the assistance while performing duties to enhance public safety for a prescribed entity. The prescribed entities are listed in the *Civil Liability Regulation 2014* (Qld) (**CLR Qld**), and include ambulance services.

Food donors and volunteers

Section 38A of the CLA Qld provides immunity from civil liability for harm resulting from the consumption of food for food donors where:

- the food was safe to consume at the time it left the food donor's possession;
- if the food was of a nature that required it to be handled in a particular way to remain safe to consume after it left the food donor's possession, the food donor informed the recipient of the handling requirements; and
- if the food only remained safe to consume for a particular period of time after it left the food donor's possession, the food donor informed the recipient of the time limit.

Section 39 of the CLA Qld provides immunity from personal civil liability in relation to any acts or omissions made by the volunteer in good faith when doing community work organised by a community organisation or as an officeholder of a community organisation. Exceptions to the immunity for volunteers include circumstances where:

- the volunteer was engaged in criminal conduct;²⁸¹
- the volunteer failed to exercise due care and skill while doing the work intoxicated;²⁸²
- the volunteer knew or ought reasonably to have known that he or she was acting outside the scope of the community work;²⁸³ or
- the volunteer acted contrary to instructions given by the community organisation.²⁸⁴

²⁷⁹ *Hamcor Pty Ltd & Anor v State of Queensland & Ors* [2014] QSC 224

²⁸⁰ (2002, commonly known as the Ipp Report)

²⁸¹ Section 40 CLA Qld

²⁸² Section 41 CLA Qld

²⁸³ Section 42(a) CLA Qld

²⁸⁴ Section 42(b) CLA Qld

Child abuse

Part 2A (Liability of institutions for child abuse) was inserted in the CLA Qld in 2018 and contains reforms regarding duty of care, identifying a proper defendant and satisfaction of settlements or judgments by current office holders, an associated trust of the institution or trustee of the associated trust.

The amendments were introduced in response to recommendations made in the Royal Commission into Institutional Responses to Child Sexual Abuse.

Duty of care

Section 33D of the CLA Qld imposes a duty on institutions to take all reasonable steps to prevent the abuse of a child by a person associated with the institution while the child is under the care, supervision, control or authority of the institution.

Section 33E of the CLA Qld creates a reverse onus on the institution where it is presumed that the institution has breached its duty of care to a child who has been abused unless it can prove that it took all reasonable steps to prevent the abuse. Relevant matters that are considered in deciding whether the institution took all reasonable steps to prevent the abuse include:

- the nature of the institution;
- the resources that were reasonably available to the institution;
- the relationship between the institution and the child; and
- the position in which the institution placed the perpetrator to the child, and the extent which it gave the perpetrator authority, power or control over the child, or an ability to achieve intimacy with the child or gain the child's trust.²⁸⁵

Vicarious liability

Vicarious liability imposes strict liability on an institution for a tort committed by its employee.

There is no provision under the CLA Qld which expressly states that an institution is vicariously liable for child abuse perpetrated by a person associated with the institution. As such, vicarious liability is still determined by common law principles.

The High Court of Australia in *Prince Alfred College Incorporated v ADC*²⁸⁶ determined that an employer is vicariously liable for child abuse perpetrated by its employee if it placed the employee in a role that provided the occasion for the abuse. The court is to take into account:

- the employee's authority, power or control over the child;
- the trust of the child in the employee; and
- the employee's ability to achieve intimacy with the child.

However, the High Court emphasised that the "relevant approach" discussed above is not an absolute test, and each matter must be determined on its own facts.

The High Court revisited the principles of vicarious liability in *CCIG Investments Pty Ltd v Schokman*²⁸⁷ and held that while an unauthorised, intentional or criminal act may be committed in the course of employment, and employer is not responsible for every act an employee chooses to do.

More recently, in *Bird v DP*²⁸⁸, the Victorian Supreme Court of Appeal held that a diocese, through its Bishop, and an Assistant Priest, can give rise to vicarious liability. The court in this case applied the 'multifactorial approach' in *Hollis v Vabu*²⁸⁹. The High Court has granted special leave for an appeal of this decision.

²⁸⁵ Section 33E(3)(d) of CLA Qld

²⁸⁶ *Prince Alfred College Incorporated v ADC* [2016] HCA 37

²⁸⁷ *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21

²⁸⁸ *Bird v DP (A Pseudonym)* [2023] VSCA

²⁸⁹ *Hollis v Vabu* [2001] HCA 8

Proper defendant

Division 3 (Liability of particular institutions and officeholders) enables a claimant to maintain a cause of action against:

- a current office holder of an unincorporated institution, if the former office holder no longer holds that position;
- an unincorporated institution that has since become incorporated;
- "continuing" or "successor" entities of institutions.

Satisfaction of liability

Division 4 (Satisfaction of Liability) enables a claimant to recover payment of damages from an associated trust of the institution, or the trustee of the associated trust.

This provision was introduced to prevent institutions from avoiding payment of damages for child abuse claims by setting up trusts which hold assets on behalf of, or in favour of the institution.

Permanent stay

Section 11A(1) of the *Limitation of Actions Act 1974* (Qld) provides that an action for damages relating to personal injury resulting from the sexual and serious physical abuse of a child, or psychological abuse of the child perpetrated in connection with sexual abuse or serious physical abuse, may be brought at any time and is not subject to a limitation period.

The removal of the limitation period was followed by a recommendation by the Royal Commission that the limitation period "should however be balanced by expressly preserving the relevant courts existing jurisdictions and powers to stay proceedings where it would be unfair to the defendant to proceed".

The court has a broad discretion to permanently stay a proceeding as "an incident of the general power of a court of justice to ensure fairness".

Recent caselaw indicates that where a permanent stay has been granted, it is due to the consequences of the lengthy passage of time and a fair adjudication of the serious allegations made is not possible. In particular, see *Willmot v State of Queensland* [2022] QSC 167 (**Willmot**), *ADA v State of Queensland* [2023] QSC 159 (**ADA**) and *DJW v State of Queensland* [2023] QSC 138 (**DJW**).

Willmot v State of Queensland

In *Willmot v State of Queensland*²⁹⁰, the High Court allowed an appeal from the Queensland Court of Appeal, disagreeing with the decisions of the lower courts that the proceedings should be permanently stayed in their entirety. The High Court approached each of Willmot's allegations of abuse separately and considered the available evidence and the potential prejudice to a fair trial in relation to each allegation.

Willmot alleges that she was physically and sexually abused on four separate occasions. The High Court was critical that the State did not identify whether there was a loss of documentation and did not conduct thorough searches in this respect, and that one perpetrator was still alive and other witnesses could provide corroborating evidence where other perpetrators were deceased. The High Court emphasised that each allegation must be examined on its facts and a stay was a "last resort" when no other means could ensure fairness.

On balance, a stay of proceedings was maintained in respect of some allegations made by Willmot, but lifted in respect of others. The case demonstrates that the bar is set high for any defendant seeking to stay proceedings on the basis that a fair trial cannot be had. The High Court found a permanent stay continues to be considered an 'extreme step', and a 'burdensome effect' is required which is more than just the passage of time, death of potential witnesses or lack of documents.

²⁹⁰ [2024] HCA 42

ADA v State of Queensland

In *ADA*, despite having more evidence than *Willmot*, including statements from other witnesses at the orphanage, Cooper J held that the State had no way of investigating whether or not the sexual assaults occurred, and no way of contradicting the plaintiff's account of the events.

In his judgment, Cooper J recognised the difficulties created by the passage of time in investigating whether sexual assaults occurred, addressing allegations of negligence, and disentangling the causative effect of the alleged sexual assaults from the effect of subsequent life stressors.

DJW v State of Queensland

In *DJW*, Crowley J considered that there was an incurable deficiency in the available evidence, which meant that there was no amount of further investigations the defendant could have undertaken to enable it to plead more than a non-admission to the allegations put forward by the plaintiff.

GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore

In the recent High Court decision of *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore*²⁹¹, the High Court allowed an appeal from the NSW Court of Appeal and determined that the fact that an alleged perpetrator and/or witnesses are unable to give evidence is not on its own a reason to grant a permanent stay in historical child sexual abuse claims. The defendant must demonstrate real prejudice in order to be successfully granted a permanent stay of proceedings and such a remedy should be one of last resort for historical child sexual abuse claims.

GLJ alleges that Father Anderson sexually abused her on one occasion in 1968 at her home when she was 14 years old. Father Anderson passed away in 1996 and the plaintiff did not commence her claim for damages until 2019. Four other witnesses provided statements claiming they were sexually abused by Father Anderson. The diocese also had documents confirming other members of clergy were aware of other sexual abuse allegations against Father Anderson.

The diocese alleged that it could not have a fair trial because the allegations were never put to Father Anderson before his death and the claim was not made until 2019, which due to the passage of time, other witnesses were deceased or documents unavailable. The High Court did not agree with this argument because there was other evidence available to the diocese such as evidence indicating inconsistencies in the plaintiff's version of events and other complaints made by against Father Anderson, and therefore there were no extenuating circumstances warranting a permanent stay.

Disclosure

The respondent's duty of disclosure under the *Personal Injuries Proceedings Act 2002 (PIPA)* is provided for at section 27. It states a respondent must give a claimant copies of the following in the respondent's possession that are directly relevant to a matter in issue in the claim:

- reports and other documentary material about the incident alleged to have given rise to the personal injury to which the claim relates;
- reports about the claimant's medical condition or prospects of rehabilitation;
- reports about the claimant's cognitive, functional or vocational capacity.

If asked by the claimant, the respondent must also provide:

- information that is in the respondent's possession about the circumstances of, or the reasons for, the incident; or
- if the respondent is an insurer of a person for the claim, information that can be found out from the insured person for the claim, about the circumstances of, or the reasons for, the incident.

In *SDA v Corporation of the Synod of the Diocese of Rockhampton & Anor*²⁹², the court of appeal stated the obligation to provide information provided under section 27 is not to be construed narrowly, but rather "a

²⁹¹ *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32

²⁹² [2021] QCA 172

broad, remedial construction" is to be preferred. Morrison JA concluded that information received 25 years after the fact could be argued to have put the defendant on notice as to the perpetrator's actions.

Section 27 of PIPA requires disclosure of documents "about the circumstances or, the reasons for, the incident". This includes claims and complaints relevant to the circumstances of the alleged events, including documents relating to the perpetrator's position of trust, control and authority which provided them with opportunity and occasion to perpetrate the abuse.

The defendant is required to disclose documents *prior* to the subject events as such documents are relevant to determining issues of breach of duty, vicarious liability and propensity: *R v McNeish* [2019] QCA 191; *Stephenson v The Salesian Society Inc*; *Eastern v The Salesian Society Inc* [2018] VSC 602; *DP v Bishop Bird* [2021] VSC 453.

However, the defendant may also be required to disclose documents *after* the subject events. In *PG v State of Queensland*,²⁹³ Smith DCJA held that a three year period after the subject events "would also enable a court to more safely conclude whether the systems in place were adequate" in respect of determining an allegation about whether the defendant failed to implement a safe system of supervision.

Once a claim proceeds to litigation, rule 211 of the *Uniform Civil Procedure Rules 1999* (Qld) creates a duty in each party to disclose documents "directly relevant to an allegation in issue in the pleadings".

Prior to disclosing any information and documents, the material should be reviewed for confidentiality and privilege. Documents should generally be disclosed in unredacted form. In *PG v State of Queensland*²⁹⁴, the court held that documents relating to recording of information about allegations of sexual abuse (including records of complaints, investigation documents, pre-court proceedings and court documents) are disclosable subject to any valid claim for legal privilege. The court ordered that notice of claims forms should be disclosed unredacted.

Whilst *PG v State of Queensland* is not binding on other judges in the District Court, nor superior courts, it is important to carefully scrutinise requests for disclosure, and in particular whether there are genuine grounds to withhold disclosure on the basis of confidentiality and relevance.

Previous settlements

Section 48(5A) of the *Limitations of Actions Act 1974* (Qld) states "an action may be brought on a previously settled right of action if a court, by order on application, sets aside the agreement effecting the settlement on the grounds it is just and reasonable to do so".

The case of *TRG v The Board of Trustees of Brisbane Grammar School*²⁹⁵ was the first guidance as to how the courts will interpret applications to set aside previously settled historic sexual abuse claims in Queensland. In that case, the court of appeal held that the expiry of the appellant's limitation period did not materially affect the appellant's decision to settle or the amount of settlement. On that basis, the appeal was dismissed. The appellant sought special leave from the High Court of Australia, however that application was refused.

Recent decisions

BYM v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane

In *BYM v The Corporation of The Trustees of The Roman Catholic Archdiocese of Brisbane*²⁹⁶, the Supreme Court of Queensland dismissed a plaintiff's claim for damages for personal injury arising from alleged historical sexual abuse due to significant inconsistencies and credibility issues in the plaintiff's evidence.

The plaintiff commenced proceedings seeking damages for personal injury sustained as a result of being sexually assaulted by a groundsman employed by the defendant, referred to as "CD" in 1999. The plaintiff alleged that whilst at school, after being granted permission by her teacher, she left the classroom

²⁹³ [2023] QDC 109

²⁹⁴ [2023] QDC 109

²⁹⁵ [2019] QSC 157; [2020] QCA 190

²⁹⁶ (No 2) [2024] QSC 106

unaccompanied and entered one of the female toilet blocks at the school. Whilst she was in a toilet cubicle, CD entered the cubicle and sexually assaulted her.

The Court found significant issues with the plaintiff's evidence which undermined the plaintiff's credibility and the overall plausibility of her account of the abuse. In contrast, the defendant presented evidence from witnesses who provided clear, reliable accounts that contradicted the plaintiff's allegations.

The plaintiff's evidence about the alleged abuse was scrutinised by the Court. In particular, the Court was troubled by:

1. the plaintiff's admission that she had made statements which were false and exaggerated and the reason for making those statements was that it had "suited her" at the time;
2. the plaintiff admitted only making a partial disclosure of the abuse in 2017, despite having a full memory. The plaintiff did not make full disclosure of the abuse until she served her part 1 notice of claim on 1 August 2019;
3. there were significant inconsistencies between the disclosures made by the plaintiff between the reports to her psychologist, her independent medical examiners, her notice of claim and her evidence at trial;
4. the plaintiff gave evidence which was highly detailed and was given in chronological sequence despite the alleged abuse occurring when the plaintiff was nine years old.

The defendant led evidence including:

1. the toilet doors were not easy to unlock as alleged by the plaintiff because witnesses gave evidence that adults had to send students under the door to unlock the door from the inside;
2. the area where the alleged abuse occurred was in a central location, near a main pathway and visible from surrounding classrooms;
3. the plaintiff returned to class following the alleged assault and managed to hide the physical, mental and emotional effects from her mother until 2017.

CD also gave evidence and denied the abuse occurred. CD explained that his job did not ordinarily require him to enter the toilets, and on rare occasions where this occurred, he first arranged for teachers to check the toilets before he entered. The Court found CD's version of events to be reliable despite the passage of time.

The Court ultimately found the defendant's evidence persuasive. The significant inconsistencies in the plaintiff's version, along with the credible testimony of CD, resulted in the Court being unable to reach a feeling of "actual persuasion" that the alleged assault occurred as described by the plaintiff.

Assessment of damages for personal injury

Chapter 3 of the CLA Qld applies to the assessment (and award) of damages for personal injury.

Of course, where the CLA Qld does not apply, damages are to be assessed by reference to comparable case law (i.e. a common law assessment).

Reference should also be made to the section that follows headed "Effect of section 4 of the CLA Qld" on page 218, in considering the assessment of damages.

General damages

General damages are damages for pain and suffering, loss of amenities of life, loss of expectation of life and/or disfigurement.²⁹⁷

Sections 61 and 62 of the CLA Qld prescribe the procedure to be followed in assessing general damages. A court must assess an injury scale value (ISV) by assigning a numerical value on a scale from 0 to 100, with 100 being applicable to the most severe injuries. The CLR Qld defines specific categories of injury and the ISV ranges for each category of injury. It also includes comments and examples which must be considered in determining the applicable ISV. A court must also have regard to the ISVs given to similar injuries in previous proceedings in determining the applicable ISV. The amount of general damages awarded to the claimant is then determined by reference to the monetary amount applicable to each ISV. These amounts are listed in the CLR Qld and are updated on 1 July each year. Tables summarising these amounts from the inception of the CLA Qld to date are attached.

Interest is not payable on an award for general damages when assessed pursuant to the CLA Qld.²⁹⁸

Economic loss

In personal injury proceedings, damages are commonly awarded for loss of earning capacity or economic loss. This represents the income that a claimant would have earned, but is now unable to earn as a result of his or her injuries or disabilities.

Generally, a claimant will seek damages for past economic loss to compensate for loss of earnings or the deprivation or impairment of past earning capacity. Interest is payable on any award made for past economic loss.

A claimant will also usually seek damages for future economic loss to compensate for the income he or she expects to be deprived of earning in the future, as a result of his or her injury.

The maximum award that a court may make for economic loss (past or future) is limited to the present value of three times the average weekly earnings.²⁹⁹

Where the claimant is an employee, he or she is also entitled to recover compensation for loss of employer-based superannuation contributions referable to the past and future economic loss heads of damage awarded.³⁰⁰

²⁹⁷ Section 51 CLA Qld

²⁹⁸ Section 60 CLA Qld

²⁹⁹ Section 54 CLA Qld

³⁰⁰ Section 56 CLA Qld

Out of pocket expenses

While not specifically provided for in the CLA Qld, a claimant will be entitled to damages to include out of pocket expenses (usually associated with treatment from hospitals and other providers, including therapists, associated travel and medication). Statutory benefits will also be sought as these are refundable.

A claimant will also generally seek future expenses, which are those expenses the claimant anticipates incurring in the future to treat or manage his or her injury.

Gratuitous care and services

Where a claimant requires personal care or domestic services from family members or friends because of his or her injury, an amount can be awarded by the court to compensate the claimant for these services.

For gratuitous damages to be awarded, a claimant must prove that the services were necessary and the need arose solely as a result of the injury. No damages for gratuitous care and assistance may be awarded unless the services are provided, or are to be provided, for at least six hours per week and for at least six months. The threshold is applicable to claims for both past and future losses.³⁰¹

No interest is payable on any award for damages for past gratuitous services.³⁰²

On the other hand, a claim for commercial services or paid care is not limited by the section 59 threshold. A claimant will generally be entitled to recover damages for commercial services or paid care if those costs were reasonable and necessary and the need for the services arose solely out of the injury in question. Where the claimant is out of pocket, he or she will also be entitled to seek interest on such loss.

Damages may also be awarded in limited circumstances to a claimant for any loss of the claimant's capacity to provide gratuitous domestic services to someone else.³⁰³

Costs

At common law, a successful claimant is usually entitled to recover standard (as opposed to indemnity) costs from a respondent. This is, of course, subject to the effect of offers made by parties in the proceedings. In cases where the pre-proceedings process is governed by the *Personal Injuries Proceedings Act 2002*, a claimant's entitlement to costs is extinguished for claims involving very low damages and substantially restricted for claims involving modest damages. Costs are not restricted in higher value claims.

2024 Amendments to CLR Qld

On 1 July 2024, Schedule 7 of the CLR was repealed and a new process began for the indexation of certain monetary amounts under the CLA Qld including:

1. the threshold which determines whether a court can award damages for loss of consortium or loss of servitium;³⁰⁴
2. caps on general damages;³⁰⁵
3. the threshold for notification by a court about a proposed award for future loss to give the parties to a proceeding a reasonable opportunity to negotiate a structured settlement³⁰⁶; and

³⁰¹ Section 59 CLA Qld

³⁰² Section 60 CLA Qld

³⁰³ Section 59A CLA Qld (considered to be a partial reinstatement of the principle in *Sullivan v Gordon* [1999] 47 NSWLR 319)

³⁰⁴ CLA Qld s 58(1)(b).

³⁰⁵ CLA Qld s 62(2).

³⁰⁶ CLA s 64(2)

4. declared costs limits, lower offer limits and upper offer limits.³⁰⁷

Before 1 July 2024, these monetary amounts were indexed by the making of regulations to prescribe the amount for each new financial year. From 1 July 2024, this indexation will now be made by the *Civil Liability Indexation Notice 2024 (Qld)* rather than by regulation. The formula for the calculation of the indexation remains the same.

³⁰⁷ *Personal Injuries Proceedings Indexation Notice 2024.*

Effect of Section 4 of the CLA Qld

Numerous provisions of the CLA Qld do not apply to breaches occurring, or injuries occurring, before specified dates.

This is particularly relevant given the introduction of section 11A of the *Limitation of Actions Act 1974* (Qld) on 1 March 2017, which removed limitation periods "in actions for damages relating to the personal injury of a person resulting from the sexual abuse of the person when the person was a child".

The effect is that, in applicable circumstances, some provisions of the CLA Qld will be excluded and the common law will apply including when assessing damages. In such circumstances, this is likely to result in awards of damages being significantly higher than those awarded under the CLA Qld .

By reason of section 4(2) of the CLA Qld, the following provisions of the CLA Qld will not apply to breaches of duty that occurred prior 2 December 2002:

- Sections 9 to 24, relating to the "general standard of care", "causation", "assumption of risk", "dangerous recreational activities", "duty of professionals" and "contributory negligence" (see earlier comments above). To the extent that those provisions modify the common law, they are therefore irrelevant;
- Sections 34 to 37 relating to the liability of public and other authorities;
- Section 55, which limits the ability of the court to make an award for damages for loss of earnings when such loss of earnings is unable to be precisely calculated by reference to a defined weekly loss.

By reason of section 4(3) of the CLA Qld, the proportionate liability provisions of the CLA Qld will not apply to breaches of duty that occurred prior to 1 March 2005.

By reason of section 4(4) of the CLA Qld, the following provisions of the CLA Qld will not apply to breaches of duty that occurred prior to 9 April 2003:

- Sections 45 to 49, providing exclusions for claiming damages because of criminal behavior or intoxication;
- Section 52, preventing the award of exemplary, punitive or aggravated damages in relation to a claim for personal injuries;
- Section 54, which places a cap on the award of damages for loss of earnings, preventing the court awarding more than an amount equal to 3 times the average weekly earnings per week for each week of the period of loss of earnings;
- Section 56, which places a cap on the damages that may be awarded to an employee for economic loss due to loss of employer superannuation contributions;
- Section 57, which provides for the application of a discount rate for calculating present value of future loss or gratuitous services;
- Section 58, which prevents a court awarding damages for loss of consortium or loss of servitium except in certain circumstances, and places a limit on damages for loss of servitium at three times average weekly earnings per week;
- Section 59, which prevents a court awarding damages for gratuitous services provided to an injured person except in certain circumstances;
- Section 60, which prevents the court awarding interest on general damages, or interest on damages for gratuitous services provided to an injured person and otherwise places limits on, and provides a formula for, the calculation of damages of interest awarded on damages compensating past monetary loss;
- Section 72, which makes inadmissible in court proceedings any expression of regret made by an individual in relation to an incident alleged to have given rise to an action for damages at any time before a civil proceeding is started.

By reason of section 4(5) of the CLA Qld, the following provisions of the CLA Qld will not apply to breaches of duty that occurred prior to 8 December 2003³⁰⁸:

- Sections 49A and 49B, in relation to failures in sterilisation procedures, and failed contraceptive procedures or advice

By reason of section 61 of the CLA Qld, general damages will not be calculated or awarded by the court by reference to an injury scale value for injuries arising before 1 December 2002. Rather, common law assessments will be undertaken. Limitations on the calculation of general damages under section 62 of the CLA Qld, will also not apply to injuries arising before 1 December 2002.

³⁰⁸ There is some uncertainty around whether this date or 1 March 2005 will be the correct date, subject to issues of statutory interpretation

Dust diseases

The limitation period for claiming damages

Section 11(2) of the *Limitation of Actions Act 1974* and Schedule 2 of the *Civil Liability Act 2003* (**CLA**) states that there is no period of limitation for personal injury suffered from a dust related condition.

Procedure - how a claim is instituted

Ordinarily, claims for personal injury must be made pursuant to the *Personal Injuries Proceedings Act 2002* (**PIPA**), which provides legislative requirements for a pre-court process with the aim of encouraging the parties to resolve personal injury claims through alternative dispute resolution rather than liability. PIPA claims are also subject of the CLA which provides and imposes statutory rights and thresholds for parties to personal injury litigation.

However, section 6(3)(b) states that PIPA does not apply to personal injury that is a dust-related condition. As such, plaintiffs do not need to comply with the pre-court process under PIPA and can commence a claim for damages by instituting litigated proceedings.

This does not apply to claims made where the respondent is an employer, in which case the claim against the employer is regulated by the *Workers' Compensation and Rehabilitation Act 2003* (**WCRA**) and the parties are subject to a pre-court process under that statute.

In such circumstances where the plaintiff is an employee and has commenced proceedings against suppliers and/or manufacturers, those proceedings are stayed until the plaintiff complies with the pre-court process under the WCRA for any claim made against his or her employer/s, of which the suppliers and/or manufacturers are typically joined as contributors and also required to participate in the WCRA pre-court process.

What is considered a dust related condition? Definitions in specific legislation

Schedule 1 of PIPA and schedule 2 of the CLA defines dust-related condition to include any of the following:

- aluminosis;
- asbestos induced carcinoma;
- asbestosis;
- asbestos related pleural disease;
- bagassosis;
- berylliosis;
- byssinosis;
- coal dust pneumoconiosis;
- farmers' lung;
- hard metal pneumoconiosis;
- mesothelioma;
- silicosis;
- silicotuberculosis;
- talcosis; or
- any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust.

Significant cases regarding civil procedure, awards of damages, etc.

*Coleman v Caesarstone Australia Pty Ltd & Ors*³⁰⁹

The Supreme Court in Queensland held that PIPA does not apply personal injury that is or results from a dust-related condition. This extends to secondary psychological or other medical conditions alleged to have been caused by the dust-related condition. As such, *Coleman* is authority that a plaintiff suffering from a secondary injury arising from a dust-related condition does not need to comply with the pre-procedures under PIPA for that secondary injury.

Greenhall & Anor v Amaca Pty Ltd [2023] QSC 137

This case confirms a worker cannot claim 'Sullivan v Gordon' damages under section 59A of the CLA against an employer even in claims for dust disease-related conditions. Section 5(1) of the CLA excludes all claims for damages for which compensation is payable under the WCRA, including dust disease claims. A person who claims damages for loss of provision of services previously provided by a worker cannot claim such damages unless the person is a 'dependent' under the WCRA. Damages under section 59A of the CLA are still recoverable against non-employer tortfeasors for dust disease claims.

*Wallaby Grip (BAE) Pty Limited (in liq) & Anor v WorkCover Queensland; CSR Limited v WorkCover Queensland*³¹⁰

This case concerned WorkCover Queensland's statutory right of recovery under section 207B of the WCRA, which states "if a person who has received compensation has not recovered, or taken proceedings to recover, damages for the injury from another person, other than the worker's employer - the insurer is entitled to be indemnified for the amount of the compensation by the other person ..." The worker suffered from asbestos related disease and commenced proceedings against manufacturers of asbestos products but did not serve those proceedings on the defendants. The proceedings were deemed stale. WorkCover commenced recovery proceedings against the manufacturers who argued that WorkCover did not have a right of recovery as the worker has commenced proceedings for his injuries. The Court of Appeal held that the worker had not served his proceedings, the proceedings were devoid of the purpose 'to recover damages' and therefore WorkCover had a statutory right of indemnity to recover compensation paid to the worker from the manufacturers.

Greenhall v Amaca Pty Ltd [2024] QCA 132

This case reconsidered the limitations on the entitlement to claim common law damages arising from injuries to workers pursuant to section 237 of the WCRA. The plaintiff, who was the wife of the deceased worker, did not satisfy the criteria of "dependent" under section 27 of the WCRA and therefore was not entitled to common law damages under section 237. To circumvent this, the plaintiff attempted to commence a claim for damages against the defendant for loss of her husband's gratuitous services pursuant to section 64 of the *Civil Proceedings Act 2011* (Qld).

The Queensland Court of Appeal unanimously rejected the application and found that section 237(1) and section 237(5) of the WCRA disentitled the plaintiff from making a wrongful death claim for benefit of widow.

The type of industries that are affected

Workers may be exposed to dust or airborne particles in a number of industries, including:

- stonemasonry;
- excavation, earth moving and drilling plant operations;
- paving and surfacing;
- mining, quarrying and mineral ore processing;
- tunnelling;

³⁰⁹ *Coleman v Caesarstone Australia Pty Ltd & Ors* [2021] QSC

³¹⁰ *Wallaby Grip (BAE) Pty Limited (in liq) & Anor v WorkCover Queensland; CSR Limited v WorkCover Queensland* [2022] QCA 204

- construction activities;
- brick, concrete or stone cutting (including grinding, jack hammering or chiseling);
- hydraulic fracturing of gas and oil wells;
- pottery making.

Recent amendments to legislation

There have been no recent amendments to the legislation.

Appendix

Recent decisions in relation to particular injuries in Queensland

Head

Howl At The Moon Broadbeach Pty Ltd v Lamble [2014] QCA 74

ISV 60 (\$121,400)

Plaintiff (male, age unknown) was assaulted by an employee of the defendant with a metal rubbish collector swung at his head. The defendant was held vicariously liable in negligence for the assault.

Injuries: Extreme mental disorder (Item 10) with a PIRS rating of 47%, serious cervical spine injury.

Douglas J, 9 September 2013

Brain

McQuitty v Midgley & Anor [2016] QSC 36

ISV 60 (\$121,400)

On appeal this assessment was upheld. *AAI Limited v McQuitty* [2016] QCA 326 at [22].

Plaintiff (age unknown) was a passenger in a car that ran off road at high speed.

Injuries: Moderate brain injury (Item 7, ISV 41-55), as well as fractured C6 and C7 left facet joints, fractured C5 through the transverse foramen, injury to the right lung, left scalp laceration and right 4th cranial nerve palsy.

Jackson J, 4 March 2019

Yamaguchi v Phipps & Anor [2016] QSC 151

ISV 55 (\$130,600)

Plaintiff (female, age unknown) was struck by a bus when she was crossing a pedestrian crossing.

Injuries: Brain damage and other physical injuries. She has lasting cognitive impairment and she suffers from depression. Moderate brain injury (Item 7, ISV 40), serious mental disorder (Item 11, ISV 25), anosmia (Item 7, ISV 7), among others, spine and pelvis injuries.

Applegarth J, 28 June 2016

Roane-Spray v State of Queensland [2016] QDC 348

ISV 15 (\$21,850)

Plaintiff (female, age unknown) resided on an island that did not have a hospital or paramedics. She called an ambulance for a stabbing pain in the left side of her head and had to be transported to the mainland. In the course of loading her onto the boat from the island, the plaintiff alleged that the head of the stretcher fell to the ground and she hit her head on the bitumen carpark that led to the ramp.

Injuries: Moderate cervical spine injury (Item 88), a moderate thoracic or lumbar spine injury (Item 93).

McGill SC DCJ, 21 December 2016

Schokman v CCIG Investments Pty Ltd [2021] QSC 120

ISV 17 (\$29,590)

Plaintiff (male, age 25) was employed by the defendant as a hospitality worker at an island resort. As a condition of his employment, he was required to share accommodation with another of the defendant's employees. The other employee was alleged to be exceedingly intoxicated one night and mistakenly and unconsciously pulled down his pants and urinated on the bed where the plaintiff was sleeping.

Injuries: Item 8 – Minor brain injury

Crow J, 27 May 2021

Sally James v USM Events Pty Ltd [2022] QSC 63

ISV 16 (\$28,800)

Plaintiff (female, age unknown) competed in a duathlon, originally a triathlon but changed due to the water conditions the day before the race, determined to change her lifestyle, lose weight and become fit after some years of personal difficulties. While undertaking the return leg of the first run, she heard yelling and swearing that startled her. She was then knocked over by a para-athlete racing in a wheelchair. The plaintiff was not aware the course she was competing on was simultaneously occupied by para-athletes in wheelchairs. She remembers the para-athlete ricocheting out of his wheelchair and hitting the ground but little else.

Injuries: Brain injury, psychiatric injury and minor physical injuries.

Brown J, 14 June 2022

Stewart v Metro North Hospital and Health Service [2024] QSC 41

ISV 85 (\$284,700)

Plaintiff was a 63 year old male, who was injured while undergoing treatment at Redcliffe Hospital between 22 March 2016 and 19 April 2016. He initially presented to the Emergency Department complaining of nausea and generalised abdominal pain. While undergoing radiological investigations, he complained of blurred vision and was found to have right eye reduced visual field. However, he was not further neurologically reviewed. Thereafter, he suffered a stepwise progression of a stroke. His treatment consisted of four laparotomies, which led to two bowel perforations, sepsis, bowel resection, removal of his spleen, and ultimately cardiac arrest. Those events caused the Plaintiff to suffer multiple significant injuries, including brain damage, which warranted a 96% whole person impairment.

Injuries: Item 5.1 - extreme brain injury.

Cooper J, 20 March 2024

Shoulder

Williams-Cook v Schloss [2018] QDC 175

ISV 7 (\$10,390)

Plaintiff (female, age unknown) was in a motor vehicle accident.

Injuries: Moderate shoulder injury (Item 97) and minor lumbar spine injury (Item 94).

Jarro DCJ, 29 August 2019

Spencer v Downie (2019) 88 MVR 117; [2019] QSC 098

ISV 24 (\$42,500)

Plaintiff (male, age unknown) was involved in a motor vehicle accident on his usual journey to work. He was riding his motorcycle and undertook to overtake a trailer, which concurrently indicated and started to turn

right into a driveway. This caused the plaintiff to break suddenly and skid off the road, causing various injuries.

Injuries: Dominant injury was a moderate shoulder injury (ISV 10-11), with other injuries, including a serious knee injury (ISV 11), closed head injury, comminuted fracture of the left clavicle, internal injuries, lacerations, bruises and scarring. The plaintiff also has developed a hernia (ISV range 0-5) and had undergone a splenectomy (ISV 8-9).

Crow J, 12 April 2019

McKay v Armstrong & Anor [2020] QDC 127

ISV 4 (\$5,440)

Plaintiff (female, age 30) was driving with her partner in Townsville, when the defendant lost control of his car and collided with the plaintiff.

Injuries: Dominant injury was held to be a soft tissue injury in the left scapular musculature manifesting in musculoligamentous pain (Item 39.2, ISV 4). No uplift allowed for secondary psychiatric injury.

Morzone QC DCJ, 10 June 2020

Longbottom v L & R Collins Pty Ltd [2021] QSC 242

ISV not in judgement (\$31,810)

Plaintiff (male, age unknow) was employed by the defendant to harvest bananas on his farm. On the day in question, the plaintiff had been working as a "humper" who was responsible for catching the banana bunch, when the other employee who he was working with had been working as the "cutter" make a large incision in the banana tree, which, instead of allowing the bunch to slowly bend in the plaintiff's direction, cause the top of the tree, with the bunch, to collapse onto him.

Injuries: Right shoulder, right hip and psychiatric injury.

Holmes CJ, 28 September 2021

Arm

Brown v Daniels (2018) 85 MVR 440; [2018] QSC 209

ISV 50 (\$120,100)

Plaintiff (male, age unknown) was injured in a collision between his motorcycle and a utility towing a horse float.

Injuries: Dominant injury was held to be an extreme hand injury (Item 117). The plaintiff had 30% of whole person impairment, and a loss of 50% of right upper extremity function. He also incurred injuries to his right foot, left clavicle and shoulder, craniofacial bone structures, base of skull fracture and a fractured sternum.

Davis J, 14 September 2018

Schofield v Hopman [2017] QSC 297

ISV 28 (\$57,350)

Plaintiff (male, age unknown) who was injured in a collision between his motorcycle and a car towing a caravan.

Injuries: Serious upper limb injury (Item 122, ISV 21), moderate lower limb injury (Item 135, ISV 10).

McMeekin J, 8 December 2017

Spinal

Hunold v Twinn [2018] QDC 43

ISV 10 (\$11,000)

Plaintiff (age unknown) was arrested for public nuisance and sued in assault and battery by the arresting police officer.

Injuries: Fracture of the right transverse process of L3 lumbar spine (Item 92), bruising and adjustment disorder with anxiety and depressed mood.

Muir DCJ, 23 March 2018

Thuong v Liu [2017] QDC 196

ISV 9 (\$14,040)

Plaintiff (male, age unknown) was in a motor vehicle collision. He had ongoing stiffness and aggravations to pain in everyday activities.

Injuries: Moderate cervical spine injury (Item 88).

Searles DCJ, 19 July 2019

Martin v Martin & Anor [2020] QDC 322

ISV 10 (\$16,650)

Plaintiff was a 18-year-old female, who was involved in two motor vehicle accidents. In the first accident, the Plaintiff was a passenger in a vehicle driven by the first defendant when they collided with the rear of a stationary vehicle after failing to stop. The second motor vehicle accident occurred three days later. The judge determined the Plaintiff's neck injury to be the dominant injury, but took into account her headaches and lower back injury, and increased the ISV.

Injuries: Item 88 - Moderate cervical spine injury.

Porter QC DCJ, 4 December 2020

Ketchell v RACQ insurance Limited [2021] QDC 307

ISV 18 (\$30,780)

Plaintiff (male, age unknown) was standing outside the front of a hotel, when a vehicle became airborne after the driver lost control of it, striking the Plaintiff on the ankle and caused him to be spun around onto his back. The Plaintiff's counsel submitted he sustained a thoracic spine injury as the dominant injury, and an adjustment disorder with mixed anxiety and depressed mood. Since the Plaintiff's psychiatric injury was secondary to his physical, the judge did not award a 25% uplift on his ISV

Injuries: Item 93 - Moderate thoracic spine injury

Coker DCJ, 16 December 2021

Towell v Mooney & Allianz Australia Insurance Ltd [2023] QDC 130

ISV 9 (\$15,300)

Plaintiff was a 31-year-old female, who sustained injuries in a motor vehicle collision, caused by the negligence of the first defendant.

Injuries: Item 88 - Moderate cervical spine injury

Dearden DCJ, 21 July 2023

Cho v Hui [2023] QDC 155

ISV 4 (\$6,480)

Plaintiff was a 52-year-old male, who was working as a ride share driver when he collided with another vehicle reversing out of an angled parking bay. The Plaintiff sustained injuries to his neck, shoulders and lower back. The judge determined the lower back injury was the dominant injury. The Plaintiff was not given an uplift for his multiple injuries.

Injuries: Item 94 - Minor thoracic spine injury.

Rosengren DCJ, 13 September 2023

Youssef v Eckersley [2024] QSC 35

ISV 15 (\$25,800)

Plaintiff was a 36 year old male, who was injured when the defendant pulled out of a shopping centre carpark in front of the Plaintiff, knocking him off his motorcycle. The Plaintiff alleged to have sustained post-concussive syndrome, a cervical spine injury, facial injuries and a depressive disorder. It was found the Plaintiff did not suffer from post-concussive syndrome and that his mental condition was not caused by the incident. However, Wilson J was satisfied the Plaintiff suffered from cervical spine injury, facial injuries and an exacerbation of a pre-existing mood condition for a period of time after the incident. Wilson J assessed the Plaintiff's cervical spine injury as his dominant injury and uplifted the top range of the ISVs for that injury to reflect the level of adverse impact caused by the Plaintiff's multiple injuries.

Injuries: Item 88 - moderate cervical spine injury - soft tissue injury.

Wilson J, 15 March 2024.

Back

Evans v Williams [2018] QDC 210

ISV 10 (\$15, 750)

Plaintiff (female, age unknown) was injured in a collision with another vehicle that failed to give way to her car. She suffered various injuries, including a musculo-ligamentous lumbar spine injury, bilateral hip injuries and a resulting psychiatric injury.

Injuries: Moderate lumbar spine injury (Item 93).

Jarro DCJ, 19 October 2018

Rook v Crofts [2018] QDC 184

ISV 15 (\$24,300)

Plaintiff (male, age unknown) was injured in a motor vehicle accident. He had his two children in the rear seat of the car with him when he came to an obstruction on the highway which caused him to brake abruptly. His daughter screamed, causing him to turn his head, his car was then struck from behind by a motorcycle.

Injuries: Injury to his neck and upper back, a soft tissue injury to the neck and an injury to a disc in the thoracic spine (Items 88 and 93).

McGill SC DCJ (12 September 2018)

Crane v Boyd and Allianz Australia Insurance Ltd [2018] QDC 177

ISV 2 (\$2,360)

Plaintiff was a 53-year-old man who was injured while driving when another driver collided with his car.

Injuries: Minor and temporary aggravation of his longstanding neck and back problems (Item 89).

Koppenol DCJ (28 August 2018)

Cornwell v Imarisio [2018] QDC 138

ISV 10 (\$14,100)

Plaintiff was a 22-year-old woman who was injured in a motor vehicle accident when the motor vehicle of the defendant collided with the driver's side of the plaintiff's vehicle.

Injuries: Lower back injury with aggravation of degenerative change at L5/S1 with spondylosis causing ongoing back pain which has failed to resolve since the accident (Item 63).

Lynham DCJ (22 June 2018)

Leg

Saul v Machalek & Anor [2020] QDC 69

ISV 12 (\$19,320.00)

Plaintiff (male, age 35) was a professional motorcycle stuntman. While rehabilitating from surgery to his left knee, he was knocked off his bicycle by a car driven by the defendant.

Injuries: Right lower limb injury (Item 135, ISV 11) consisting of compound fracture of the right tibia, a fracture to the right fibula, and scarring to the leg. Uplift allowed for meniscal tear on the right knee and post traumatic chondromalacia patellae of the right knee.

Muir DCJ, 28 April 2020

Zavodny v Couper & Anor [2020] QSC 42

ISV 25 (\$48,950)

Plaintiff (male, aged 65) was injured when he fell from his bicycle when trying to avoid a vehicle being reversed negligently by the defendant.

Injuries: Ankle injury (Item 142, ISV 16-17), grade 2 AC joint injury (Item 97, ISV 6-7), psychiatric injury (Item 12, 4-5).

Henry J, 13 March 2020

Fleming v State of Queensland [2016] QDC 334

ISV 29 (\$42,200)

Plaintiff (male, age unknown) had attended the local police station to report a matter. As he exited, he walked down some stairs which were rotting. They collapsed and the plaintiff fell.

Injuries: Serious lower limb injury (Item 134, ISV 23), moderate thoracic or lumbar spine injury (Item 92/93, ISV 10), moderate mental disorder (Item 12, ISV 8).

Morzzone QC DCJ, 16 December 2016

Du Pradal & Anor v Petchell [2014] QSC 261

ISV 40 (\$68,000)

Plaintiff (male, age unknown) was snorkelling when he was run over by a motor boat. He suffered upper body injuries to his ribs and lungs, as well as fractures in his arms and legs. He now walks with a walking stick and has a tilted leg gait due to one leg being longer than the other.

Injuries: Serious lower limb injury (Item 134, ISV 30), among other injuries.

Mullins J, 24 October 2014

Psychiatric

Sabidussi v Young [2017] QDC 146

ISV 10 (\$14,850)

Plaintiff (age unknown) developed a major depressive disorder, a soft tissue injury to the lumbar spine and an injury to the right knee after a car collision.

Injuries: Moderate mental disorder (Item 12, ISV 8).

Rafter DCJ

Sutton v Hunter [2021] QSC 249

ISV 13 (\$21,280)

Plaintiff was a 44-year-old woman who suffered soft tissue injuries and a dominant post-traumatic stress disorder following a car collision. Her psychiatric condition became an impediment to future work. She was assessed with a PIRS impairment of 10% and a maximum ISV of 10, uplifted by 25% to account for multiple injuries. Injuries: Item 12 - Moderate mental disorder.

Freeburn J, 7 October 2021

Allen v O'Donnell & Anor [2021] QSC 63

ISV 44 (\$109,640)

Plaintiff was a 43-year-old male who sustained significant injuries from a head-on collision, which also injured members of his family. He suffered post-traumatic stress disorder, fractured ribs, bilateral knee injuries and some scarring. His psychiatric injury was found to have been the dominant injury, with a PIRS impairment of 17%. To account for the overall impact of physical injuries, his ISV was increased to the maximum - 40, with a 25% uplift.

Injuries: Item 11 - Serious mental disorder.

Crow J in the Rockhampton Supreme Court, 25 March 2021

Brockhurst v Rawlings [2021] QSC 217

\$65,000 for general damages and violation of personal integrity (assessed at common law for a historical abuse claim and therefore general damages under the *Civil Liability Act 2003* did not apply)

Plaintiff was a 25-year-old male who suffered depressive disorder as a result of being groomed and sexually abused by his school teacher when he was 13-14 years old.

Injuries: Psychological - Depressive disorder.

Ryan J, 27 August 2021

Chapman v Wide Bay Hospital and Health Service [2022] QDC 271

ISV 13 (\$21,780)

Plaintiff was a 40-year-old female who was admitted to have a laparoscopic hysterectomy and inadvertently suffered a bowel perforation. The perforation was not immediately apparent to the surgeon or the Plaintiff, however due to Plaintiff's complaints of pain after the procedure, she underwent a further exploratory procedure where the puncture was identified and repaired. The Plaintiff awoke from the second surgery to discover a colostomy bag had been fitted to her abdomen which was necessary to stay in place for approximately two months.

Injuries: Item 12 - Moderate mental disorder; Item 73 - Moderate bowel injury ; Item 155.3 - Moderate scarring to a part of the body other than the face.

Rosengren DCJ, 2 December 2022

Internal

McAndrew v AAI Limited [2013] QSC 290

ISV 70 (\$150,800)

Plaintiff (male, age unknown) suffered various injuries, including a severely disabled right arm after a motorbike collided with him as he walked along the street.

Injuries: Severe brachial plexus injury (Item 121, ISV 65).

McMeekin J, 25 October 2013

Coulon v Adams [2022] QDC 291

ISV 9 (\$14,000)

Plaintiff (female, age unknown) underwent a colonoscopy, performed by the defendant. The defendant found the surgery difficult due to looping with a redundant colon and was unable to proceed past the distal ascending colon. The Plaintiff was discharged that day. The Plaintiff returned the next day to the hospital unwell and in a lot of pain. A CT scan showed a large ruptured subcapsular splenic haematoma and the Plaintiff was sent to the operating theatre, where her spleen was removed. As a result, the Plaintiff requires oral antibiotics for the rest of her life.

Injuries: Item 80 - Loss of spleen (complicated).

Sheridan DCJ, 19 December 2022

Amputation

Armstrong v Mitchell-Smith and Allianz Australia Insurance Limited [2012] QSC 334

ISV 18 \$22,800

Plaintiff (male, age unknown) was a passenger in a car accident when the car rolled and crushed his left hand. He was taken to hospital and his left middle finger had to be amputated. While he has not experienced ongoing pain in the amputated finger, he has ongoing issues with his ring finger.

Injuries: Subtotal amputation of the left middle finger at the level of the proximal interphalangeal joint (Item 114) (ISV 15). Also a severed extensor tendon and ligament injury to the left ring finger with a Boutonniere deformity (flexion deformity of proximal interphalangeal joint with hyperextension distal interphalangeal joint) (ISV 6).

McMeekin J, 7 November 2012

Bosk v Burgess & Anor (QBE Insurance) [2021] QSC 338

ISV 61 (\$167,760)

Plaintiff was a 31-year-old was injured while holidaying in Australia during 2014. He was walking along a footpath in Noosa Heads when the defendant lost control of her car at a roundabout and drove onto the footpath and collided with him. The plaintiff sustained various severe injuries, including amputation. A significant component of damages was the cost to purchase and replace (every four years over his lifetime) four different styles of prosthetic limbs for different purposes.

Injuries: Item 132 - below the knee amputation of one lower limb.

Wilson J, 14 December 2021

Burn

Dearden v Ryan & Anor [2022] QSC 111

ISV 38 (\$95,670)

Plaintiff (male, age 21) attended a party on the defendant's property, where a group of attendees noticed that he had absented himself from the party. Inspired by an earlier grassfire that night, one of the attendees ventured to a shed on the property to obtain some fuel with the intention that he would wake up the plaintiff by lighting his swag on fire. He proceeded to dribble the fuel on the plaintiff's clothing and ignited it with a lighter.

Injuries: Burn injuries to upper right side.

Crow J, 2 June 2022

Date of Loss: 02.12.02 - 30.06.10

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(1) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	1,000	26	37,000	51	96,560	76	169,520
2	2,000	27	39,000	52	99,320	77	172,640
3	3,000	28	41,000	53	102,080	78	175,760
4	4,000	29	43,000	54	104,840	79	178,880
5	5,000	30	45,000	55	107,600	80	182,000
6	6,200	31	47,200	56	110,360	81	185,300
7	7,400	32	49,400	57	113,120	82	188,600
8	8,600	33	51,600	58	115,880	83	191,900
9	9,800	34	53,800	59	118,640	84	195,200
10	11,000	35	56,000	60	121,400	85	198,500
11	12,400	36	58,400	61	124,340	86	201,800
12	13,800	37	60,800	62	127,280	87	205,100
13	15,200	38	63,200	63	130,220	88	208,400
14	16,600	39	65,600	64	133,160	89	211,700
15	18,000	40	68,000	65	136,100	90	215,000
16	19,600	41	70,580	66	139,040	91	218,500
17	21,200	42	73,160	67	141,980	92	222,000
18	22,800	43	75,740	68	144,920	93	225,500
19	24,400	44	78,320	69	147,860	94	229,000
20	26,000	45	80,900	70	150,800	95	232,500
21	27,800	46	83,480	71	153,920	96	236,000
22	29,600	47	86,060	72	157,040	97	239,500
23	31,400	48	88,640	73	160,160	98	243,000
24	33,200	49	91,220	74	163,280	99	246,500
25	35,000	50	93,800	75	166,400	100	250,000

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 30,000	0
30,001 - 50,000	2,500
> 50,000	Standard costs on the relevant Court scale

Date of Loss: 01.07.10 - 30.06.11

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(2) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	1,180	26	43,560	51	113,750	76	199,680
2	2,360	27	45,920	52	117,000	77	203,360
3	3,540	28	48,280	53	120,250	78	207,040
4	4,720	29	50,640	54	123,500	79	210,720
5	5,900	30	53,000	55	126,750	80	214,400
6	7,310	31	55,590	56	130,000	81	218,290
7	8,720	32	58,180	57	133,250	82	222,180
8	10,130	33	60,770	58	136,500	83	226,070
9	11,540	34	63,360	59	139,750	84	229,690
10	12,950	35	65,950	60	143,000	85	233,850
11	14,600	36	68,780	61	146,460	86	237,740
12	16,250	37	71,610	62	149,920	87	241,630
13	17,900	38	74,440	63	153,380	88	245,520
14	19,550	39	77,270	64	156,840	89	249,410
15	21,200	40	80,100	65	160,300	90	253,300
16	23,080	41	83,140	66	163,760	91	257,420
17	24,960	42	86,180	67	167,220	92	261,540
18	26,840	43	89,220	68	170,680	93	265,660
19	28,720	44	92,260	69	174,170	94	269,780
20	30,600	45	95,300	70	177,600	95	273,900
21	32,720	46	98,340	71	181,280	96	278,020
22	34,840	47	101,380	72	184,960	97	282,140
23	36,990	48	104,420	73	188,640	98	286,260
24	39,080	49	107,460	74	192,320	99	290,380
25	41,200	50	110,500	75	196,000	100	294,500

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 35,340	0
35,341 - 58,900	2,950
> 58,900	Standard costs on the relevant Court scale

Date of Loss: 01.07.11 - 30.06.12

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(3) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	1,220	26	44,880	51	117,200	76	205,590
2	2,440	27	47,310	52	120,550	77	209,480
3	3,660	28	49,740	53	123,900	78	213,270
4	4,880	29	52,170	54	127,250	79	217,060
5	6,100	30	54,600	55	130,600	80	220,850
6	7,550	31	57,270	56	133,950	81	224,860
7	9,000	32	59,940	57	137,300	82	228,870
8	10,450	33	62,610	58	140,650	83	232,880
9	11,900	34	65,280	59	144,000	84	236,890
10	13,350	35	67,950	60	147,350	85	240,900
11	15,050	36	70,870	61	150,910	86	244,910
12	16,750	37	73,790	62	154,470	87	248,920
13	18,450	38	76,710	63	158,030	88	252,930
14	20,150	39	79,630	64	161,590	89	256,940
15	21,850	40	82,550	65	165,150	90	260,950
16	23,790	41	85,680	66	168,710	91	265,190
17	25,730	42	88,810	67	172,270	92	269,430
18	27,670	43	91,940	68	175,830	93	273,670
19	29,610	44	95,070	69	179,390	94	277,910
20	31,550	45	98,200	70	182,950	95	282,150
21	33,730	46	101,330	71	186,740	96	286,390
22	35,910	47	104,460	72	190,530	97	290,630
23	38,090	48	107,590	73	194,320	98	294,870
24	40,270	49	110,720	74	198,110	99	299,110
25	42,450	50	113,850	75	201,900	100	303,350

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 36,400	0
36,401 - 60,670	3,040
> 60,670	Standard costs on the relevant Court scale

Date of Loss: 01.07.12 - 30.06.13

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(4) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	1,290	26	47,360	51	123,630	76	217,000
2	2,580	27	49,920	52	127,160	77	221,000
3	3,870	28	52,480	53	130,690	78	225,000
4	5,160	29	55,040	54	134,220	79	229,000
5	6,450	30	57,600	55	137,750	80	233,000
6	7,980	31	60,420	56	141,280	81	237,230
7	9,510	32	63,240	57	144,810	82	241,460
8	11,040	33	66,060	58	148,340	83	245,690
9	12,570	34	68,880	59	151,870	84	249,920
10	14,100	35	71,700	60	155,400	85	254,150
11	15,890	36	74,780	61	159,160	86	258,380
12	17,680	37	77,860	62	162,920	87	262,610
13	19,470	38	80,940	63	166,680	88	266,840
14	21,260	39	84,020	64	170,440	89	271,070
15	23,050	40	87,100	65	174,200	90	275,300
16	25,100	41	90,400	66	177,960	91	279,770
17	27,150	42	93,700	67	181,720	92	284,240
18	29,200	43	97,000	68	185,480	93	288,710
19	31,250	44	100,300	69	189,240	94	293,180
20	33,300	45	103,600	70	193,000	95	297,650
21	35,600	46	106,900	71	197,000	96	302,120
22	37,900	47	110,200	72	201,000	97	306,590
23	40,200	48	113,500	73	205,000	98	311,060
24	42,500	49	116,800	74	209,000	99	315,530
25	44,800	50	120,100	75	213,000	100	320,000

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 38,390	0
38,391 - 63,990	3,210
> 63,990	Standard costs on the relevant Court scale

Date of Loss: 01.07.13 - 30.06.14

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(5) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	1,180	26	43,560	51	113,750	76	199,680
2	2,360	27	45,920	52	117,000	77	203,360
3	3,540	28	48,280	53	120,250	78	207,040
4	4,720	29	50,640	54	123,500	79	210,720
5	5,900	30	53,000	55	126,750	80	214,400
6	7,310	31	55,590	56	130,000	81	218,290
7	8,720	32	58,180	57	133,250	82	222,180
8	10,130	33	60,770	58	136,500	83	226,070
9	11,540	34	63,360	59	139,750	84	229,690
10	12,950	35	65,950	60	143,000	85	233,850
11	14,600	36	68,780	61	146,460	86	237,740
12	16,250	37	71,610	62	149,920	87	241,630
13	17,900	38	74,440	63	153,380	88	245,520
14	19,550	39	77,270	64	156,840	89	249,410
15	21,200	40	80,100	65	160,300	90	253,300
16	23,080	41	83,140	66	163,760	91	257,420
17	24,960	42	86,180	67	167,220	92	261,540
18	26,840	43	89,220	68	170,680	93	265,660
19	28,720	44	92,260	69	174,170	94	269,780
20	30,600	45	95,300	70	177,600	95	273,900
21	32,720	46	98,340	71	181,280	96	278,020
22	34,840	47	101,380	72	184,960	97	282,140
23	36,990	48	104,420	73	188,640	98	286,260
24	39,080	49	107,460	74	192,320	99	290,380
25	41,200	50	110,500	75	196,000	100	294,500

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 40,460	0
40,461 - 67,450	3,380
> 67,450	Standard costs on the relevant Court scale

Date of Loss: 01.07.14 - 30.06.15

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(6) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	1,410	26	51,750	51	135,160	76	237,280
2	2,820	27	54,550	52	139,020	77	241,660
3	4,230	28	57,350	53	142,880	78	246,040
4	5,640	29	60,150	54	146,740	79	250,420
5	7,050	30	62,950	55	150,600	80	254,800
6	8,720	31	66,030	56	154,460	81	259,430
7	10,390	32	69,110	57	158,320	82	264,060
8	12,060	33	72,190	58	162,180	83	268,690
9	13,730	34	75,270	59	166,040	84	273,320
10	15,400	35	78,350	60	169,900	85	277,950
11	17,360	36	81,720	61	174,010	86	282,580
12	19,320	37	85,090	62	178,120	87	287,210
13	21,280	38	88,460	63	182,230	88	291,840
14	23,240	39	91,830	64	186,340	89	296,470
15	25,200	40	95,200	65	190,450	90	301,100
16	27,440	41	98,810	66	194,560	91	305,990
17	29,680	42	102,420	67	198,670	92	310,880
18	31,920	43	106,030	68	202,780	93	315,770
19	34,160	44	109,640	69	206,890	94	320,660
20	36,400	45	113,250	70	211,000	95	325,550
21	38,910	46	116,860	71	215,380	96	330,440
22	41,420	47	120,470	72	219,760	97	335,330
23	43,930	48	124,080	73	224,140	98	340,220
24	46,440	49	127,690	74	228,520	99	345,110
25	48,950	50	131,300	75	232,900	100	350,000

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 41,990	0
41,991 - 70,010	3,510
> 70,010	Standard costs on the relevant Court scale

Date of Loss: 01.07.15 - 30.06.17

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(7) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	1,440	26	52,970	51	138,450	76	243,040
2	2,880	27	55,840	52	142,400	77	247,530
3	4,320	28	58,710	53	146,350	78	252,020
4	5,760	29	61,580	54	150,300	79	256,510
5	7,200	30	64,450	55	154,250	80	261,000
6	8,910	31	67,610	56	158,200	81	265,740
7	10,620	32	70,770	57	162,150	82	270,480
8	12,330	33	73,930	58	166,100	83	275,220
9	14,040	34	77,090	59	170,050	84	279,960
10	15,750	35	80,250	60	174,000	85	284,700
11	17,760	36	83,700	61	178,210	86	289,440
12	19,770	37	87,150	62	182,420	87	294,180
13	21,780	38	90,600	63	186,630	88	298,920
14	23,790	39	94,050	64	190,840	89	303,660
15	25,800	40	97,500	65	195,050	90	308,400
16	28,090	41	101,200	66	199,260	91	313,410
17	30,380	42	104,900	67	203,470	92	318,420
18	32,670	43	108,600	68	207,680	93	323,430
19	34,960	44	112,300	69	211,890	94	328,440
20	37,250	45	116,000	70	216,100	95	333,450
21	39,820	46	119,700	71	220,590	96	338,460
22	42,390	47	123,400	72	225,080	97	343,470
23	44,960	48	127,100	73	229,570	98	348,480
24	47,530	49	130,800	74	234,060	99	353,490
25	50,100	50	134,500	75	238,550	100	358,500

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 43,020	0
43,020 - 71,730	3,600
> 71,730	Standard costs on the relevant Court scale

Date of Loss: 01.07.17 - 30.06.18

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(7) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	1,480	26	54,290	51	141,850	76	249,000
2	2,960	27	57,230	52	145,900	77	253,600
3	4,320	28	60,170	53	149,950	78	258,200
4	4,440	29	63,110	54	154,000	79	262,800
5	7,400	30	66,050	55	158,050	80	267,400
6	9,150	31	69,290	56	162,100	81	272,260
7	10,900	32	72,530	57	166,150	82	277,120
8	12,650	33	75,770	58	170,200	83	281,980
9	14,400	34	79,010	59	174,250	84	286,840
10	16,150	35	82,250	60	178,300	85	291,700
11	18,210	36	85,780	61	182,610	86	296,560
12	20,270	37	89,310	62	186,920	87	301,420
13	22,330	38	92,840	63	191,230	88	306,280
14	24,390	39	96,370	64	195,540	89	311,140
15	26,450	40	99,900	65	199,850	90	316,000
16	28,800	41	103,690	66	204,160	91	321,130
17	31,150	42	107,480	67	208,470	92	326,260
18	33,500	43	111,270	68	212,780	93	331,390
19	35,850	44	115,060	69	217,090	94	336,520
20	38,200	45	118,850	70	221,400	95	341,650
21	40,830	46	122,640	71	226,000	96	346,780
22	43,460	47	126,430	72	230,600	97	351,910
23	46,090	48	130,220	73	235,200	98	357,040
24	48,720	49	134,010	74	239,800	99	362,170
25	51,350	50	137,800	75	244,400	100	367,300

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 44,070	0
44,070- 73,490	3,690
> 73,490	Standard costs on the relevant Court scale

Date of Loss: 01.07.18 - 30.06.19

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(7) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	1,530	26	55,930	51	146,220	76	256,590
2	3,060	27	58,960	52	150,390	77	261,330
3	4,590	28	61,990	53	154,560	78	266,070
4	6,120	29	65,020	54	158,730	79	270,810
5	7,650	30	68,050	55	162,900	80	275,550
6	9,450	31	71,390	56	167,070	81	280,560
7	11,250	32	74,730	57	171,240	82	285,570
8	13,050	33	78,070	58	175,410	83	290,580
9	14,850	34	81,410	59	179,580	84	295,590
10	16,650	35	84,750	60	183,750	85	300,600
11	18,770	36	88,390	61	188,190	86	305,610
12	20,890	37	92,030	62	192,630	87	310,620
13	23,010	38	95,670	63	197,070	88	315,630
14	25,130	39	99,310	64	201,510	89	320,640
15	27,250	40	102,950	65	205,950	90	325,650
16	29,670	41	106,860	66	210,390	91	330,940
17	32,090	42	110,770	67	214,830	92	336,230
18	34,510	43	114,680	68	219,270	93	341,520
19	36,930	44	118,590	69	223,710	94	346,810
20	39,350	45	122,500	70	228,150	95	352,100
21	42,060	46	126,410	71	232,890	96	357,390
22	44,770	47	130,320	72	237,630	97	362,680
23	47,480	48	134,230	73	242,370	98	367,970
24	50,190	49	138,140	74	247,110	99	373,260
25	52,900	50	142,050	75	251,850	100	378,550

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 45,430	0
45,430- 75,750	3,800
> 75,750	Standard costs on the relevant Court scale

Date of Loss: 01.07.19 - 30.06.20

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(7) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	\$1,580	26	\$57,570	51	\$150,600	76	\$264,280
2	\$3,160	27	\$60,690	52	\$154,900	77	\$269,160
3	\$4,740	28	\$63,810	53	\$159,200	78	\$274,040
4	\$6,320	29	\$66,930	54	\$163,500	79	\$278,920
5	\$7,900	30	\$70,050	55	\$167,800	80	\$283,800
6	\$9,750	31	\$73,490	56	\$172,100	81	\$288,960
7	\$11,600	32	\$76,930	57	\$176,400	82	\$294,120
8	\$13,450	33	\$80,370	58	\$180,700	83	\$299,280
9	\$15,300	34	\$83,810	59	\$185,000	84	\$304,440
10	\$17,150	35	\$87,250	60	\$189,300	85	\$309,600
11	\$19,330	36	\$91,000	61	\$193,870	86	\$314,760
12	\$21,510	37	\$94,750	62	\$198,440	87	\$319,920
13	\$23,690	38	\$98,500	63	\$203,010	88	\$325,080
14	\$25,870	39	\$102,250	64	\$207,580	89	\$330,240
15	\$28,050	40	\$106,000	65	\$212,150	90	\$335,400
16	\$30,540	41	\$110,030	66	\$216,720	91	\$340,850
17	\$33,030	42	\$114,060	67	\$221,290	92	\$346,300
18	\$35,520	43	\$118,090	68	\$225,860	93	\$351,750
19	\$38,010	44	\$122,120	69	\$230,430	94	\$357,200
20	\$40,500	45	\$126,150	70	\$235,000	95	\$362,650
21	\$43,290	46	\$130,180	71	\$239,880	96	\$368,100
22	\$46,080	47	\$134,210	72	\$244,760	97	\$373,550
23	\$48,870	48	\$138,240	73	\$249,640	98	\$379,000
24	\$51,660	49	\$142,270	74	\$254,520	99	\$384,450
25	\$54,450	50	\$146,300	75	\$259,400	100	\$389,900

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 46,800	0
46,800 - 78,040	3,910
> 78,040	Standard costs on the relevant Court scale

Date of Loss: 01.07.20 - 30.06.21

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(7) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	\$1,620	26	\$58,890	51	\$154,000	76	\$270,240
2	\$3,240	27	\$62,080	52	\$158,400	77	\$275,230
3	\$4,860	28	\$65,270	53	\$162,800	78	\$280,220
4	\$6,480	29	\$68,460	54	\$167,200	79	\$285,210
5	\$8,100	30	\$71,650	55	\$171,600	80	\$290,200
6	\$9,990	31	\$75,170	56	\$176,000	81	\$295,480
7	\$11,880	32	\$78,690	57	\$180,400	82	\$300,760
8	\$13,770	33	\$82,210	58	\$184,800	83	\$306,040
9	\$15,660	34	\$85,730	59	\$189,200	84	\$311,320
10	\$17,550	35	\$89,250	60	\$193,600	85	\$316,600
11	\$19,780	36	\$93,080	61	\$198,270	86	\$321,880
12	\$22,010	37	\$96,910	62	\$202,940	87	\$327,160
13	\$24,240	38	\$100,740	63	\$207,610	88	\$332,440
14	\$26,470	39	\$104,570	64	\$212,280	89	\$337,720
15	\$28,700	40	\$108,400	65	\$216,950	90	\$343,000
16	\$31,250	41	\$112,520	66	\$221,620	91	\$348,570
17	\$33,800	42	\$116,640	67	\$226,290	92	\$354,140
18	\$36,350	43	\$120,760	68	\$230,960	93	\$359,710
19	\$38,900	44	\$124,880	69	\$235,630	94	\$365,280
20	\$41,450	45	\$129,000	70	\$240,300	95	\$370,850
21	\$44,300	46	\$133,120	71	\$245,290	96	\$376,420
22	\$47,150	47	\$137,240	72	\$250,280	97	\$381,990
23	\$50,000	48	\$141,360	73	\$255,270	98	\$387,560
24	\$52,850	49	\$145,480	74	\$260,260	99	\$393,130
25	\$55,700	50	\$149,600	75	\$265,250	100	\$398,700

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 47,850	0
47,850- 79,790	4,000
> 79,790	Standard costs on the relevant Court scale

Date of Loss: 01.07.21 - 30.06.22

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(7) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	\$1,630	26	\$59,150	51	\$154,620	76	\$271,360
2	\$3,260	27	\$62,350	52	\$159,040	77	\$276,370
3	\$4,890	28	\$65,550	53	\$163,460	78	\$281,380
4	\$6,520	29	\$68,750	54	\$167,880	79	\$286,390
5	\$8,150	30	\$71,950	55	\$172,300	80	\$291,400
6	\$10,050	31	\$75,480	56	\$176,720	81	\$296,700
7	\$11,950	32	\$79,010	57	\$181,140	82	\$302,000
8	\$13,850	33	\$82,540	58	\$185,560	83	\$307,300
9	\$15,750	34	\$86,070	59	\$189,980	84	\$312,600
10	\$17,650	35	\$89,600	60	\$194,400	85	\$317,900
11	\$19,890	36	\$93,440	61	\$199,090	86	\$323,200
12	\$22,130	37	\$97,280	62	\$203,780	87	\$328,500
13	\$24,370	38	\$101,120	63	\$208,470	88	\$333,800
14	\$26,610	39	\$104,960	64	\$213,160	89	\$339,100
15	\$28,850	40	\$108,800	65	\$217,850	90	\$344,400
16	\$31,410	41	\$112,940	66	\$222,540	91	\$349,990
17	\$33,970	42	\$117,080	67	\$227,230	92	\$355,580
18	\$36,530	43	\$121,220	68	\$231,920	93	\$361,170
19	\$39,090	44	\$125,360	69	\$236,610	94	\$366,760
20	\$41,650	45	\$129,500	70	\$241,300	95	\$372,350
21	\$44,510	46	\$133,640	71	\$246,310	96	\$377,940
22	\$47,370	47	\$137,780	72	\$251,320	97	\$383,530
23	\$50,230	48	\$141,920	73	\$256,330	98	\$389,120
24	\$53,090	49	\$146,060	74	\$261,340	99	\$394,710
25	\$55,950	50	\$150,200	75	\$266,350	100	\$400,300

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 48,030	0
48,030 - 80,090	4,020
> 80,090	Standard costs on the relevant Court scale

Date of Loss: 01.07.22 - 30.06.23

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(7) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	\$1,690	26	\$61,260	51	\$159,970	76	\$280,680
2	\$3,380	27	\$54,570	52	\$164,540	77	\$285,860
3	\$5,070	28	\$67,880	53	\$169,110	78	\$291,040
4	\$6,760	29	\$71,190	54	\$173,680	79	\$296,220
5	\$8,450	30	\$74,500	55	\$178,250	80	\$301,400
6	\$10,420	31	\$78,150	56	\$182,820	81	\$306,880
7	\$12,390	32	\$81,800	57	\$187,390	82	\$312,360
8	\$14,360	33	\$85,450	58	\$191,960	83	\$317,840
9	\$16,330	34	\$89,100	59	\$196,530	84	\$232,320
10	\$18,300	35	\$92,750	60	\$201,100	85	\$328,800
11	\$20,620	36	\$96,720	61	\$205,950	86	\$334,280
12	\$22,940	37	\$100,690	62	\$210,800	87	\$339,760
13	\$25,260	38	\$104,660	63	\$215,650	88	\$345,240
14	\$27,580	39	\$108,630	64	\$220,500	89	\$350,720
15	\$29,900	40	\$112,600	65	\$225,350	90	\$356,200
16	\$32,550	41	\$116,880	66	\$230,200	91	\$361,980
17	\$35,200	42	\$121,160	67	\$235,050	92	\$367,760
18	\$37,850	43	\$125,440	68	\$239,900	93	\$373,540
19	\$40,500	44	\$129,720	69	\$244,750	94	\$379,320
20	\$43,150	45	\$134,000	70	\$249,600	95	\$385,100
21	\$46,110	46	\$138,280	71	\$254,780	96	\$390,880
22	\$49,070	47	\$142,560	72	\$259,960	97	\$396,660
23	\$52,030	48	\$146,840	73	\$265,140	98	\$402,440
24	\$54,990	49	\$151,120	74	\$270,320	99	\$408,220
25	\$57,950	50	\$155,400	75	\$275,500	100	\$41,400

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 49,700	0
49,700 - 82,870	4,020
> 82,870	Standard costs on the relevant Court scale

Date of Loss: 01.07.23 - 30.06.24

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 7 Section 8(7) of the *Civil Liability Regulation 2014* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	\$1,780	26	\$64,540	51	\$168,510	76	\$295,660
2	\$3,560	27	\$68,030	52	\$173,320	77	\$301,120
3	\$5,340	28	\$71,520	53	\$178,130	78	\$306,580
4	\$7,120	29	\$75,010	54	\$182,940	79	\$312,040
5	\$8,900	30	\$78,500	55	\$187,750	80	\$317,500
6	\$10,980	31	\$82,340	56	\$192,560	81	\$323,270
7	\$13,060	32	\$86,180	57	\$197,370	82	\$329,040
8	\$15,140	33	\$90,020	58	\$202,180	83	\$334,810
9	\$17,220	34	\$93,860	59	\$206,990	84	\$340,580
10	\$19,300	35	\$97,700	60	\$211,800	85	\$346,350
11	\$21,740	36	\$101,880	61	\$216,910	86	\$352,120
12	\$24,180	37	\$106,060	62	\$222,020	87	\$357,890
13	\$26,620	38	\$110,240	63	\$227,130	88	\$363,660
14	\$29,060	39	\$114,420	64	\$232,240	89	\$369,430
15	\$31,500	40	\$118,600	65	\$237,350	90	\$375,200
16	\$34,290	41	\$123,110	66	\$242,460	91	\$381,290
17	\$37,080	42	\$127,620	67	\$247,570	92	\$387,380
18	\$39,870	43	\$132,130	68	\$252,680	93	\$393,470
19	\$42,660	44	\$136,640	69	\$257,790	94	\$399,560
20	\$45,450	45	\$141,150	70	\$262,900	95	\$405,650
21	\$48,570	46	\$145,660	71	\$268,360	96	\$411,740
22	\$51,690	47	\$150,170	72	\$273,820	97	\$417,830
23	\$54,810	48	\$154,680	73	\$279,280	98	\$423,920
24	\$57,930	49	\$159,190	74	\$284,740	99	\$430,010
25	\$61,050	50	\$163,700	75	\$290,200	100	\$436,100

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Damages \$	Prescribed costs \$
< 52,350	0
52,350- 87,300	4,380
> 87,300	Standard costs on the relevant Court scale

Date of Loss: 01.07.24 - 30.06.25

General Damages

Section 62 of the *Civil Liability Act 2003* (Qld)

Schedule 1 Part 2 of the *Civil Liability Indexation Notice 2024* (Qld)

No.	\$	No.	\$	No.	\$	No.	\$
1	\$1,860	26	\$67,610	51	\$176,590	76	\$309,770
2	\$3,720	27	\$71,270	52	\$181,630	77	\$315,490
3	\$5,580	28	\$74,930	53	\$186,670	78	\$321,210
4	\$7,440	29	\$78,590	54	\$191,710	79	\$326,930
5	\$9,300	30	\$82,250	55	\$196,750	80	\$332,650
6	\$11,480	31	\$86,270	56	\$201,790	81	\$338,700
7	\$13,660	32	\$90,290	57	\$206,830	82	\$344,750
8	\$15,840	33	\$94,310	58	\$211,870	83	\$350,800
9	\$18,020	34	\$98,330	59	\$216,910	84	\$356,850
10	\$20,200	35	\$102,350	60	\$221,950	85	\$362,900
11	\$22,760	36	\$106,730	61	\$226,990	86	\$368,950
12	\$25,320	37	\$111,110	62	\$232,650	87	\$375,000
13	\$27,880	38	\$115,490	63	\$238,000	88	\$381,050
14	\$30,440	39	\$119,870	64	\$243,350	89	\$387,100
15	\$33,000	40	\$124,250	65	\$248,700	90	\$393,150
16	\$35,920	41	\$128,980	66	\$254,050	91	\$399,530
17	\$38,840	42	\$133,710	67	\$259,400	92	\$405,910
18	\$41,760	43	\$138,440	68	\$264,750	93	\$412,290
19	\$44,680	44	\$143,170	69	\$270,100	94	\$418,670
20	\$47,600	45	\$147,900	70	\$275,450	95	\$425,050
21	\$50,870	46	\$152,630	71	\$281,170	96	\$431,430
22	\$54,140	47	\$157,360	72	\$286,890	97	\$437,810
23	\$57,410	48	\$162,090	73	\$292,610	98	\$444,190
24	\$60,680	49	\$166,820	74	\$298,330	99	\$450,570
25	\$63,950	50	\$171,550	75	\$304,050	100	\$456,950

Costs

Section 56 of the *Personal Injuries Proceedings Act 2002* (Qld)

Section 12 of the *Personal Injuries Proceedings Regulation 2014* (Qld)

Schedule 1 of the *Personal Injuries Proceedings Indexation Notice 2024* (Qld)

Damages \$	Prescribed costs \$
< \$54,849	0
\$54,850 - \$91,459	4,380
> \$91,460	Standard costs on the relevant Court scale

Loss of Consortium or Loss of Servitium

The *Civil Liability Indexation Notice 2024* (Qld) introduced a threshold which determines whether a court can award damages for loss of consortium or loss of servitium under section 58(1)(b) CLA Qld. To be entitled to damages for loss of consortium or loss of servitium, the general damage of the Plaintiff, or the deceased, must be assessed at, or more than, \$54,850.

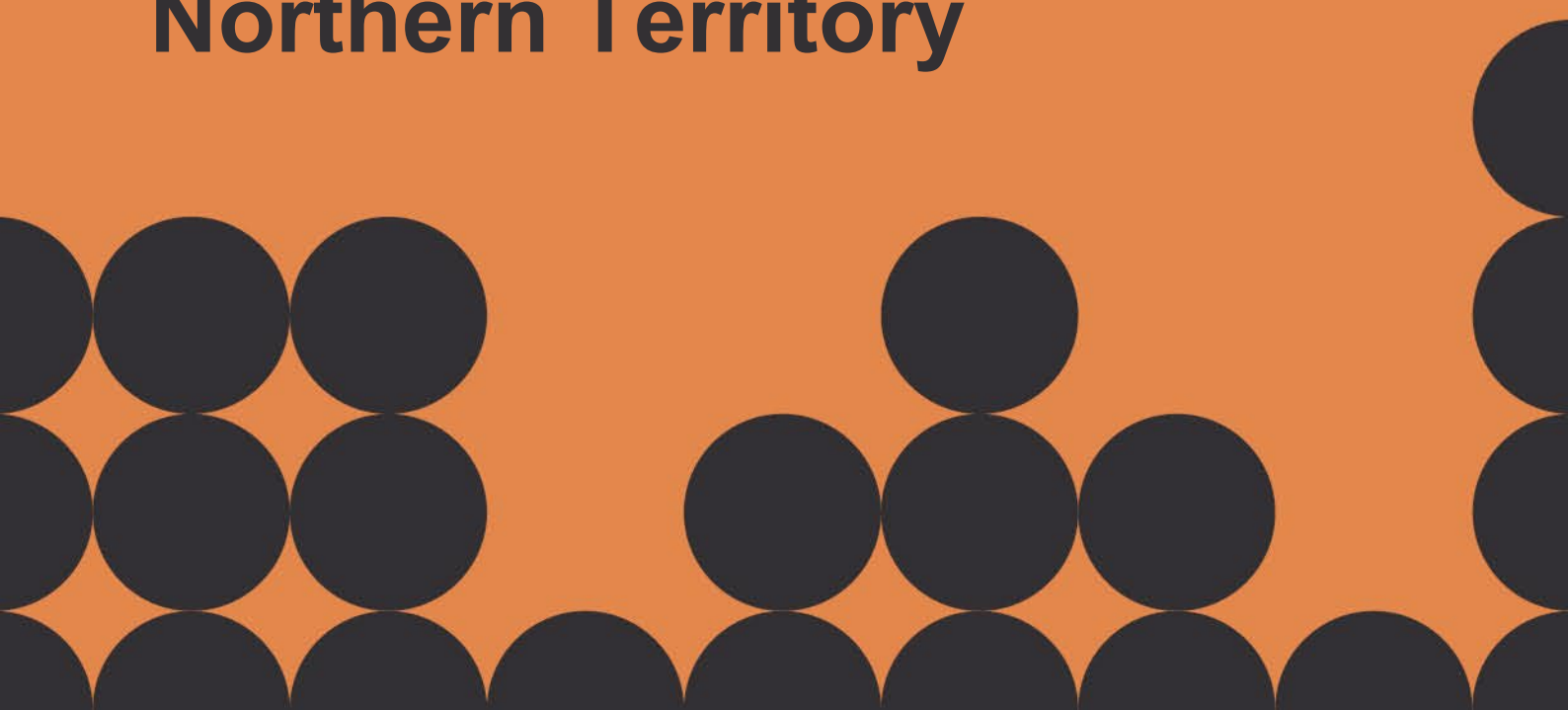
Future Loss

The *Civil Liability Indexation Notice 2024* (Qld) introduced a threshold for notification by a court about a proposed award for future loss to give the parties to a proceeding a reasonable opportunity to negotiate a structured settlement under section 64(2) CLA Qld. When a court uses its discretion to make an award for

future loss for, or more than, \$182,910, the court must give notice of the terms of the award it proposes to make, under section 75 CLA Qld.

06

Northern Territory



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Personal Injuries (Civil Claims) Act 2003 (NT)

Application

The Northern Territory remains the only Australian jurisdiction in which the common law remains paramount in determining duty of care and causation in the tort of negligence. However, two pieces of legislation have been enacted in response to Justice Ipp's report and recommendations. Both pieces of legislation deal exclusively with the costs, efficiency, and processing of claims. For instance, the objectives of the *Personal Injuries (Civil Claims) Act 2003* (NT) are to minimise costs in relation to making claims, the fixing of appropriate legal costs, and the promotion of settlements.³¹¹

The central objective is:

- To improve the efficiency of processes in the resolution of claims for damages for personal injuries while assisting in the affordability of such claims before commencement of legal proceedings.

The objectives are stated as being achieved by:

- resolving claims prior to commencing proceedings in a court;
- promoting claims settlement;
- forbidding people from commencing proceedings without being fully prepared to resolve the claim by settlement or trial;
- minimising claims costs;
- fixing appropriate awards for legal costs; and
- making rules that provide for efficiency and equity for claims resolution in order to regulate the commencement of legal proceedings in respect of unresolved claims.

The *Personal Injuries (Liabilities and Damages) Act 2003* (NT) applies to all civil claims for damages for personal injuries from 1 May 2003.³¹² The objectives are to:³¹³

- modify the law relating to the entitlement to damages for personal injury;
- clarify principles of contributory negligence;
- fix reasonable limits on certain awards for damages for personal injuries; and
- provide for periodic payments of damages for personal injuries.

Part 4 of the *Personal Injuries (Liabilities and Damages) Act 2003* implemented legislative changes to the calculation of damages for personal injury claims. The Northern Territory Law Reform Committee's December 2014 *Report: Tort Law Reform in the Northern Territory* noted the legislative changes to consist of:³¹⁴

- a cap of three times of the average weekly earnings to be applied in relation to the assessment of pecuniary loss;
- awards for future pecuniary loss being required to state the assumptions upon which they are based and must be adjusted for a percentage possibility that the events might have occurred regardless of the inquiry;
- damages for gratuitous services to meet a threshold of six hours per week for six months or more, with a cap for full time services;
- the discount rate for the present value of a lump sum for future pecuniary loss to be set at 5%;
- abolition of common law principles relating to non-pecuniary loss;
- non-pecuniary loss to be awarded as a percentage of the statutory maximum amount (currently \$686,500). The percentage is determined by a court, based on evidence from medical practitioners

³¹¹ See: Northern Territory Law Reform Committee, *Report: Tort Law Reform in the Northern Territory*, Report No. 41, December 2014. https://justice.nt.gov.au/__data/assets/pdf_file/0009/238617/NTLRC-Tort-Law-Reform-Report-at-December-2014.pdf

³¹² Ibid

³¹³ See Long Title *Personal Injuries (Liabilities and Damages) Act 2003* (NT)

³¹⁴ See: Northern Territory Law Reform Committee, *Report: Tort Law Reform in the Northern Territory*, Report No. 41, December 2014, 6

who have assessed the plaintiff with the prescribed guide (currently the American Medical Association Guides to the Evaluation of Permanent Impairment); and

- where permanent impairment is assessed at less than 5%, no amount is payable for non-pecuniary loss.

Section 4 of the *Personal Injuries (Liabilities and Damages) Act 2003* (NT) excludes claims relating to:

- motor accidents;
- workers' compensation;
- dust-related conditions; and
- certain provisions of the *Competition and Consumer Act 2010* (Cth).

New Part 4A (Damages Awarded to Offenders) limits the liability of a public entity defendant to an individual in custody in relation to the torts of battery, assault and false imprisonment. This part does not apply to civil wrongs arising from child abuse of an offender.

Amendments

The Northern Territory Parliament passed amendments to the *Personal Injuries (Liabilities and Damages) Act 2003* (NT) that gave effect to a number of reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse in its Redress and Civil Litigation Report.³¹⁵ This Bill, as amended, was passed on 19 May 2022.³¹⁶ The amendments to the primary Act appear to cover the following:

- Part 2 – Damages awarded to offenders.
- Part 3 – Damages awarded to pecuniary loss.
- Part 4 - Damages relation to institutional liability for child abuse.
- Part 5 - Further amendments related to damages awarded to offenders.

These particular amendments do not interact with determining duty of care and causation in the tort of negligence in the Northern Territory.

Negligence - the elements

The Northern Territory has not legislated any provisions in respect of the three elements of negligence:

1. duty of care;
2. breach; and
3. causation.

As mentioned, the common law test for negligence applies in the Northern Territory. This formulation is set out in:

- *Wyong Shire Council v Shirt* (1980) 146 CLR 40; and
- *Roads and Traffic Authority of New South Wales v Dederer* [2007] 238 ALR 761.

The scope of the duty of care - the elements and steps of breach

Standard of care

The standard of care is the level of care that the potential defendant was required to exercise in accordance with the class of person the care is required for.

Before establishing if the risk which caused the harm or personal injury was *reasonably foreseeable*, it is necessary to establish the class of person and level of care the defendant ought to have been reasonably practising. It is essential to determine if the defendant's conduct fell below the required standard of care.

³¹⁵ See: Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, August 2015. https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_redress_and_civil_litigation.pdf

³¹⁶ *Personal Injuries (Liabilities and Damages) Amendment Bill 2022*

At common law, the standard of care is that which is objectively reasonable.

The standard of care to be exercised by:

- Children is low (*McHale v Watson*³¹⁷);
- Persons with higher technical skills and expertise (for instance a person teaching a learner driver how to drive) is high (*Imbree v McNeilly*³¹⁸);
- Mentally incompetent is the same standard as a reasonable person unless:³¹⁹
 - the mentally incompetent person cannot appreciate wrongfulness; and
 - the mentally incompetent person does not have control of his or her actions.
- Skilled professionals such as medical doctors accused of breaching professional negligence is to be determined under the principle held in *Rogers v Whitaker* that a professional standard of care is "the standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill".³²⁰ Medical doctors have a further duty to:
 - warn their patients of material risks associated with their treatment and pre-existing mental or physical conditions.

Reasonable foreseeability of risk of injury

This is a common law test.

The common law authorities hold that the **risk** should be:

- **foreseeable**; and
- the **risk should not be "insignificant"**.

This means that the **risk** should not be "one that is **far-fetched or fanciful**" (Mason J in *Wyong Shire Council v Shirt*³²¹).

Calculus of negligence

There should be "consideration of the magnitude of the risk and the degree of the probability of its occurrence" (Mason J in *Wyong Shire Council v Shirt*).³²²

The calculus of negligence has four components:

- the probability that the harm would occur if care were not taken (*Romeo*³²³/*RTA v Dederer*³²⁴);
- gravity - The likely seriousness of the harm (*Paris v Stepney*³²⁵/*Tame*³²⁶);
- the burden of taking precautions to avoid the risk of harm (*Woods v Multi-Sport*³²⁷ /*Neindorf v Junkovic*³²⁸); and
- the social utility of the activity that creates the risk of harm (*E v Red Cross*³²⁹).

There is a breach if:

- probability of the harm and gravity of the harm > burden of taking precautions; and
- probability gravity > social utility.

³¹⁷ *McHale v Watson* (1966) 115 CLR 199

³¹⁸ *Imbree v McNeilly and Another (No s43/2008) - (2008)* 248 ALR 647

³¹⁹ It was held that the standard of care required of a person with an unsound mind is the objective standard of care expected from the ordinary person, See: *Carrier v Bonham* [2002] 1 Qd R 474

³²⁰ *Rogers v Whitaker* [1992] 109 ALR 625, 628 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ)

³²¹ *Wyong Shire Council v Shirt* [1980] 29 ALR 217

³²² *Ibid* at 221

³²³ *Romeo v Conservation Commission of the Northern Territory* [1998] 151 ALR 263

³²⁴ *Roads and Traffic Authority of New South Wales v Dederer and Another* [2007] 238 ALR 761

³²⁵ *Paris v Stepney Borough Council* [1951] 1 ALL ER 42

³²⁶ *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd* [2002] 191 ALR 449

³²⁷ *Woods v Multi-Sports Holdings Pty Ltd* [2002] 186 ALR 145

³²⁸ *Neindorf v Junkovic* [2005] 222 ALR 631

³²⁹ *E v Australian Red Cross Society* [1991] 105 ALR 53

This is explained by the following four indicia:

- there must be an untaken precaution (would have prevented accident);
- precaution must be reasonable (cannot pose an unreasonable burden to society);
- benefits of risk reduction > costs and burden on society; and
- benefits of risk reduction > costs of precaution.

Causation

After confirming breach using the above common law principles, one must prove causation being:

- that the failure to take precaution caused the plaintiff harm **OR** some precaution would have prevented the plaintiff's harm.

Step 1 - "But For" Test

The first step at common law is to prove factual causation -- this is the **"But For" Test**:

- "But for" the defendant's failure to take reasonable precaution the plaintiff's harm would have been avoided (factual causation).

Causation is a question of fact. "The cause of a particular occurrence is a question of fact which must be determined by applying common sense to the facts of each particular case" (*Chapman v Hearse*³³⁰/*Strong v Woolworths*³³¹).

Causation is a matter of common sense (Mason J in *March*³³²).

Chief Justice French in *Amaca Pty Ltd v Booth*³³³ clarified the common law position of determining factual causation (+ common sense):

*"Factual causation does not require that the propounded cause be one link in a chain of causative factors or events. It may be, as some commentators have suggested, a "necessary element of a sufficient set" of causes."*³³⁴

If the above test fails, the case could fall into an "exceptional circumstance". This could be due to a failure to warn.

For instance, an exceptional circumstance may eventuate when there has been a failure by a medical practitioner to inform the patient of risks causally related to injuries sustained (*Chappel v Hart*³³⁵).

Step 2 - Is there a *Novus Actus Interveniens* (NAI) - an intervening act?

At common law the first causation step must be proved - that something must have caused the harm to occur - but an intervening act can potentially sever the causal connection outlined in Step 1. This means the original or primary tortfeasor is no longer liable as the chain of causation has been broken.

An intervening act has two elements:

- it must be an intentional/voluntary act not contaminated or influenced by the original tortfeasor (*Haber v Walker*³³⁶); or
- must be a causally independent event or coincidence (See *Mahony*³³⁷/*Chapman v Hearse*).

An intervening act will sever the liability of the primary tortfeasor (*March*).

³³⁰ *Chapman v Hearse* [1962] ALR 379

³³¹ *Strong v Woolworths Ltd t/as Big W* [2012] 285 ALR 420

³³² *March v E & MH Stramare Pty Ltd* [1991] 99 ALR 423

³³³ *Amaca PTY LTD (ACN 000 035 512) (under NSW administered winding-up) v Booth and Another (Matter No s219/2011)* [2011] 283 ALR 461

³³⁴ See Chief Justice French at [47-49]; Wright, "The NESS Account of Natural Causation: A Response to Criticisms", in R Goldberg (ed), *Perspectives on Causation*, Hart, Oxford, 2011, p 285

³³⁵ *Chappel v Hart* [1998] 156 ALR 517

³³⁶ *Haber v Walker* [1963] VR 339

³³⁷ *Mahony v J Krushchich (Demolitions) Pty Ltd* [1985] 59 ALJR 504

An NAI can be a voluntary human act (*Rickards v Lothian*³³⁸) that is:

- free, informed, and deliberate; and has
- knowledge of the consequence.

An NAI can be a subsequent negligent act (*Mahony*) that is:

- a reasonably foreseeable event in situation of a risk created by the defendant.

Step 3 - Remoteness

The test at common law for remoteness involves determining whether or not the act causing the damage is reasonably foreseeable.

The question to be asked is: was the harm reasonably foreseeable?

This involves the principle that the defendant ought to be able to foresee the "kind of damage", not the actual damage. The defendant's liability depends upon the foreseeability of the kind of damage (*Wagon Mound No 1*³³⁹).

A risk of injury of even a small magnitude is and should be reasonably foreseeable (*Wagon Mound No 2*); and whether a reasonable person would have "realised or foreseen and prevented the risk" "it must follow that the defendant is liable in damages" (Lord Reid in *Wagon Mound No 2*³⁴⁰).

The next step requires further questions to be asked to determine whether the defendant's actions fit within the scope of liability, whether their actions caused harm that was reasonably foreseeable.

These include the following propositions and principles:

1. The kind of damage is foreseeable (*Hughes v Lord Advocate*³⁴¹)
2. Manner of harm need not be foreseeable (*Jolley v Sutton*³⁴²)
3. The Egg Shell Skull rule - take the victim as you find them - the extent of the injury need not be reasonably foreseeable, only the particular class of injury (*Mt Isa Mines v Pusey*³⁴³). The Egg Shell Skull rule makes a defendant liable for damage of an unforeseeable extent, but not for unforeseeable damage of a different kind. Under this principle a defendant is liable for additional damage of a foreseeable kind suffered by a plaintiff who has some special vulnerability (*Commonwealth v McLean*³⁴⁴):
 - a. a subsequent injury can occur after the defendant's harm. The second injury need not be reasonably foreseeable but must be triggered by an unusual susceptibility:
 - i. existing susceptibility (*Smith v Leech Brain Co Ltd*³⁴⁵); and
 - ii. triggering new injury (*Stephenson v Waite Tileman Ltd*³⁴⁶).

Egg Shell Skull Rule extends to environmental susceptibilities.

 - iii. development of rare psychiatric condition - the Egg Shell Skull cases are not confined to the physical or constitutional characteristics of the particular individual (*Nader v Urban Transport Authority of NSW*³⁴⁷).
 - b. Egg Shell Skull rule extends to cultural susceptibilities (*Kavanagh v Akhtar*³⁴⁸).

³³⁸ *Rickards v Lothian* [1913] 19 ALR 105

³³⁹ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (Wagon Mound (No 1) case)* [1961] ALR 569

³⁴⁰ *Miller Steamship Company Pty Ltd v Overseas Tankship (UK) Ltd (The Wagon Mound (No 2))* [1966] 1 Lloyd's Rep 657

³⁴¹ *Hughes v Lord Advocate* [1963] 1 All ER 705

³⁴² *Jolley v Sutton London Borough Council* [2000] 3 All ER 409

³⁴³ *Mt Isa Mines v Pusey* [1970] 125 CLR 383

³⁴⁴ *Commonwealth of Australia v McLean* [1997] NSWCA 76

³⁴⁵ *Smith v Leech Brain & Co Ltd and Another* [1961] 3 All ER 1159

³⁴⁶ *Stephenson v Waite Tileman Ltd* [1973] 1 NZLR 152

³⁴⁷ *Nader v Urban Transit Authority (NSW)* [1985] 2 NSWLR 501

³⁴⁸ *Kavanagh v Akhtar* [1998] 45 NSWLR 588

"Defences" to negligence

Concurrent liability: non-delegable duties and vicarious liability

The Northern Territory has not reformed the issue of vicarious liability nor non-delegable duty of care. Both are common law based. For non-delegable duty the following requirements must be satisfied:

- control/responsibility - defendant must have had some control over the plaintiff or the plaintiff's property; and
- vulnerability - the plaintiff must have been unable to protect him or herself and was forced to rely on the defendant's requisite standard of care.

Examples of relationships of the above are: employer/employee, hospital/patient and school/pupil (See, eg, *Burnie Port Authority v General Jones P/L* [1994] 179 CLR 520; *New South Wales v Lepore* [2003] 212 CLR 511; *Kondis v State Transport Authority* [1984] 154 CLR 672).

For vicarious liability an employer can be found vicariously liable for wrongful, unauthorised or negligent acts carried out by an employee during the course of his or her employment. The negligent act or omission must take place during the employee's employment where the employee was authorised to do such an act resulting in the negligent conduct under the control of his or her employer. This principle has been endorsed by the High Court in the case of *New South Wales v Lepore* (2003) 212 CLR 511. If it is an independent contractor who committed a tortious act who was sufficiently under the control of their "employer" where such a position is evidenced through an objective relationship, the "employer" will be held vicariously liable (*Hollis v Vabu Pty Ltd* (2001) 207 CLR 21).

Obvious risk - negligence calculus

As with the elements of negligence, many of the defences remain a common law test, including obvious risk.

Where a risk is obvious, the duty of care that a person owes does not include a duty to warn or protect unless there is a high probability of inadvertence or carelessness (*Romeo v Northern Conservation Commission of the Northern Territory*³⁴⁹).

But an obvious risk does not completely discharge a defendant's liability. The issue of obvious risk goes to the contributory negligence of the plaintiff (*Vairy*³⁵⁰).

Examples of obvious risks include:

- Where the exercise of reasonable care would result in the realisation that the dangers of a cliff were obvious (Brennan CJ in *Romeo*);
- An authority or commission not being under a duty to erect a sign when the dangers are obvious (Toohey and Gummow JJ in *Romeo*);
- An authority or commission not being under a duty to erect a fence where there is a "diffuse risk" which is obvious, i.e. it would have required the commission to fence an unreasonably long area of a cliff (*Romeo*);
- A council not being required to warn about the risks of body surfing because those who volunteer in pleasurable but risky past-times must take personal responsibility for what they do (*Prast v Town of Cottesloe*³⁵¹);
- Where a risk is so well known there is no duty to warn (*Prast*);
- Where people are expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, trees, roots or holes (*Brodie v Singleton Shire Council*; *Ghantous v Hawkesbury City Council*³⁵²);

³⁴⁹ *Romeo v Conservation Commission of the Northern Territory* [1998] 192 CLR 431

³⁵⁰ *Vairy v Wyong Shire Council* [2005] 221 ALR 711

³⁵¹ *Prast v Town of Cottesloe* [2001] 22(20) Leg Rep Sl4

³⁵² *Brodie v Singleton Shire Council*; *Ghantous v Hawkesbury Shire Council* [2001] 180 ALR 145

- Where a person dives into a wave close to the shore there is an inherent and well known risk of encountering a sandbar, or swimming in a creek (*Swain*³⁵³, *Vairy*, and *Mulligan*).
- These general statements of principle summarised by the High Court in *Mulligan*:
 - a foreseeable risk is to be assessed by reference to community standards of reasonable behaviour (*Mulligan*);
 - the determination of the existence and content of a duty is to be assessed by examining the nature of the risk assessed before the accident - it is assessed prospectively to what was reasonably foreseeable (*Mulligan*);
 - the type of activity is guided by a choice of participation - if you volunteer yourself for an activity like diving or swimming you are under personal autonomy and thus should take reasonable care of oneself (*Vairy*);
 - the obviousness of the risk is one factor to be considered in assessing the circumstances of the case - it can also be a conclusive factor (*Mulligan*); and
 - there is an expectation that persons will take care of their own safety which is to be taken into account when assessing the reasonableness of a response to an obvious or inherent risk (*Vairy*).

Dangerous recreational activities

Remains a common law test, no legislative reforms.

Section 48 of the *Consumer Affairs and Fair Trading Act 2003* (NT) places restrictions on the liability of a service provider of recreational and sporting activities.

Criminal activity

Where the court is satisfied on the balance of probabilities that the injured person was engaged in conduct which would constitute an indictable offence punishable by imprisonment and that conduct materially contributed to the risk of injury, the defendant does not incur civil liability for the harm caused to the plaintiff.³⁵⁴

The court may, however, make an exception to this if it deems the circumstances of the case before it to be exceptional in some way or that it would be harsh and unjust to exclude liability in the circumstances.³⁵⁵

Contributory negligence

Part 5 of the *Law Reform (Miscellaneous Provisions) Act 1956* (NT) contains provisions dealing with contributory negligence. These provisions allow the court to have a discretionary power to reduce the total damages to such an extent that "the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."³⁵⁶

Intoxication

If the injured person was intoxicated at the time of the incident and the respondent alleges contributory negligence, there is a presumption that the applicant contributed to the harm caused.³⁵⁷ This is rebutted if the claimant establishes that the claimant's intoxication did not materially contribute to the incident or was involuntary.³⁵⁸

Where contributory negligence is established, section 17 of the *Personal Injuries (Liabilities and Damages) Act 2003* (NT) provides that the court must take into consideration the amount of damages which the claimant would have been entitled prior to the contributory negligence. In calculating the damages due to the

³⁵³ *Swain v Waverly Municipal Council* [2005] 213 ALR 249

³⁵⁴ Section 10 *Personal Injuries (Liabilities and Damages) Act 1956* (NT)

³⁵⁵ *Ibid*

³⁵⁶ *Law Reform (Miscellaneous Provisions) Act (NT)* section 16

³⁵⁷ Section 14 *Personal Injuries (Liabilities and Damages) Act 2003* (NT)

³⁵⁸ *Ibid*

plaintiff, the court is then to reduce that calculation by 25% or more with regard to what it deems "appropriate" in the circumstances.

Proportionate liability

Proportionate liability in the Northern Territory is governed by the *Proportionate Liability Act 2005* (NT).

The Act deems a claim for damages (in tort, contract, under statute or otherwise) arising from a failure to take reasonable care to be apportioned so long as the loss was not caused intentionally or fraudulently.³⁵⁹ Section 13 stipulates that the court may determine the liability of concurrent wrongdoers.

The Act specifies that a claim arising from a personal injury is not an apportionable claim.

Good samaritans

Section 8 of the *Personal Injuries (Liabilities and Damages) Act 2003* (NT) provides an immunity from personal civil liability for personal injury caused by an act done in good faith and without recklessness while giving emergency assistance to a person. It is worth noting that this section will not apply if the Good Samaritan was intoxicated while giving the assistance or advice. The legislation is unclear as to whether the immunity is available for acts or omissions which are not for the benefit of the injured person but for the benefit of others, such as bystanders within a zone of danger.

Volunteers

Similarly, section 7 of the Act provides protection for volunteers. A volunteer does not incur any personal civil liability for a personal injury caused by an act done in good faith and without recklessness while doing community work for a community organisation. Instead, the community organisation itself incurs the civil liability. A "community organisation" is defined to mean a religious body, a body corporate, or an agency or department of the Territory that organises, directs or supervises community work done by volunteers.

"Community work" is quite broadly defined as work for numerous purposes such as environmental conservation and religion, however excludes work undertaken as part of a community work order. The immunity does not extend to situations where the volunteer is intoxicated, has acted outside the scope of their authority or contrary to the instructions of the organisation.

However, exceptions to the above rule apply where:

- the volunteer knew, or ought reasonably to have known, that he or she was acting outside the scope of his or her authority or contrary to the instructions of the community organisation; and
- committed the act while intoxicated.

Food donors

The Act provides that a person who donates food or a grocery product does not incur civil liability for a personal injury caused by the consumption of that food if:³⁶⁰

- it is donated in good faith for a charitable or benevolent purpose;
- the intention is that the consumer would not have to pay;
- it is fit for human consumption or safe to use, at the time it left possession of the donor; and
- the food donor advised of any handling requirements and/or time limits on the safety of the food.

³⁵⁹ Section 7 *Proportionate Liability Act 2005* (NT)

³⁶⁰ *Personal Injuries (Liabilities and Damages) Act 2003* (NT) section 7A

Mental harm

Injuries arising from mental or nervous shock is dealt with in Part 7 of the *Law Reform (Miscellaneous Provisions) Act 1956* (NT).

Pursuant to section 25 of the *Law Reform (Miscellaneous Provisions) Act*, the liability of the person in respect of the injury to the plaintiff extends to a parent or the husband, or wife, or de factor partner of the person killed, injured or put in peril and also to certain family members (specified below) who were "within sight or hearing" of the injury or death occurring.

Section 23 determines that a claim for mental harm injuries is restricted to the following relatives of a person killed, injured, or put in peril:

- "Children" - the son, daughter, grandson, granddaughter, step-son or step-daughter or a person to whom that person stands in loco parentis;
- "Member of the family" - the husband, wife, de factor partner, parent, child, brother, sister, half-brother or half-sister; and
- "Parent" - the father, mother, grandfather, grandmother, step-father, or step mother of the person harmed or killed or a person standing in loco parentis to that person.

Child abuse

Part 4 of the *Personal Injuries (Liabilities and Damages) Amendment Act 2022* commenced from 8 June 2022. The Amendment Act inserted Part 3A into the *Personal Injuries (Liabilities and Damages) Act 2003* providing three important reforms:

- the prospective imposition of a new statutory duty of care on all institutions that exercise care, supervision or authority over a child to take all reasonable steps to prevent child abuse by another child or any individual associated with the institution;
- the extension of vicarious liability of institutions from employees to individuals akin to an employee; and
- mechanisms to retrospectively allow for the nomination of a proper respondent with financial capacity for cases brought against unincorporated and now defunct institutions.

These amendments follow recommendations made in the Royal Commission into Institutional Responses to Child Sexual Abuse and follow similar reforms in other jurisdictions.

Duty of care

Division 2 (Sections 17D - 17F) imposes a prospective duty on an institution exercising care, supervision or authority over a child to take all reasonable steps to prevent child abuse occurring by an individual associated with the institution and/or by another child in the care or authority of that institution. This provision reverses the onus of proof in negligence by establishing a duty which the institution must demonstrate it has adhered to by ensuring proper policies and procedures were in place and observed.

If child abuse occurs, there is a presumption that the institution failed in its duty of care unless it can prove, on the balance of probabilities, that reasonable steps were taken to prevent the child abuse. Factors that a court may take into consideration when determining if an institution took all reasonable steps are contained in section 17E(3) and 17F(3).

Vicarious liability

Division 3 (Section 17G) expands the vicarious liability of organisations from employees to include non-employees who are "akin to an employee" (being individuals who carry out activities as an integral part of the activities carried on by and for the benefit of the organisation).

The definition of an "individual" who is akin to an employee is defined under 17G(5) to be an individual who carries out an activity (whether a series of activities or a single act) that enables the institution to perform its functions or carries out that activity with the intention to benefit the institution.

An exclusion is contained in section 17G(5) in respect of individuals who carry out activities for a recognisably independent business (ie an independent contractor) or an authorised carer (adopting the meaning of that role from section 78 of the CPCA Act³⁶¹).

Section 17G(2) is in addition to the identical common law position outlined by the High Court of Australia in *Prince Alfred College Incorporated v ADC*.³⁶² An organisation is vicariously liable for child abuse perpetrated by an employee if the employee took advantage of their role that provided them the occasion to perpetrate the abuse. In determining if the employee's role provided the occasion for the abuse, a court is to take into account the authority, power or control over the child, the trust of the child and the ability to achieve intimacy with the child.

Proper respondent

Division 4 (Sections 17H - 17N) enables the appointment of a proper defendant with suitable assets for cases brought against unincorporated association.

Section 17H provides a person or entity can be nominated as a proper respondent if the person or entity has the financial capacity to pay the amount of damages and legal costs that could be reasonably expected to be

³⁶¹ *Care and Protection of Children Act 2007* (NT)

³⁶² [2016] HCA 37

awarded and incurred if the proceedings were successful, the person or entity consents to the nomination and is capable of being sued. Importantly, once a proper respondent has been appointed, they assume any liability of the institution against which the claim has been brought and are responsible for the conduct of the proceeding.

Division 5 (Section 17P) allows for a successor institution to assume the liability of a former institution in a personal injury claim arising from child abuse if the successor institution is substantially the same as the former institution. A court will ultimately assess the relationship between the former institution and successor institution in determining whether the former institution is substantially the same as the successor institution.

Division 6 allows for proceedings to be commenced or continued against an unincorporated institution in the name of the institution as if the institution were a legal person capable of being sued. This reform applies prospectively and retrospectively and overcomes the impediment that plaintiffs could not previously bring proceedings against unincorporated associations because they do not exist as a juridical entity.³⁶³

Limitation period

The *Limitation Amendment (Child Abuse) Act 2017* commenced on 15 June 2017 inserting Section 5A into the *Limitation Act 1981* thereby abolishing the limitation period for causes of action arising from child abuse. Child abuse is defined as any sexual abuse, serious physical abuse and/or psychological abuse arising from that sexual or serious physical abuse against a person when they were under 18 years of age.

The above amendment does not limit a court's power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible³⁶⁴.

Setting aside settlements

Section 54 of the *Limitation Act 1981*, gives the court the power to set aside pre-existing judgments made only where the limitation period had expired on the basis it is just and reasonable to do so.

If a pre-existing judgment is set aside, the defendant cannot recover the amount paid to the plaintiff under that judgment. Rather, that amount may be taken into account in determining the damages payable.

Further legislative developments

In late July 2023, the Northern Territory parliament passed amendments to the *Criminal Code Act 1983* (NT) replacing the term "sexual relationship" with "repeated sexual abuse" in the context of children, bringing it into line with other Australian jurisdictions. The NT parliament also introduced a new offence of grooming a child, criminalised stealthing and removed the ability for child sex offenders to rely on good character references during sentencing.

Assessment of damages for personal injury

Non-economic loss

Non-pecuniary loss - "pain, suffering, loss of amenities of life and disfigurement" is discussed in sections 25, 26 and 27 of the *Personal Injuries (Liabilities and Damages) Act 2003* (NT). Damages may not be awarded under this head of damage if the court determines that the degree of permanent impairment is less than 5% of the whole person. When awarding damages for non-pecuniary loss, a court must award the following amount:

- If the court determines the degree of permanent impairment to be 85% or more of the whole person - the maximum amount is to be awarded (\$680,000) (as at 2 January 2024);
- If the court determines the degree of permanent impairment to be not less than 15% and not more than 84% of the whole person - the relevant percentage of the maximum amount is to be awarded; and

³⁶³ *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117 at [47]

³⁶⁴ *Limitation Amendment (Child Abuse) Act 2017* (NT) Section 5A(5).

- If the court determines the degree of permanent impairment to be a percentage of the whole person specified in column 1 of the Table - the amount specified in column 2 opposite the relevant percentage is to apply.

TABLE

Column 1	Column 2
Degree of permanent impairment as percentage of whole person	Amount of damages to be awarded
not less than 5% but less than 10%	2% of the maximum amount
10%	3% of the maximum amount
11%	4% of the maximum amount
12%	6% of the maximum amount
13%	8% of the maximum amount
14%	12% of the maximum amount

Out of pocket expenses

As with the other jurisdictions, out of pocket expenses (generally medical expenses) incurred in order to treat the injuries and disabilities suffered as a result of the negligence of the defendant are claimable as damages. Out of pocket expenses may take the form of past out of pocket expenses and future out of pocket expenses.

Past out of pocket expenses can generally be easily quantified by reference to government notices and with receipts from pharmacies and other medical service providers.

Future out of pocket expenses are typically the subject of expert opinion and comment involving an assessment of the expenses associated with the plaintiff's claimed injury that are likely to be incurred in the future. Future out of pocket expenses paid as a lump sum are also subject to section 22 of the *Personal Injuries (Liabilities and Damages) Act* (NT) which provides that if a court awards damages that include a lump sum component for future loss, the amount of that component is to be assessed in accordance with the discounted present values (with the discount rate of 5%).

Economic loss (Section 20)

In personal injury proceedings, damages are commonly awarded for loss of earning capacity or economic loss. Economic loss represents the income the plaintiff would have earned prior to the disabling effect of his or her injury. As with out of pocket expenses, economic loss may be divided into past economic loss for deprivation or impairment of past earnings and/or future economic loss for loss of earning capacity.

Section 20 of the *Personal Injuries (Liabilities and Damages) Act* (NT) stipulates that the maximum award that a court may make for loss of earnings is limited to the present value of three times the average male weekly earnings in the Northern Territory. As at November 2024, in Australia the average weekly earnings for full time ordinary hours worked by adults were \$1,975.80.³⁶⁵

Again, future economic loss is subject to section 22 where there is a lump sum payment.

Gratuitous services

In circumstances where a person requires personal care or domestic services as a result of the negligently inflicted injury, an amount can be awarded to compensate the plaintiff for the care provided.

Under section 23 of the *Personal Injuries (Liabilities and Damages) Act* (NT), a court may award damages for the provision of gratuitous services only if the court is satisfied that:

- there is, or was, a reasonable need for the services;
- the need for the services is or was solely because of the personal injury to which the damages relate; and
- the services were only provided because of the personal injury and would not have otherwise been provided.

Further, section 23 restricts the court in awarding damages for gratuitous services to circumstances in which the services are provided for six hours or more per week and for six months or more (similar to the way in which gratuitous services are provided for in New South Wales).

In assessing damages for the provision of gratuitous services, the court must take into account any offsetting benefit the service provider obtains as a result of providing the services and periods for which the injured person was, or is not likely to need the services because of being cared for in hospital or another institution.

³⁶⁵ *Average Weekly Earnings, Australia* is issued in May and November and is available at www.abs.gov.au

Dust diseases

Limitation period for claiming damages

Section 12(2)(a) of the *Limitation Act 1981* (NT) states that there is no limitation period for personal injury arising from a dust disease.

Procedure - how a claim is instituted

Section 52 of the *Return to Work Act 1986* (RTWA) abolishes rights of a worker to bring a claim for damages against their employer for an injury to the worker in the Northern Territory. This includes personal injury suffered from a dust-related condition. The worker is instead entitled to claim workers' compensation benefits under the RTWA.

However, if the worker's cause of action accrued prior to the enactment of the *Workers Rehabilitation and Compensation Act 1986* (the predecessor statute to RTWA) on 1 January 1987, the worker is entitled to claim common law damages for their dust disease injuries by virtue of court proceedings.

Outside of the compensation which a worker has access to under the *Return to Work Act 1986*, the worker has no entitlement to claim common law damages in the Northern Territory.

For non-work related exposure, section 4 of the *Personal Injuries (Liabilities and Damages) Act 2003* states that a claim for damages for personal injury that is a dust-related condition is excluded from the application of that act.

However, a worker is able to commence a civil claim in the Northern Territory courts by filing a writ or originating process. The assessment of the claim will then be subject to the common law.

What is considered a dust related condition? Definitions in specific legislation

The *Limitation Act 1981* defines a dust disease as a pathological condition of the lungs, pleura or peritoneum that is attributable to dust.

The *Personal Injuries (Liabilities and Damages) Act 2003* defines a dust-related condition as:

1. Aluminosis, asbestosis, asbestos induced carcinoma, asbestos related pleural disease, bagassosis, berylliosis, byssinosis, coal dust pneumoconiosis, farmer's lung, hard metal pneumoconiosis, mesothelioma, silicosis, silico-tuberculosis or talcosis; or
2. Any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust.

Significant cases regarding civil procedure, awards of damages, etc.

Alcan Gove Pty Ltd v Zabic [2015] HCA 33

The respondent worked as a labourer at the appellant's alumina refinery from 1974 to 1977 where he inhaled asbestos fibres. The respondent later developed symptoms of mesothelioma in late 2013 to early 2014.

A worker's right to common law damages was abolished by the *Workers Rehabilitation and Compensation Act 1986* (the Act) for causes of action which accrued after the commencement of the Act, being 1 January 1987. For determination by the court was whether the respondent's cause of action accrued before the commencement of the Act.

At trial, the Supreme Court of Northern Territory found that the respondent's cause of action arose after 1 January 1987 and was therefore statute barred. The respondent appealed and the Court of Appeal found that on the medical evidence, asbestos fibres caused changes to the respondent's cells prior to the commencement of the Act which meant the cause of action arose before 1 January 1987.

The appellant appealed the High Court on the basis that the Court of Appeal erred in deciding the cause of action arose before the commencement of the Act. The High Court of Australia unanimously held that it could be inferred that the trigger which led to the mesothelioma was present in the respondent's cells before 1 January 1987, and therefore the respondent's cause of action arose before 1 January 1987. The appeal was dismissed with a finding that the respondent's action was not barred by the Act.

White v Pink Batts Insulation Pty Ltd [2000] NTSC 27

The plaintiff brought proceedings in the Supreme Court of the Northern Territory against a previous employer for silica induced small airways disease as a result of working as a sandblaster between May 1971 and August 1974.

The Court was required to determine whether the system of work of the employer was negligent, and if so, whether the plaintiff thereby sustained damage, specifically through the development of small airways disease related to silica exposure.

Based on the evidence of former employees, the court was satisfied that the system of work of the defendant was negligent as the employees were not given adequate instruction, protective clothing, equipment, or protective apparel.

While finding that the defendant breached its duty of care for failing to provide a safe system of work, the court found that the plaintiff failed to prove that the plaintiff had developed small airways disease related to his silica dust exposure.

The Court accepted the opinion of:

- Dr Field, that the delay between the plaintiff's exposure and the complaints of respiratory problems showed that they are in no way related to the silica exposure; and
- Dr MacKenzie, that there was no evidence of silica in the plaintiff's lungs or evidence that silica caused damage to the lungs, and that it is outside his experience that a person would have a disability or abnormality of lung function attributable to silica when there is a perfectly clear chest x-ray.

The court entered judgment in favour of the defendant.

Roussos v Amaca Pty Ltd [2024] NTSC 20

This case found that the deceased worker's exposure to asbestos materially contributed to his development of lung cancer, despite his extensive smoking history of 192 pack years, amounting to approximately 60 cigarettes per day for over 54 years.

The action was brought by a representative of the estate (**plaintiff**) of the deceased under section 5(1) of the *Law Reform (Miscellaneous Provisions) Act 1956* (NT) and subsection 7 and 8 of the *Compensation (Fatal Injuries) Act 1974* (NT).

The deceased's exposure to asbestos cement dust ceased in 1983, after about 25 to 30 years of using products manufactured by the defendant in his role as a carpenter. The first sign of lung cancer was in 2019. There was differing medical opinion regarding the interaction between asbestos and the risks of smoking. Associate Professor McKenzie opined that the deceased's lung cancer was likely caused by smoking with a possible contribution from asbestos, however the asbestos component was less than 1% and therefore *de minimus*. Associate Professor Klebe stated that each episode of being exposed to asbestos made a material contribution to the deceased's lung cancer. The court accepted that the deceased's level of exposure to asbestos cement fibre caused or contributed to his cancer.

The defendant alleged that the deceased had contributed to his own injuries by continuing to smoke cigarettes despite public health warnings, and failing to take adequate precautions for his own safety when using the defendant's products. Regarding the former allegation, 50% was apportioned to contributory negligence and regarding the latter, no finding of contributory negligence was made as the warnings provided by the defendant were inadequate.

Judgement was entered for the plaintiff in the sum of \$329,751.87 for damages and interest.

Types of industries that are affected

Workers may be exposed to dust or airborne particles in a number of industries, including:

- stonemasonry;
- excavation, earth moving and drilling plant operations;
- paving and surfacing;
- mining, quarrying and mineral ore processing;
- tunnelling;
- construction activities;
- brick, concrete or stone cutting (including grinding, jack hammering or chiselling);
- hydraulic fracturing of gas and oil wells;
- pottery making.

Appendix

Recent decisions in relation to particular injuries in the Northern Territory

"Damages are no longer awarded for pain and suffering and loss of amenities of life. In lieu, damages may be awarded for non-pecuniary loss in accordance with section 27 Personal Injuries (Liabilities and Damages) Act (the Act). That requires assessment of an injured person's degree of permanent impairment in accordance with s 26 of the Act." (*Kent v City of Darwin*)

Back

Kampourakis v Dct (Nt) Pty Ltd [2013] NTSC 76

Plaintiff (male, age unknown) was engaged by the respondent employer as a labourer on a building site. Plaintiff claimed that as a result of lifting and manoeuvring in the course of his work, he suffered injury to his back, leg and psychological state.

The plaintiff was assessed as having a 6% whole person impairment.

Non-pecuniary loss assessed at \$11,110.

Blokland J (14 November 2013)

Femoral nerve

Bentley v Nta and Anor [2008] NTSC 36

Plaintiff (age unknown) underwent a diagnostic cardiac angiogram and subsequently developed a bleed. A haematoma subsequently developed which extended into the groin. An ultrasound was conducted and a false aneurysm was found and successfully corrected. Plaintiff suffered constant pain in the right side of the groin and in the right leg and an inability to stand for any length of time.

Non-pecuniary loss assessed at \$180,000.

Mildren J (15 September 2008)

Hip

Kent v City of Darwin [2018] NTSC 3

Plaintiff (male, age unknown) was involved in a bicycle accident caused by a failure to prune a vine overhanging a bike path. The vine had grown through a cyclone mesh fence bordering the path. The plaintiff became distracted by oncoming riders and his handlebars entangled in the vine and he was projected over the front of the bicycle.

Injuries: Fracture to right hip in a region of a previous hip replacement, abrasions and injuries to left elbow and right shoulder (14% whole person impairment).

Non-pecuniary loss assessed at \$79,200 (12% maximum amount).

Barr J (17 January 2018)

Psychiatric

Rezazadeh v An Assessor under s 24 of the Victims of Crime Act [2021] NTCAT 18

Applicant (male, age unknown) fled Iran due to legitimate fear of being persecuted by the government and became a detainee at Wickham Point Detention Centre. At the detention centre, other detainees threatened and assaulted the Applicant, and he sustained serious injuries needing hospitalisation. Following this violent act, Applicant was put into solitary condition for approximately 40 days, during which he attempted suicide. Eventually the Applicant was granted permanent residency and released from the detention centre, however he continued to suffer from nightmares, long-standing low mood and chronic anxiety.

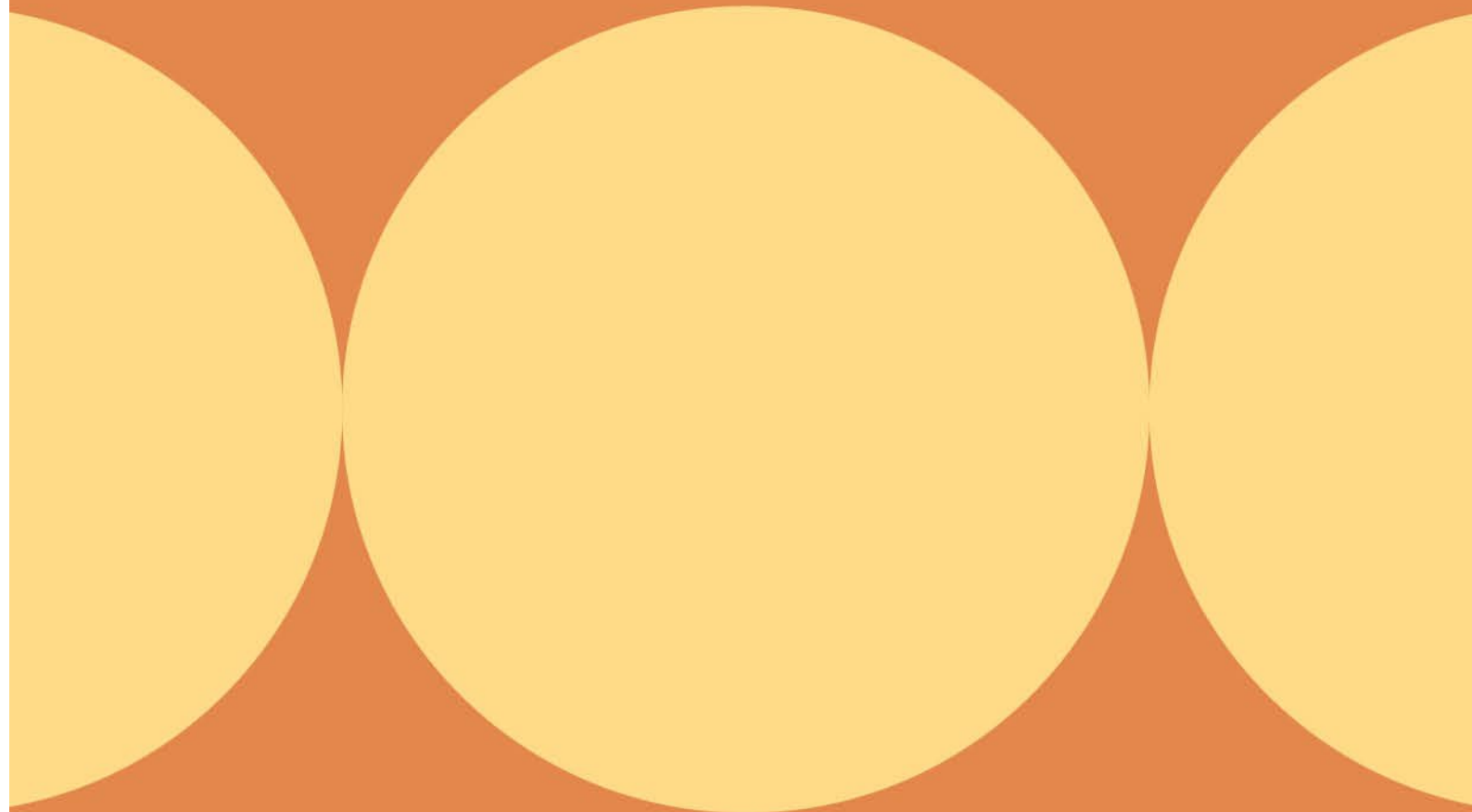
The applicant was assessed as having a 25% whole person impairment.

Non-pecuniary loss assessed at \$200,000.

Ben O'Loughlin (21 August 2021)

07

South Australia



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Civil Liability Act 1936 (SA)

Application

In South Australia, the tort of negligence is governed by the *Civil Liability Act 1936 (SA)* (**CLA SA**).

The CLA SA applies in most circumstances where a claim is brought for damages for harm resulting from the negligence of another party.

Section 43 excludes liability for criminal conduct. Pursuant to section 43(1), liability for damages is excluded where the court:

- is satisfied beyond reasonable doubt that the accident occurred while the injured person was engaged in conduct constituting an indictable offence; and
- is satisfied on the balance of probabilities that the injured person's conduct contributed materially to the risk of injury.

Section 43(2), however, allows the court to award damages despite this exclusionary principle if it is satisfied that:

- the circumstances of the particular case are exceptional; and
- the principle would, in the circumstances of the particular case, operate harshly and unjustly.

Negligence - The Elements

As with the common law test for negligence, in order to establish negligence under Part 6 of the CLA SA, a plaintiff must prove that the defendant:

- owed the plaintiff a duty of care (Division 1);
- breached that relevant standard of care; and
- caused the alleged damage (Division 2).

Duty of Care

To determine whether or not a duty of care has been breached, the court will first examine the relevant standard of care expected to be provided by the defendant to the plaintiff. Where the defendant's conduct falls short of the standard of care expected in the circumstances, the defendant will be deemed to have breached their duty of care.

Section 31 of the CLA SA sets out the relevant standard of care required by the defendant.

- Section 31(1) states that the relevant standard of care required by the defendant is that of a reasonable person in the defendant's position where the person possessed all information that the defendant had, or ought reasonably to have had, at the time of the incident out of which the harm arose.
- Section 31(2) states that the reasonable person in the defendant's position will be assumed to be sober **unless**:
 - the defendant was intoxicated;
 - the intoxication was wholly attributable to the use of drugs in accordance with the prescription or instructions of a medical practitioner; and
 - the defendant was complying with the instructions and recommendations of the medical practitioner and the manufacturer of the drugs as to what he or she should do, or avoid doing, while under the influence of the drugs, and in that event, the reasonable person will be taken to be intoxicated to the same extent as the defendant (Section 31(2)(c)).

Standard of care of persons professing to have a particular skill

Section 40 of the CLA SA provides the relevant standard of care expected of defendants who have professed to have a particular skill. The standard to be applied by the court in determining whether the defendant acted with **due care and skill** is determined by:

- what could reasonably be expected of a person professing that skill; and
- the relevant circumstances at the date of the alleged negligence and not a later date.

In *Cleland v Weetra*,³⁶⁶ Slattery J was satisfied that the plaintiff relied entirely on the skill of the defendant in his duty as a pest control operator and, despite no expert evidence adduced as to what would reasonably be expected of a person professing that skill, it was held that the defendant failed to observe the standard of an ordinarily competent pest control operator and should be liable for damages.

Standard of care for professionals

Section 41 of the CLA SA provides the standard of care for professionals. Specifically, pursuant to section 41(1), "a person who provides a professional service incurs no liability in negligence arising from the service if it is established that the provider acted in a manner that (at the time the service was provided), was widely accepted in Australia by members of the same profession as competent professional practice".

In determining whether or not a professional opinion is widely accepted, section 41(4) provides that "a professional opinion does not have to be universally accepted to be considered widely accepted".

The standard of care for professionals provided for in section 41(1)-(4) does not apply "to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of a risk of death or injury associated with the provision of a health care service" (section 45(5)).

Breach

Section 32(1) of the CLA SA contains the determinants of whether a person has acted negligently in not taking precautions against a risk of harm being that:

- the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
- the risk was not insignificant; and
- in the circumstances, a reasonable person in the person's position would have taken those precautions.

Section 32(2) further lists the conditions that a court will consider in determining whether a reasonable person would have taken precautions against a risk of harm. The conditions are:

- the probability that the harm would occur if precautions were not taken;
- the likely seriousness of the harm;
- the burden of taking precautions to avoid the risk of harm; and
- the social utility of the activity that creates the risk of harm.

With regard to foreseeability, South Australia has drawn upon the Commonwealth authority of *Wyong Shire Council v Shirt*³⁶⁷ in determining whether a risk is "far-fetched or fanciful" or real and therefore foreseeable. The Supreme Court of South Australia applied *Shirt*³⁶⁸ in *Flavel v State of South Australia*³⁶⁹ where the Court found it reasonably foreseeable that instructing beginner windsurfers to engage in a "race" could result in injury.

In the more recent decision of *BHP Billiton Ltd v Van Soest*,³⁷⁰ the respondent contracted mesothelioma allegedly due to asbestos exposure while working at the appellant's shipbuilding yard. The decision of the South Australia District Court was upheld, maintaining that due to the foreseeable risk, the appellant failed to meet its duty to eliminate or minimise the respondent's exposure to asbestos which a reasonable person in the position of the appellant would have done.

Causation

In any claim for damages resulting from negligence, the plaintiff must prove, on the balance of probabilities, that such damage was caused by the negligence of the defendant. Division 2 of the CLA SA provides the relevant statutory provisions for the determination of causation.

³⁶⁶ *Cleland v Weetra* [2013] SADC 52

³⁶⁷ *Wyong Shire Council v Shirt* [1980] 29 ALR 217

³⁶⁸ *Wyong Shire Council v Shirt* [1980] 29 ALR 217

³⁶⁹ *Flavel v State of South Australia* [2008] SASC 333

³⁷⁰ *BHP Billiton Ltd v Van Soest* [2014] SASCF 135

Section 34(1)(a)-(b) provides the general principles of causation constituting two limbs. To determine if negligence caused a particular harm the following elements must be satisfied:

Limb 1 - Factual causation:

- that the negligence was a necessary condition of the occurrence of the harm; and

Limb 2 - Scope of liability:

- that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused.

Section 34(2) of the CLA SA provides for the situation in which a plaintiff has been negligently exposed to a similar risk of harm by a number of different persons (the "defendants") and it is not possible to assign responsibility for causing the harm to any one or more of them. When the harm has been caused by a number of different persons, there are two elements to assist the court in determining when such an issue arises:

- the court may continue to apply the principle under which responsibility may be assigned to the defendants for causing the harm; and
- the court should consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability.

Section 35 codifies the burden of proof such that:

- in determining liability for negligence, the **plaintiff** always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.

In *Queen Elizabeth Hospital v Curtis*,³⁷¹ the appellant submitted that the trial judge reversed the onus of proof as to causation surrounding the hearing loss suffered by the respondent. The court dismissed the appeal, citing the appellant's failure to make a timely diagnosis of meningitis and subsequent delay in treatment of the respondent was sufficient causation of the respondent's hearing loss.

Mental harm

South Australia expressly includes a provision in the Act which relates to liability for mental harm at section 33 of the CLA SA.

Section 33(1) provides that the defendant does not owe a duty to the plaintiff to take care not to cause the plaintiff mental harm, unless a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a psychiatric illness. This is assessed with reference to *Tame v State of New South Wales*³⁷² where the High Court dismissed the appellant's appeal on the basis that her reaction to a clerical error by a police officer was extreme and not reasonably foreseeable.

Section 33(2)(a) provides that if it is a case in which pure mental harm (i.e. no physical harm) has occurred, the court is to have regard to the following circumstances of the case:

- whether or not the mental harm was suffered as a result of a sudden shock;
- whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;
- the nature of the relationship between the plaintiff and any person killed, injured or put in peril; and
- whether or not there was a pre-existing relationship between the plaintiff and the defendant.

Section 33(2)(b) provides that in cases where consequential mental harm occurs, the circumstances of the case must include the nature of the bodily injury out of which the mental harm arose.

In *Anwar v Mondello Farms Pty Ltd*,³⁷³ the appellant was injured at work and subsequently developed schizophrenia. The trial judge found the respondent liable for the physical injuries, however, found that the appellant was likely to suffer from schizophrenia at some point in his life in any event and subsequently reduced damages by 30%.

³⁷¹ *Queen Elizabeth Hospital v Curtis* [2008] SASC 344

³⁷² *Tame v State of New South Wales* [2002] HCA 35

³⁷³ *Anwar v Mondello Farms Pty Ltd* [2015] SASCFC 109

The appellate court emphasised that the relevant question was not whether the appellant was a person of normal fortitude, but whether a reasonable person in the respondent's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a psychiatric illness. The court ruled that it was indeed foreseeable, and with reference to the statutory test, it need not be foreseeable that the appellant would develop schizophrenia, but simply develop a psychiatric illness.

Section 33(3) provides that section 33 does not affect the duty of care of a defendant to the plaintiff if the defendant knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude.

"Defences" to negligence

Contributory negligence

The *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA)* controls the treatment of contributory negligence and the apportionment of liability. "Contributory negligence" is defined as "a failure by a person who suffers harm to take reasonable care for his or her own protection or the protection of his or her own interests".

Part 7 of the *Civil Liability Act*³⁷⁴ addresses contributory negligence. Statutory examples include:

- If the injured person was intoxicated at the time of the accident, so long as the intoxication:
 - did not contribute to the accident;
 - was not self-induced; or
 - is wholly attributable to the use of drugs in accordance with the prescription or instructions of a medical practitioner, and the injured person was complying with the instructions of the medical practitioner and the manufacturer as to what he or she should do, or avoid doing, while under the influence of the drugs.
- Failure to wear a seat belt or helmet at the time of the accident (section 49(1)); and
- Reliance on the care and skill of a person known to be intoxicated by the injured person (section 47).

Pursuant to Part 7 of The *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA)*, if the contributory negligence has contributed to the harm for which damages are claimed, contributory negligence will be accounted for in the apportionment of damages but it will not defeat the claim.

Part 7(2) of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA)* details the following procedure for the courts to follow in determining damages where the person who suffers primary harm is at fault:

- The court is to determine the amount of damages which the plaintiff would have been entitled without reference to the allegation of contributory negligence;
- The court is to then reduce the damages to "the extent the Court thinks just and equitable having regard to the extent the contributory negligence contributed to the harm".

The Full Court of the South Australian Supreme Court overturned on appeal a finding of contributory negligence in *Eicas v Dawson*.³⁷⁵ The trial judge found Mr Dawson, the rider of a motorcycle which collided with a motor vehicle driven by Ms Eicas, 20% contributorily negligent for the accident. On appeal, the judges disagreed with the decision of the trial judge on the basis that Mr Dawson had no chance to avoid Ms Eicas's car and as such, did not contribute to the harm to any recognisable extent.

Apportionable liability

Pursuant to Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA)* where the harm arose as a result of actions committed by two or more wrongdoers, the court will examine the extent to which each wrongdoer's actions contributed to the loss or damage and apportion liability accordingly.

The Act provides the following example for the apportionment of liability:³⁷⁶

A, who acts with intention to defraud, prepares a false and deceptive statement. B, who is not aware of the fraud, negligently publishes the statement to C, who relies on it and suffers financial loss in consequence. C brings an action against A and B under section 56 of the Fair Trading Act 1987. In this case, B's liability is an apportionable liability but A's is not.

Unlike other jurisdictions, the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA)* also applies to personal injury claims.

³⁷⁴ *Civil Liability Act 1936 (SA)*

³⁷⁵ *Eicas v Dawson* [2016] SASFC 124

³⁷⁶ *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* Part 1(2)(c)

Intoxication and criminal activity

Intoxication is generally irrelevant to the standard of care of a reasonable person in the defendant's position. However, where the defendant was intoxicated and the intoxication was either wholly or partly attributable to clinically prescribed drugs, then the standard of care of the defendant will be compared with a "reasonable" person intoxicated to the same extent as the defendant pursuant to section 31 of the CLA SA.

Where the injured person was intoxicated at the time of the accident, and the defendant invokes an allegation of contributory negligence, a rebuttable presumption that the injured person was contributorily negligent will be established (section 46 of the CLA SA).

Damages where an injured person was intoxicated are typically reduced by 25% on the basis of contributory negligence resulting from the intoxication as per section 46(3) of the CLA SA, although it is at the court's discretion if a higher proportion is necessary. In *Motor Accident Commission v Curzons*,³⁷⁷ the plaintiff suffered severe injuries after being struck by a vehicle while considerably intoxicated. The court allowed the appeal to increase the apportionment against the plaintiff from 25% to 50%.

The injured person may, however, rebut the presumption of contributory negligence by establishing on the balance of probabilities that the intoxication did not contribute to the accident, or that the intoxication was not self-induced (section 46).

Good samaritans and volunteers

Section 74 provides an immunity from personal civil liability for an act or omission done or made in good faith and without recklessness in assisting a person in apparent need of emergency assistance.

The immunity does not apply where the liability falls within third party motor vehicle insurance, or where the samaritan's capacity to exercise care and skill was significantly impaired by alcohol or another recreational drug.

Food donors

Section 74A provides that a food donor or distributor incurs no civil liability for loss of life or personal injury arising from the consumption of food that has been donated or distributed:

- without expectation of payment or other consideration;
- for a charitable or benevolent purpose; and
- with the intention that the consumer would not have to pay for the food.

The immunity, however, does not operate if the donor or distributor knew, or was recklessly indifferent to the fact that the food was unsafe within the meaning of the *Food Act 2001* when it left their possession.

Mental harm

The application of a duty of care when mental harm results is found at section 33 of the CLA SA. In this regard, a plaintiff may only recover for "pure mental harm" (i.e. where there are no physical injuries or disabilities) where the harm is a recognised psychiatric illness (section 53).³⁷⁸

Under section 53(1) of the CLA SA, damages for mental harm will only be awarded if the injured person was:

- physically injured in the accident or was present at the scene of the accident when the accident occurred; or
- a parent, spouse, domestic partner or child of a person killed, injured or endangered in the accident.

A leading authority in this regard is *King v Philcox*³⁷⁹ where an appeal was brought from the Supreme Court of South Australia for a claim of pure mental harm. The respondent's brother was killed in a car accident as a result of the appellant's negligence. The High Court held that a duty of care was owed pursuant to section 33, however, no damages were awarded as the respondent was not present when the accident itself occurred.

³⁷⁷ *Motor Accident Commission v Curzons* [2012] SASCFC 22

³⁷⁸ See also: *Tame v State of New South Wales* [2002] HCA 35

³⁷⁹ *King v Philcox* [2015] HCA 19

Assessment of damages for personal injury

Non-economic loss - Section 52

Section 52 of the CLA SA provides for situations where damages for non-economic loss are awarded. Section 52(1) provides that non-economic loss can be awarded where:

- 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 have been reasonably incurred in connection with the injury.

The "prescribed minimum" means:

- an injury arising from an accident that occurred during 2002 - \$2,750; or
- in relation to an injury arising from an accident that occurred in a subsequent calendar year - a sum (calculated to the nearest multiple of \$10) that bears to \$2,750 the same proportion as the Consumer Price Index for the September quarter of the preceding year bears to the Consumer Price Index for the September quarter 2001.

Section 52(2) provides that when damages are to be awarded for non-economic loss, other than in relation to personal injury arising from a motor vehicle accident, they must be assessed as follows:

- the injured person's total non-economic loss is to be assigned a numerical value (the "scale value") on a scale running from 0-60 (the scale reflecting 60 equal graduations of non-economic loss, from a case in which the non-economic loss is not severe enough to justify any award of damages to a case in which the injured person suffers non-economic loss of the gravest conceivable kind);
- the damages for non-economic loss are to be calculated in relation to an injury arising from an accident that occurred during 2002 by multiplying the scale value by \$1,710;
- the damages for non-economic loss are to be calculated in relation to an injury arising from an accident that occurred during 2003 as follows:
 - if the scale value is 10 or less-by multiplying the scale value by \$1,150;
 - if the scale value is 20 or less but more than 10 - by adding to \$11,500 an amount calculated by multiplying the number by which the scale value exceeds 10 by \$2,300;
 - if the scale value is 30 or less but more than 20 - by adding to \$34,500 an amount calculated by multiplying the number by which the scale value exceeds 20 by \$3,450;
 - if the scale is 40 or less but more than 30 - by adding to \$69,000 an amount calculated by multiplying the number by which the scale value exceeds 30 by \$4,600;
 - if the scale value is 50 or less but more than 40 - by adding to \$115,000 an amount calculated by multiplying the number by which the scale value exceeds 40 by \$5,750;
 - if the scale value is 60 or less but more than 50 - by adding to \$172,500 an amount calculated by multiplying the number by which the scale value exceeds 50 by \$6,900;
 - the damages for non-economic loss in relation to an injury arising from an accident that occurred in a subsequent calendar year are to be calculated in accordance with paragraph (c) but the amount arrived at is to be adjusted (to the nearest multiple of \$10) by multiplying it by a proportion obtained by dividing the Consumer Price Index for the September quarter of the previous calendar year by the Consumer Price Index for the September quarter 2002.

Section 52(3)-(5) provides the requirements for an assessment of damages arising from a motor vehicle accident.

Out of pocket expenses

As with the other Australian jurisdictions, out of pocket expenses (generally medical expenses) incurred in order to treat the injuries and disabilities suffered as a result of the negligence of the defendant are claimable as damages. Out of pocket expenses may take the form of past out of pocket expenses and future out of pocket expenses.

Future out of pocket expenses paid as a lump sum are also subject to section 55 of the CLA SA which provides that if a court awards damages that include a lump sum component for future loss, the amount of that component is to be assessed in accordance with the discounted present values (with the discount rate of 5%).

Economic loss - Section 54

Section 54(1) provides that if the injured person was incapacitated for work, damages for loss of earning capacity are not to be awarded in respect of the first week of the incapacity.

Once a claim for loss of earning capacity has been established, the total damages are not to exceed the prescribed maximum (section 54(2)). The "prescribed maximum" is:

- \$2.2 million for injury arising from an accident that occurred in 2002; or
- A sum that bears to \$2.2 million the same proportion as the Consumer Price Index for the September quarter of the preceding year compared with the Consumer Price Index for the September quarter 2001.

Once again, any lump sum payment for future economic loss is subject to section 55 of the CLA SA.

Section 54(3) provides for assessment where an action is brought for the benefit of dependents of a deceased person.

Damages in respect of gratuitous services - Section 58

A claimant may seek damages for loss of capacity to perform domestic services that they may have reasonably been expected to perform for the household had they not been injured.

Under section 58, damages may only be awarded to compensate for gratuitous services where the services were performed by:

- a parent;
- spouse;
- domestic partner; or
- child of the injured person.

The section caps recovery to reflect a rate of remuneration for the person providing the services which is to be no more than four times the state average weekly earnings.

In addition to the court needing to be satisfied that the gratuitous services were reasonably required by the injured person, it is also necessary to establish that if those services were not provided gratuitously, the injured person would have to engage another person to provide the services for remuneration.

Child abuse

Part 7A (Liability of Institutions) was inserted in 2022 and contains reforms regarding duty of care, vicarious liability and identifying a proper defendant. Part 7B (Setting Aside Settlements), inserted in 2022, provides for a court to set aside a previous settlement if it is just and reasonable to do so.

These amendments follow recommendations made in the Royal Commission into Institutional Responses to Child Sexual Abuse and follow similar reforms in other jurisdictions.

Duty of care

Division 2 imposes a prospective duty on organisations that wholly or partly hold responsibility over a child to prevent child abuse from occurring. This provision reverses the onus of proof in negligence by establishing a duty which the organisation must demonstrate it has adhered to by ensuring proper systems were in place and observed.

If child abuse occurs, there is a presumption that the organisation failed in its duty of care unless it can prove that reasonable precautions were taken to prevent the abuse. Factors that a court may take into consideration when determining if an organisation took reasonable care are contained in section 50F(3).

Vicarious liability

Division 3 provides for the circumstances in which an institution will be vicariously liable for abuse of a child by an employee of the institution. The reforms in this Division operate prospectively.

Proper defendant

Division 4 enables the appointment of a proper defendant with suitable assets for cases brought against unincorporated association.

This reform overcomes the impediment that plaintiffs could not previously bring proceedings against unincorporated associations because they do not exist as a juridical entity.³⁸⁰

Setting aside settlements

Part 7B allows for a court to set aside settlements of certain child abuse claims entered into prior to legislative reforms in:

- 2018 (Part 1A of the *Limitation of Actions Act 1936*, which removed the limitation period for civil claims involving child sexual abuse, serious physical abuse and any other abuse perpetrated in connection with sexual or serious physical abuse); and
- 2022 (ie Part 7A identified above);

if it is "just and reasonable" to do so.

In determining whether it is just and reasonable to set aside an "affected agreement", the court may consider:

- The extent to which the existence of the limitation period or barriers to identifying an appropriate defendant materially contributed to the applicant's decision to enter into the agreement;
- The circumstances in which the agreement was negotiated and entered into, including whether:
 - negotiations were affected by an imbalance of power;
 - the applicant was legally represented; and
 - the defendant (or other parties) engaged in unfair or oppressive conduct;
- Any other matter the court considers relevant.

Part 7B does not, however, allow for a court to set aside an acceptance of an offer made under the National Redress Scheme,³⁸¹ or contracts of insurance.

If an affected agreement is set aside, the defendant cannot recover the amount paid to the plaintiff under that agreement. Rather, that amount may be taken into account in determining the damages payable.

³⁸⁰ *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117 at [47]

³⁸¹ National Redress Scheme for Institutional Child Sexual Abuse

Dust diseases

Limitations

The *Dust Diseases Act 2005 (DDA)* outlines the manner in which dust disease actions are determined in South Australia.

The *Limitation of Actions Act 1936 (SA)* imposes time limits specifying the time in which an action for damage in relation to death or personal injury may be commenced. Dust diseases are governed by section 36 of the Act. A claim in negligence for injury caused by asbestos must be made within 3 years from when the injury first comes to a person's knowledge. In some circumstances the Court may extend this period for 12 months if the individual learns new facts relevant to the viability of the claim afterwards for example because of an increase in disability or extent of disease (section 48).

Loss of dependency claims must be lodged within 3 years of date of death (*Civil Liability Act* section 25).

Procedure - How a claim is instituted

Civil action proceedings for damages in relation to dust diseases in South Australia are commenced in the South Australian Employment Tribunal (**SAET**) or the District Court.

Section 3 of the *Survival of Causes of Actions Act 1940 (SA)* provides that if a person commences an action in respect of a dust-related condition and dies before the action is finalised, the estate can still receive damages for pain and suffering, bodily and mental harm, and curtailment of expectation of life, and exemplary damages.

Assessment of damages

Damages may be claimed to compensate for the loss or impairment of capacity to perform domestic services for another person (section 9(3) of the DDA.)

Pursuant to section 9(2) of the DDA, exemplary damages may be awarded if the Court or Tribunal is satisfied that the defendant:

- (a) Knew that the injured person was at risk of exposure to asbestos dust or carried on a prescribed or commercial process that resulted in the injured person's exposure to asbestos dust; and
- (b) Knew at the time of exposure, that exposure to asbestos dust could result in a dust disease.

Damages for loss of spouse cannot exceed \$10,000 (*Civil Liability Act 1936 (SA)* section 29(1)(b)).

What is considered a dust related condition?

Section 3 of the DDA defines "dust disease" as:

- asbestosis
- asbestos induced carcinoma
- asbestos related pleural disease
- mesothelioma
- any other disease or pathological condition resulting from exposure to asbestos dust.

Significant cases regarding awards of damages

Ewins v BHP Billiton Limited & Wallaby Grip Limited [2005] SASC 95

The plaintiff (male, aged 71 years old) was exposed to asbestos while working for BHP as a carpenter and a joiner from 1949 to 1963.

Injury:	Malignant epithelial mesothelioma
Damages:	Loss of expectation of life: \$10,000.00
	Pain and suffering and loss of amenities: \$100,000.00
	Interest: \$1,400.00
	Past medical expenses: \$2,887.85
	Future medical expenses: \$39,000.00
	Gratuitously provided services: \$44,000.00

Doyle CJ (17 March 2005)

Parker v BHP Billiton Limited [2011] SADC 104

The plaintiff (male, aged 69) worked at Whyalla Shipyards as a shipwright in 1971 and 1972, and was exposed to asbestos as he worked in the vicinity of ladders installing and spraying asbestos insulation on the ships. He had previously been exposed to asbestos while working in England.

Injuries:	Mild asbestosis and benign pleural asbestos disease
Damages:	
	Compensatory damages \$52,124.93 (Originally \$104,294.85 but 50% reduction from his damage for the contribution in England for his asbestos condition).
	Exemplary damages \$20,000.00 (the first to be awarded under the <i>Dust Diseases Act</i>)

Judge Lovell (18 July 2011)

BHP Billiton Limited v Parker [2012] SASCF 73

BHP appealed against the assessment of damages and the Judge's award of costs to the respondent on an indemnity basis. The full court upheld the plaintiffs award for compensatory and exemplary damages.

Doyle CJ; Gray and White JJ (18 June 2012)

Hamilton v BHP Billiton Ltd [2012] SADC 25

The plaintiff's husband (deceased, died aged 67) was employed by BHP from May 1964 to April 1965 as an electrician on the fitting-out wharf at Whyalla. He had previously worked as an electrician in shipbuilding in Scotland between 1961 and 1964. During both periods the deceased had been exposed to significant levels of asbestos dust.

Injuries:	Mesothelioma
Damages	General damages (pain, suffering and loss of amenities): \$115,000
	Loss of expectation of life: \$15,000.00
	Special damages: \$10,990.65
	Gratuitous care: \$15,935.31
	Sullivan v Gordon Damages: \$35,000.00
	Interest: \$40,779.00

Judge McCusker (29 February 2012)

BHP Billiton Ltd v Hamilton & Anor [2013] SASCF 75

BHP appealed against the judgment on the basis that it did not breach its duty of care, and on causation. BHP's appeal was dismissed. The plaintiff cross-appealed on quantum that the award for pain, suffering and loss of amenities of life was inadequate.

General Damages (pain, suffering and loss of amenities) were re-assessed at \$190,000.

Kourakis CJ; Blue and Stanley JJ (15 August 2013)

Munzer v State of South Australia [2015] SADC 18

The plaintiff (male, age 73) was exposed to asbestos while working for the Electricity Trust of South Australia at Playford Power Station in Port Augusta. He had various exposure periods, initially for three years from 1964, a few months in 1969, and for approximately 17 years from 1973. The plaintiff was a smoker (40 per day).

Injury: Pleural plaques causing chest pain.

Damages: General damages: \$45,000
 Past out of pocket expenses: \$3,500
 Future out of pocket expenses: \$17,500
 Exemplary damages: \$20,000
 Interest: \$9,000

Judge Gilchrist (26 February 2015)

Resi Corporation v Munzer [2016] SASCF 15

The appellant argued that the Judge's assessment of damages was manifestly excessive. The respondent cross-appealed alleging the damages award was manifestly inadequate. The appeal was dismissed and cross-appeal allowed with the damages assessment by the judge determined to be manifestly inadequate and general damages were increased from \$45,000 to \$80,000.

Latz v Amaca Pty Ltd [2017] SADC 56

Plaintiff (male, age 70) contracted mesothelioma as a result of building and construction work he carried out at his home, between 1976 and 1977. The plaintiff had retired nine years earlier and was receiving the superannuation pension and age pension.

Injuries: Terminal malignant mesothelioma

Damages: General damages: \$230,000
 Loss of expectation of life: \$20,000
 Future medical expenses: \$90,000
 Past and future gratuitous care: \$75,000
 Past and future gratuitous domestic services to others: \$100,000
 Future economic loss for loss of aged pension: \$500,000
 Exemplary damages: \$30,000

Gilchrist J (26 May 2017)

***Amaca Pty Ltd v Latz* [2017] SASCFC 145**

Amaca appealed to the Full Court of the Supreme Court against the award of \$500,000 on the grounds that a pension is not a recoverable head of loss and in the alternative the Judge should have deducted the value of the reversionary pension. Held by a majority that the value of the superannuation pension and the age pension were "compensable loss", but the majority reduced the award to take into account the reversionary pension that the plaintiff's spouse would receive when he passed away.

Damages:

Future economic loss for loss of aged pension: reduced by \$432,915 (cross appeal allowed to increase this by \$82,174 damages awarded)

Exemplary damages: increased by \$220,000

The Honourable Justice Blue, The Honourable Justice Stanley and The Honourable Justice Hinton (30 October 2017)

***Amaca v Latz* [2018] HCA 22**

The decision to award future economic loss for loss of an age pension was ultimately the subject of an appeal to the High Court. The majority found that the loss of the superannuation pension was a compensable loss but damages should be reduced based on the reversionary pension that his spouse would receive when he passed away. The court also held that the loss of the age pension was not a compensable loss.

Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ (11 May 2018)

***Werfel v Amaca Pty Ltd* [2019] SAET 159**

Plaintiff (male, aged 42) was exposed to asbestos material manufactured by James Hardie whilst undertaking fencing work from 1994 to 1997, when undertaking domestic maintenance and renovations from 2000 to 2001 on his home, and undertaking domestic maintenance and renovations on a second home in 2004.

Injuries: Mesothelioma of the Tunica Vaginalis Testis

Compensation awards:

Total award: \$3,077,187

General Damages (pain and suffering): \$400,000 plus \$8000 interest

Loss of expectation of life: \$40,000

Past economic loss and interest: \$23,817

Future economic loss - the lost years: \$1,300,000

Past and future medical expenses: \$162,929

Past gratuitous services provided to the plaintiff: \$98,419

Future gratuitous services provided to the plaintiff: \$187,862

Past and future gratuitous care provided by Mr Werfel to family: \$606,160

Exemplary damages: \$250,000

Farrell DP (6 August 2019)

Amaca Pty Ltd V Werfel [2020] SASCFC 125

Amaca Pty Ltd appealed to the Court of Appeal and the court allowed the appeal but only to the extent of reducing total damages award to \$2,228,247.

Damages:

General Damages (pain and suffering): reduced to \$280,000 with interest on past loss at a rate of 4 per cent.

Loss of expectation of life: reduced to \$20,000

Past gratuitous services provided to the plaintiff: reduced to \$25,000 plus interest on past loss at a commercial rate of 6.5 per cent.

Future gratuitous services provided to the plaintiff: reduced to \$125,000

Past and future gratuitous care provided by Mr Werfel to family: reduced to \$245,000

Exemplary damages: reduced to \$35,000 as it was inappropriate to use the exemplary damages award of \$250,000 made in *Amaca v Latz* as a template for the making of an award in this case as the circumstances are different and the plaintiff is in a different class of claimants.

The Honourable Chief Justice Kourakis, The Honourable Justice Nicholson and The Honourable Justice Livesey (21 December 2020).

Amaca's Special Leave application to the High Court was unsuccessful.

The State of South Australia v Bradford Insulation (S.A.) Pty Ltd (in Liquidation) and Anor (No 3) [2023] SAET 13

The State of South Australia initiated proceedings against the defendants for contribution in relation to a previous mesothelioma Judgement awarding damages of \$650,000.00.

Injuries: Mesothelioma as a result of asbestos exposure at the Playford Power Stations.

Held: His Honour Judge Rossi held that both Bradford Insulation & the State of South Australia breached duty of care and reasoned that the appropriate apportionment of contribution is an equal split.

The court ordered Bradford Insulations to make a 50% contribution to the State of South Australia, being \$325,000.00.

The type of industries that are affected

Many dust disease claims have a long latency period and may not arise until 40 or more years after the exposure. They can arise from the following circumstances:

- asbestos mining
- boiler workers
- building/construction - including home renovation
- carpenters
- cement plant workers
- electricians
- environmental exposure from living or working in the vicinity of a factory or mine
- excavators
- factory worker
- fire-fighters
- fitter and turner
- floor coverers

- indirect or bystander exposure from a home renovation and washing of work clothes
- industrial workers - machine operators, machinists, welders, metal workers
- insulation installer/lagger
- mechanics
- naval workers
- painters
- plumbers
- power-plant workers
- railroad workers
- shipyard workers
- stonemasons

Appendix

Recent cases in relation to particular injuries in South Australia

Asbestos

Latz v Amaca P/L (Formerly James Hardie & Co P/L) [2017] SADC 56

Plaintiff (age unknown) was exposed to asbestos dust and fibre during the course of building, construction and renovation work carried out at a house residence. Plaintiff suffered terminal malignant mesothelioma.

General damages: \$230,000

Judge Gilchrist (26 May 2017)

Amaca Pty Ltd v Werfel [2020] SASCFC 125

Respondent plaintiff was exposed to asbestos from products manufactured by the appellant, James Hardie, while employed by fencing contractors retained by the South Australian Housing Trust between 1994 and 1997. Plaintiff was diagnosed with a rare form of mesothelioma in August 2017, when he was just 40 years old. He has a life expectancy of a little more than two years, rather than the statistical average of in excess of 40 years.

General damages: \$280,000

Livesey JJ (21 December 2020)

Back

Norton v Blight [2014] SADC 4

Plaintiff was a 23-year-old female who was involved in a head-on motor vehicle collision and suffered a fractured right femur, which she claimed later resulted in back pain.

General damages: \$26,480

Barrett DCJ (17 January 2014)

Sloan v Service Stream Ltd [2020] SADC 98

Plaintiff was a 48-year-old male who sustained a significant lower back injury while undertaking pit and pipe installation at work. The plaintiff had previously sustained three previous injuries to his lower back during the course of employment.

General damages: \$13,770

Schammer J (28 July 2020)

Brain

Kent v Redhead [2017] SADC 55

Plaintiff (age unknown) was assaulted by the defendant in a car park and consequently suffered fractures of the jaw, cheekbone and eye socket.

General damages: \$24,000

Soulio DCJ (26 May 2017)

Breast

Justus v Reed & Anor [2014] SADC 176

Plaintiff was a 43-year-old female who underwent breast augmentation surgery which she claimed was performed negligently by the defendant. Plaintiff alleged that as a result of the surgery, she suffered pain, discomfort and loss of enjoyment of the amenities of life. She also claimed that her ability to lead a normal life was significantly impaired by the injury.

General damages: \$84,315

Smith DCJ (24 October 2014)

Hand

Anwar v Mondello Farms Pty Ltd [2014] SADC 105

Plaintiff (male, age unknown) suffered injury to the dorsum of his right hand when it was caught in a conveyor belt at work. As a result of the injury, he required a skin graft. Plaintiff suffered ongoing pain and subsequently developed schizophrenia.

General damages: \$18,042.30

Cuthbertson DCJ (13 June 2014)

Leg

Norton v Blight [2014] SADC 4

Plaintiff was a 23-year-old female who sustained a fractured right femur as a result of a motor vehicle accident. Plaintiff later developed back pain. At the time of the accident, the plaintiff was not wearing a seat belt and was driving on the wrong side of the road.

General damages: \$419,891.02 (reduced by 90% to \$41,989)

Barret DCJ (17 January 2014)

Stringer v Westfield Shopping Centre Management Co (SA) Pty Limited [2017] SADC 35

Plaintiff (female, age unknown) was seriously injured when she slipped and fell, walking along a common area within a shopping centre mall occupied and managed by the defendant. Plaintiff sustained a fractured right ankle, a lacerated right hand, and extensive bruising, including to her chin.

General damages: \$37,950

Beazley J (18 April 2017)

Crossley v State of South Australia (No 2) [2020] SADC 56

Unlawful arrest of the plaintiff, a 34-year-old male, using a leg lock which fractured the left femoral shaft leaving the plaintiff with constant pain.

General damages: \$90,000

Tilmouth J (15 May 2020)

Neck

Farrington v Sampson [2013] SADC 47

Plaintiff (age unknown) was driving a vehicle when it collided with a vehicle driven by the defendant, which was travelling in the opposite direction. Plaintiff suffered soft tissue injury to the neck and a fractured sternum.

General damages: \$6,110

Chivell DCJ (18 April 2013)

Knee

Burton v Grocke & Ors [2014] SADC 195

Plaintiff (female, age unknown) suffered an injury to her right knee while playing netball. The injury was a dislocation of the patella, extensive fragmentation of the chondral surface, and disruption of the medial retinaculum. As a result of the incident, the plaintiff had undergone ten surgical procedures to her right knee.

General damages: \$58,760

Chivell DCJ (28 November 2014)

Clutterbuck v Pollifrone [2021] SADC 15

Plaintiff was a 51-year-old woman who attended the defendant's property to purchase three two-metre long and one tonne in weight harvesting conveyor belts. Plaintiff was struck from behind when one of the conveyor belts fell off while the defendant was using the forklift to lift the product. Plaintiff injured her knee with a full thickness rupture of the left anterior cruciate ligament, posteromedial capsular tear, meniscus damage and a comminuted impaction fracture of the left posteromedial tibial plateau.

General damages: \$48,334

Judge Durrant (19 February 2021)

Paraplegia

Allen v Chadwick [2014] SASFC 100

Plaintiff was in a motor vehicle accident on the outskirts of Port Victoria. She was aged 21 years and pregnant. Plaintiff suffered serious spinal injuries resulting in paraplegia.

General damages: 52 points on the scale of 0 to 60, which equated to a dollar value of \$211,530.00.

Gray and Nicholson JJ (16 September 2014)

Shoulder

Pantazis & Anor v Jezina [2013] SADC 45

Plaintiff was 73-year-old female who was injured as a passenger in a car which collided with the defendant's car when it went through a red light. As a result, the plaintiff suffered soft tissue injury to her left shoulder.

General damages: \$154,536.39

Barrett DCJ (11 April 2013)

De Pasquale & Anor v Viet Thahn Bakery Pty Ltd [2012] SADC 121

Plaintiff (female, age unknown) slipped and fell on a "puddle" of water while attending the defendant's bakery shop in James Place, Adelaide to purchase a bread roll. She claimed damages for physical and psychological injuries.

General damages: \$26,110

Costello DCJ (27 September 2012)

Voluntary assumption of risk and obvious risk

Schuller v S J Webb Nominees Pty Ltd [2015] SASFC 162

Plaintiff (female, age unknown) sustained a serious injury to her right leg when she fell from a chair at the defendant's premises. At the time of the incident, the plaintiff was intoxicated by alcohol.

General damages: Nil

Stretton DCJ (30 October 2014)

Multiple injuries

Stringer & Stringer v Westfield Shopping Centre Management Co (SA) P/L [2017] SADC 35

Plaintiff was a 41-year-old female who slipped and fell in a Westfield shopping centre, suffering a fractured right ankle, a lacerated right hand and extensive bruising.

General damages: \$37,950

Beazley J (4-8 May 2015)

Paues v Battunga Country Lions Club [2020] SADC 162

First (36-year-old) and second (33-year-old) plaintiffs attended the Macclesfield Gravity Festival with their three children in April 2014. A competitor in the open class race lost control of the go-kart and collided with spectators, allegedly injuring the plaintiffs. First plaintiff suffered severe injuries to his right knee, including medial meniscal tear, a lateral meniscal tear and moderate to severe chondral thinning, which will cause a level of knee pain indefinitely. Second plaintiff suffered injuries to her upper extremity (shoulder, elbow, wrist, hand and thumb), neck, back and right knee.

General damages: First plaintiff: 18 points out of 60, which equated to a dollar value of \$40,580

Second plaintiff: 12 points out of 60, which equated to a dollar value of \$21,850.00

Evans CJ (20 November 2020)

Plumridge v Pandelis [2022] SADC 42

Plaintiff, 25-year-old woman, was riding her bike when she was injured in a motor vehicle accident and claimed damages for her physical and psychiatric injuries. Plaintiff developed permanent injuries to her right shoulder, neck and upper back with ongoing mechanical pain to neck and upper back. Diagnosed with post-traumatic stress disorder consequent to the accident.

General damages: \$5,200

Judge Thomas (11 April 2022)

Raccanello v Motor Accident Commission [2023] SADC 84

First plaintiff, 38-year-old male, was injured in a motor vehicle accident. The first plaintiff sustained injury to his cervical spine at the C6/7 level for which he required disc replacement surgery. He also sustained pure mental harm including a Post Traumatic Stress Disorder, Major Depressive Disorder and Substance Use Disorder.

General damages: \$17,850

Deuter J (12 July 2023)

Pastuch v Transport Accident Commission [2023] SADC 150

Plaintiff, a 42-year-old male, was an interstate truck driver and was involved in a collision with another vehicle which veered into his lane. The plaintiff damaged his right arm, shoulder, and developed Post-Traumatic Stress Disorder.

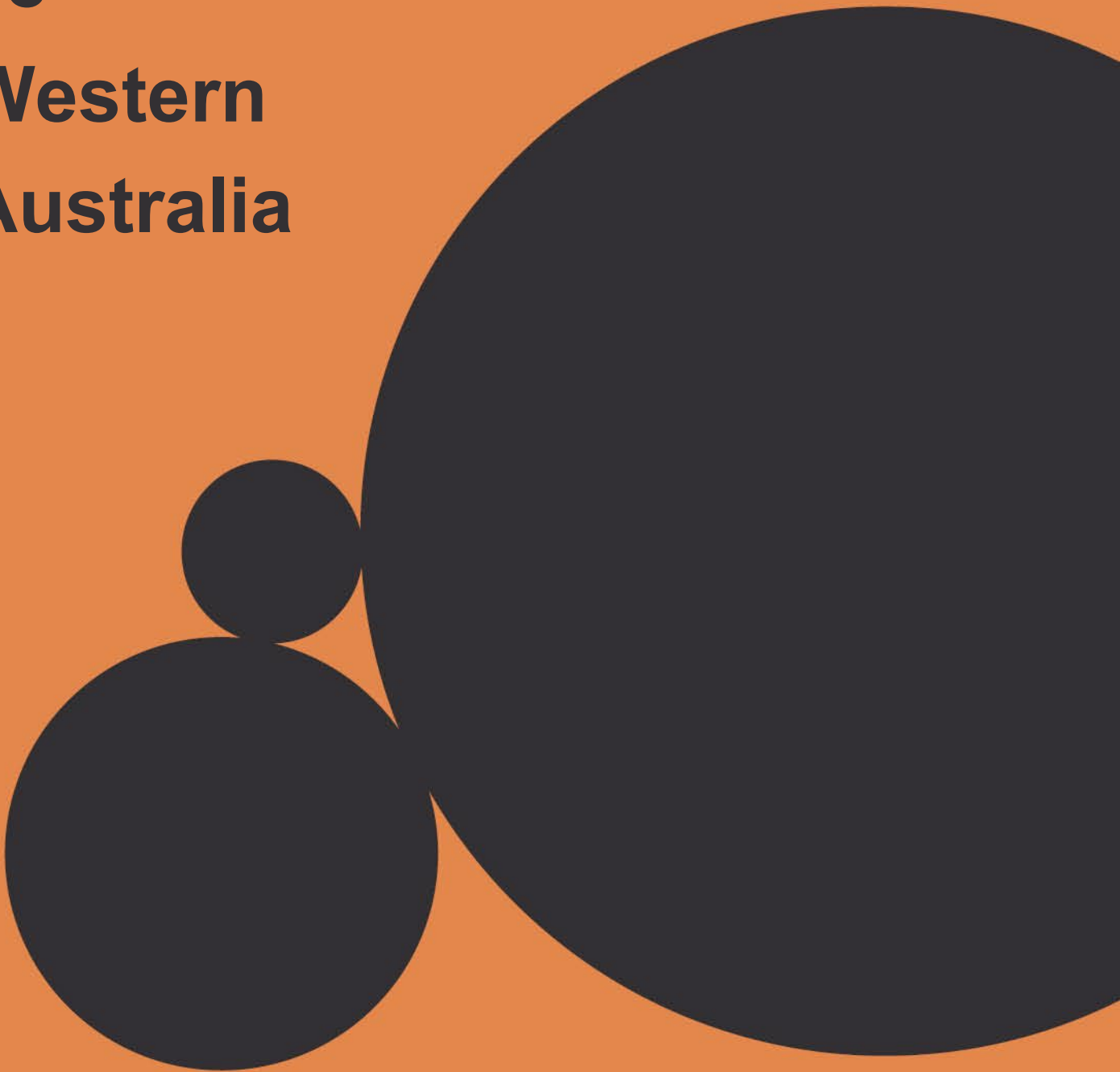
General damages: \$17,850

Slattery J (9 November 2023)

**Colin
Biggers
& Paisley**

08

**Western
Australia**



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Civil Liability Act 2002 (WA)

Application

In Western Australia, the common law of negligence is governed under the *Civil Liability Act 2002 (CLA WA)*.

The CLA WA, subject to the exclusions mentioned under Section 3A, applies to any claim for damages for harm³⁸² caused by the fault of a person³⁸³ (though not tortious claims generally), including claims for damages caused by the fault of a person originating in contract or any other action.

Importantly, claims for damages for the following exclude certain sections of the CLA WA:³⁸⁴

- an unlawful act done with the intention to cause personal injury;
- an intentional sexual offence or unlawful sexual conduct;
- damages to which the *Motor Vehicle (Third Party Insurance) Act 1943* applies;
- damages to which the *Workers' Compensation and Injury Management Act 2023* applies;
- damages under the *Civil Aviation (Carriers' Liability) Act 1961* applies; and
- damages related to personal injury resulting from smoking, use of tobacco products or inhalation of asbestos.

There are no pre-court procedures for civil claims.

Negligence - The Elements

As with common law negligence, in order to establish negligence under the CLA WA, a plaintiff must prove that the defendant:

- owed the plaintiff a duty of care;³⁸⁵
- breached the relevant standard of care; and
- caused the alleged damage.³⁸⁶

Duty of Care

In considering whether a defendant owes a duty to a plaintiff, a court is required to determine whether:

- the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);³⁸⁷
- the risk was not insignificant;³⁸⁸ and
- in the circumstance, a reasonable person in the person's position would have taken those precautions.³⁸⁹

In determining whether a reasonable person would have taken precautions against a risk of harm, a court will consider, amongst other things:

- the probability that the harm would occur if precautions were not taken;³⁹⁰
- the likely seriousness of the harm;³⁹¹

³⁸² Defined under Section 3 of the CLA WA to mean any kind of harm, including personal injury, damage to property and economic loss

³⁸³ Section 5A(1) CLA WA

³⁸⁴ Section 3A CLA WA

³⁸⁵ Division 2 CLA WA

³⁸⁶ Division 3 CLA WA

³⁸⁷ Section 5B(1)(a) CLA WA considered in *Markey v Scarborough Surf Life Saving Club Inc & Anor* [2007] WADC 194

³⁸⁸ Section 5B(1)(b) CLA WA

³⁸⁹ Section 5B(1)(c) CLA WA

³⁹⁰ Section 5B(2)(a) CLA WA

³⁹¹ Section 5B(b) CLA WA

- the burden of taking precautions to avoid the risk of harm;³⁹² and
- the social utility of the activity that creates the risk of harm.³⁹³

To determine whether or not a duty of care has been breached, the court will first examine the relevant standard of care expected to be provided by the defendant to the plaintiff. Where the defendant's conduct falls short of the standard of care expected in the circumstances, the defendant will be deemed to have breached their duty of care.

The common law sets out the standard of care expected as that which a reasonable person in the position of the defendant would have done in response to a reasonably foreseeable risk (*Wyong Shire Council v Shirt*).³⁹⁴

A defendant does not owe a duty to a plaintiff not to cause him or her mental harm unless "a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a psychiatric illness if care were not taken".³⁹⁵

If it is a case in which pure mental harm (i.e. no physical harm) has occurred, the court must also have regard to the following circumstances of the case:

- whether or not the mental harm was suffered as the result of a sudden shock;³⁹⁶
- whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;³⁹⁷
- the nature of the relationship between the plaintiff and any person killed, injured or put in peril;³⁹⁸ and
- whether or not there was a pre-existing relationship between the plaintiff and the defendant.³⁹⁹

Standard of care for health professionals

The CLA WA provides that an act or omission of a health professional is not negligent if, at the time of the act or omission, the act or omission is widely accepted by the health professional's peers as a competent professional practice.

Pursuant to Part 1A, Division 7 (section 5PA), a health professional includes a person registered under the *Health Practitioner Regulation National Law (Western Australia)* or "any other person who practises a discipline or profession in the health area that involves the application of a body of learning."

Duty to warn of obvious risk during the provision of a professional service

Per Part 1A, Div 6 (section 5O) of the CLA WA, there is no duty of care for a person (the defendant) to warn another person (the plaintiff) of an obvious risk unless:

- the plaintiff has requested advice or information about the risk from the defendant; or
- the defendant is required by a written law to warn the plaintiff of the risk; or
- the defendant is a professional and the risk of harm to the plaintiff is from the provision of a professional service by the defendant

Causation

To succeed in a claim for damages for negligence, a plaintiff must show that the damage suffered was caused by the defendant's negligence.

The general principles to determine that negligence caused particular harm are:

- that the negligence was a necessary condition of the occurrence of the harm (factual causation);⁴⁰⁰

³⁹² Section 5B(2)(c) CLA WA

³⁹³ Section 5B(2)(d) CLA WA

³⁹⁴ *Wyong Shire Council v Shirt* [1980] 146 CLR 40

³⁹⁵ Section 5S CLA WA

³⁹⁶ Section 5S(2)(a) CLA WA

³⁹⁷ Section 5S(2)(b) CLA WA

³⁹⁸ Section 5S(2)(c) CLA WA

³⁹⁹ Section 5S(2)(d) CLA WA

⁴⁰⁰ Section 5C(1)(a) CLA WA

- that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).⁴⁰¹

In satisfying the factual causation limb, CLA WA provides for the application of the "but for" test. A more detailed discussion on the above elements of causation can be found in the New South Wales section of this handbook.

CLA WA also deals with the admissibility of evidence in determining negligence and provides that in determining liability for negligence, the **plaintiff** always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.⁴⁰²

⁴⁰¹ Section 5C(1)(b) CLA WA

⁴⁰² Section 5D CLA WA

"Defences" to negligence

Obvious risk

An "obvious risk" is defined as a risk that would have been obvious to a reasonable person in the position of the person who suffered harm. An obvious risk can include a risk that is patent or a matter of common knowledge. A risk can also be obvious even if it has a low probability of occurring or is not prominent, conspicuous or physically observable.⁴⁰³

A person who suffers harm is presumed to have been aware of the risk of harm, if that risk was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.⁴⁰⁴ In determining whether a person is aware of a risk, it is sufficient that that person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk that caused the harm.⁴⁰⁵

A defendant does not owe a duty of care to a plaintiff to warn of an obvious risk, provided that that plaintiff has not sought advice or information about the risk from that defendant or the defendant is not required by law to so warn the plaintiff of that risk.⁴⁰⁶

Where a defendant is a professional and the risk is a risk of harm to the plaintiff from the provision of a professional service by that defendant, the defendant will still owe a duty to warn in respect of that risk.⁴⁰⁷

Recreational activities

A defendant will not be liable for harm suffered by a plaintiff while he or she is engaged in a dangerous recreational activity if the harm is the result of the occurrence of something that is an obvious risk of that activity.⁴⁰⁸

A "dangerous recreational activity" is defined as a recreational activity that involves a significant risk of harm, including:⁴⁰⁹

- any sport (whether or not the sport is an organised activity);
- any pursuit or activity engaged in for enjoyment, relaxation or leisure; and
- any pursuit or activity engaged in for enjoyment, relaxation or leisure at a place (such as a beach, park or other public open space) where people ordinarily engage in such pursuits or activities.

The defendant will not be liable in these circumstances even if the plaintiff was not aware of the risk,⁴¹⁰ but may be liable if the plaintiff has requested advice or information about the risk from the defendant, or the defendant is required by a written law to warn the plaintiff of that risk.⁴¹¹

Risk warning

There is no duty of care owed to a plaintiff for a recreational activity where there is a risk warning provided.⁴¹² For the purposes of this section, a risk warning can be given orally or in writing (including by means of a sign)⁴¹³ and need not be understood by that person.⁴¹⁴ Further, the warning may be general and need not be

⁴⁰³ Section 5F CLA WA

⁴⁰⁴ Section 5N(1) CLA WA

⁴⁰⁵ Section 5N(2) CLA WA

⁴⁰⁶ Section 5O CLA WA

⁴⁰⁷ Section 5O(1)(c) CLA WA

⁴⁰⁸ Section 5H CLA WA

⁴⁰⁹ Section 5E "recreational activity" CLA WA

⁴¹⁰ Section 5H(2) CLA WA

⁴¹¹ Section 5H(2) and (3) CLA WA

⁴¹² Section 5I(1) CLA WA

⁴¹³ Section 5I(6) CLA WA

⁴¹⁴ Section 5I(5) CLA WA

specific to the particular risk concerned.⁴¹⁵ In circumstances involving children, a warning need only be given to the parent⁴¹⁶ or person in control of that child.⁴¹⁷

There are certain circumstances in which a defendant is not entitled to rely on a risk warning, including:

- When the risk warning is not given by the defendant or someone on behalf of the defendant, or by or on behalf of the occupier of the place where the recreational activity is engaged in;⁴¹⁸
- If it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a written law, or a law of the Commonwealth, that establishes specific practices or procedures for the protection of personal safety;⁴¹⁹
- Where the risk warning was contradicted by any representation as to risk made by, or on behalf of the defendant to the person;⁴²⁰
- If the plaintiff was required to engage in the recreational activity by the defendant;⁴²¹
- If it is established (on the balance of probabilities) that the harm concerned resulted from an act done or omission made with reckless disregard, with or without consciousness, for the consequences of the act or omission;⁴²² and
- If the risk warning was provided to an incompetent person.⁴²³

Inherent risk

There is no liability for harm from an inherent risk (risk that cannot be avoided by the exercise of reasonable skill and care).⁴²⁴

Intoxication and criminal activity

There is a presumption of contributory negligence for a plaintiff who is found to have been affected by drugs or alcohol at the time of the act or omission that caused their harm,⁴²⁵ unless:

- the court is satisfied that the intoxication was not self-induced;⁴²⁶ or
- the plaintiff establishes, on the balance of probabilities, that their intoxication did not in any way contribute to the cause of the harm.⁴²⁷

Relevantly, intoxicated is defined as "affected by alcohol or a drug or other substance capable of intoxicating a person to such an extent that the person's capacity to exercise reasonable care and skill is impaired."⁴²⁸

For a further discussion of the relevant case law relating to intoxication, please see the New South Wales section of this handbook.

Good samaritans and volunteers

A good samaritan does not incur any personal civil liability for an act or omission done or made by the good samaritan at the scene of an emergency, but the act must be in good faith and without recklessness to assist a person in apparent need of emergency assistance. This extends to a medically qualified good samaritan

⁴¹⁵ Section 5I(7) CLA WA

⁴¹⁶ Section 5I(2) CLA WA

⁴¹⁷ Section 5I(2) CLA WA

⁴¹⁸ Section 5I(8) CLA WA

⁴¹⁹ Section 5I(9) CLA WA

⁴²⁰ Section 5I(10) CLA WA

⁴²¹ Section 5I(11) CLA WA

⁴²² Section 5I(12) CLA WA

⁴²³ Section 5I(13) CLA WA

⁴²⁴ Section 5P(1) CLA WA

⁴²⁵ Section 5L(1) CLA WA

⁴²⁶ Section 5L(2) CLA WA

⁴²⁷ Section 5L(3) CLA WA

⁴²⁸ Section 5L(4) CLA WA

who gives advice in good faith and without recklessness to a person in apparent need of emergency assistance.⁴²⁹

However, this immunity does not apply where the good samaritan's capacity to exercise care and skill was significantly impaired by alcohol or another recreational drug and where such intoxication was self-induced.⁴³⁰

Food donors

The *Volunteers (Protection from Liability) Act 2002 (WA)* (**VPLA WA**) protects food donors from civil liability arising from personal injury from the consumption of food. The VPLA WA protects persons who have donated food and grocery products for charitable purposes if:⁴³¹

- the food is donated in good faith for a charitable or benevolent purpose;
- the food is donated without the intention of payment being required to consume it;
- the food was fit for human consumption and/or safe to use at the time it left the possession or control of the donor;
- all instructions with respect to consumption, handling requirements and/or time limits on the food and groceries have been given to the customer.

Public and road authorities

Some exclusions to the application of liability to public and road authorities exist under sections 50 to 57 of the CLA WA.

Contributory negligence

The same principles apply for a person who is liable for harm, to a person who has suffered harm but has negligently contributed to his or her harm.⁴³² The standard of care required of a person who suffered harm is that of a reasonable person in the position of the person and that matters relating to contributory negligence are determined on the basis of what the person knew or ought to have known at the time.⁴³³

The *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA)* provides that the court shall reduce the amount of damages owed to a plaintiff with regard to the extent of contributory negligence.⁴³⁴

Proportionate liability

Pursuant to Part 1F of the CLA WA, the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed, depending on the extent of the defendant's responsibility for the damage or loss.

Part 1F of the CLA WA defines a concurrent wrongdoer as a person "who is one of 2 or more persons whose act or omission caused, independently of each other or jointly, the damage or loss that is the subject of the claim."

The CLA WA excludes the use of proportionate liability in personal injury claims and misleading and deceptive claims under the Fair Trading Act 2010 (WA)⁴³⁵.

⁴²⁹ Section 5AD CLA WA

⁴³⁰ Section 5AE CLA WA

⁴³¹ Section 8A VPLA WA

⁴³² Section 5K(1) CLA WA

⁴³³ Section 5K(2) CLA WA

⁴³⁴ Section 4 *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*

⁴³⁵ Section 5AI

Child abuse

Section 6A of the *Limitation Act 2005* was introduced in 2018 and removed the limitation period for child sexual abuse claims. Unlike other jurisdictions, there is still a limitation period for other forms of child abuse, such as physical abuse and connected emotional or psychological abuse, although courts have determined that it is causally impossible to separate such forms of abuse from the alleged sexual abuse.⁴³⁶

Part 2A (Child sexual abuse actions) was inserted in the CLA WA in 2018 and contains reforms regarding identifying a proper defendant and satisfaction of settlements or judgments by current officer holders of an unincorporated institution, associated trust of the institution or trustee of the associated trust.

The amendments were introduced in response to recommendations made in the Royal Commission into Institutional Responses to Child Sexual Abuse.

Duty of care

Unlike legislative amendments made to comparable Acts in Victoria, New South Wales and Queensland, there is no provision in the CLA WA which imposes a reverse onus of proof on an institution to demonstrate that it took reasonable steps to prevent child sexual abuse by a person associated with the institution.

The CLA WA also only specifically deals with child "sexual" abuse, and not physical abuse and connected emotional or psychiatric abuse, unlike other jurisdictions.

The CLA WA currently does not modify the common law principles of duty of care and breach of duty, although this was recommended by the WA Department of Justice and Strategic Reform.⁴³⁷

Vicarious liability

Vicarious liability imposes strict liability on an institution for a tort committed by its employee.

There is no provision under the CLA WA which expressly states that an institution is vicariously liable for child abuse perpetrated by a person associated with the institution. As such, vicarious liability is still determined by common law principles.

The High Court of Australia in *Prince Alfred College Incorporated v ADC*⁴³⁸ determined that an employer is vicariously liable for child abuse perpetrated by its employee if it placed the employee in a role that provided the occasion for the abuse. The court is to take into account:

- the employee's authority, power or control over the child; and
- the trust of the child in the employee; and
- the employee's ability to achieve intimacy with the child.

The High Court revisited the principles of vicarious liability in *CCIG Investments Pty Ltd v Schokman*⁴³⁹ and held that while an unauthorised, intentional or criminal act may be committed in the course of employment, an employer is not responsible for every act an employee chooses to do.

The landmark High Court decision in the case of *Bird v DP*⁴⁴⁰, delivered on 13 November 2024, determined the boundaries of vicarious liability in child abuse matters. The case concerned allegations of child abuse perpetrated by a priest of the Catholic Diocese of Ballarat (Diocese) in 1971, and it was agreed that the priest was not an employee of the Diocese. The High Court found by majority that on the question of whether vicarious liability ought to be extended to apply to relationships that are "akin to employment", the answer is

⁴³⁶ *Lawrence v Province Leader of the Oceania Province of the Congregation of the Christian Brothers* [2020] WADC 27

⁴³⁷ Department of Justice Strategic Reform *Discussion Paper Royal Commission into Institutional Responses to Child Sexual Abuse - Duty of institutions - recommendations 89-93*, December 2018

⁴³⁸ *Prince Alfred College Incorporated v ADC* [2016] HCA 37

⁴³⁹ *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21

⁴⁴⁰ *Bird v DP (a pseudonym)* [2024] HCA 41

no. In other words, there can be no finding of vicarious liability in child abuse matters unless there is an employee/employer relationship between the alleged perpetrator and the institution being held liable.

This decision is contrary to the approach in overseas jurisdictions like the United Kingdom and Canada who have readily expanded vicarious liability to non-employment relationships. The High Court stated in this regard that it is for the legislatures to expand vicarious liability.

Proper defendant

Division 2 (Liability of certain office holders and institutions and availability of assets) enables a claimant to maintain a cause of action against:

- a current office holder of an unincorporated institution, if the former office holder no longer holds that position;
- an unincorporated institution that has since become incorporated;
- "continuing" or "successor" entities of institutions.

Satisfaction of liability

Section 15E of the CLA WA enables a claimant to recover payment of damages from an associated trust of the institution, or the trustee of the associated trust.

This provision does not apply to settlements or judgments given or reached prior to the 2018 CLA WA amendments.

Revisit claims and setting aside prior deeds

Amendments to the *Limitations Act 2005 (WA)* (**Limitations Act**) permit plaintiffs, in certain circumstances, to apply for a previous settlement or judgment to be set aside, where it is 'just and reasonable'. overturning the finality of settlement - this is commonly referred to as a 'revisit claim'. In WA, plaintiffs are required to apply for leave to commence a proceeding and to set aside a deed, regardless of whether the defendant takes the point of prior settlement and hence opposes the application. The plaintiff bears the burden of proving that it is just and reasonable. The Limitations Act does not define "just and reasonable"

Recent cases in WA have considered the procedure and principles relevant to section 92 applications.

JAS v The Trustees of the Christian Brothers (2018) WADC 169

The applicant alleged sexual abuse at orphanages run by the Christian Brothers in the 1960s. He received two payments from the Christian Brothers, one in 1998 for \$2,000, the other in 2015 for \$150,000. The latter involved signing a Deed of release.

The Court construed the legislative amendments, noting that section 92 of the Limitations Act confers wide discretion, and is informed by the remedial purposes of the amendments.

In this case, the Court had regard to a number of factors which are likely to be true of most section 92 applications, including that:

- as a general rule there is no statutory limitation period for such a claim;
- because the applicant's claim had been statute-barred at the time of entry into the 2015 deed, "*his bargaining position was severely curtailed and he was left with no real choice but to accept whatever amount was offered by the Christian Brothers without it being necessarily a reflection of his proper entitlement if he was successful in an action against the Christian Brothers.*";
- the applicant's entitlement in relation to child sexual abuse has never been decided on its merits;
- the respondent is unlikely to be financially disadvantaged by having made payment under the deed as that payment would be taken into account in any judgment if this application is successful; and
- it is "*consistent with the broad intention of the amending Act to remove legal barriers to claimants commencing an action and having their claims decided on their merits.*"

It was also relevant that the respondent does not oppose the application.

The applicant was granted leave to commence proceedings and both settlements were set aside.

Sleight CJDC (13 November 2018)

ARA v Perth Diocesan Trustees [2020] WASC 188

The applicant brought an urgent application due to his age and terminal mesothelioma. He was a ward of the State and alleged that he was sexually abused whilst under the supervision of the group home run by the respondent in 1940s and 1950s.

The parties reached a settlement in 2010 for \$80,000 and the applicant signed a Deed. At the hearing, the respondent did not oppose the application for leave to commence proceedings and to set aside the 2010 Deed. The Court endorsed the analysis in *JAS v The Trustees of the Christian Brothers*.

The applicant was granted leave to commence proceedings and the Deed was set aside.

Kenneth Martin J (1 May 2020)

WPM v Trustees of the Christian Brothers [2020] WADC 112

The applicant alleged that he was physically, mentally and sexually abused by a number of brothers and residents of the farm operated by the Christian Brothers between 1954 and 1961. The applicant and the respondent reached settlement agreements in 2009 and 2014 for which he received \$40,000 and \$250,000 respectively.

The applicant was not legally represented at the mediation which led to the 2009 Deed, and the respondent did not oppose the application in relation to that deed. The Court held that the legal representation did not overcome the insurmountable legal barrier of which the applicant was keenly aware. The Court had regard to the factors identified in *JAS v The Trustees of the Christian Brothers* (2018) WADC 169, as well as to the merits of the applicant's proposed claim, the quantum of other recent judgments in abuse cases, compared to what he received. The Court noted that at the time for 2014 deed the applicant's claim was statute-barred, and he faced an uphill battle in establishing that the respondent was the proper defendant.

The applicant was granted leave to commence proceedings and both settlements were set aside.

Stavrianou DCJ (19 August 2020)

PDL v XYZ (A Pseudonym) [2023] WADC 96

The applicant alleged that they had been sexually abused by his paternal uncle, who was a priest and office holder of the respondent in the 1970s. The applicant and respondent reached a settlement agreement in 1996 for \$50,000 following a mediation at which the applicant was legally represented. The perpetrator was convicted and imprisoned for offences including in relation to the applicant.

The respondent opposed the application for leave to commence proceedings and set the 1996 Deed aside. It was significant that they did not lead any evidence to challenge the applicant's assertion that it was his subjective belief that he had no option but to settle. The Court had regard to the factors identified in *JAS v The Trustees of the Christian Brothers* and noted that the case was not without merit and was "well arguable" given the perpetrator's conviction and imprisonment.

The applicant was granted leave to commence proceedings and the settlement set aside.

Gillan DCJ (18 August 2023)

Permanent stay

The removal of the limitation period was followed by a recommendation by the Royal Commission that the limitation period "should however be balanced by expressly preserving the relevant courts existing jurisdictions and powers to stay proceedings where it would be unfair to the defendant to proceed".

The court has a broad discretion to permanently stay a proceeding as "an incident of the general power of a court of justice to ensure fairness".

Section 6A(5) of the *Limitations Act 2005* (WA) specifies that the removal of limitation period in respect of child sexual abuse actions does not limit any inherent, implied or statutory jurisdiction of a court; or any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction. Relevantly, the Note to this subsection refers to permanent stay applications specifically:

Note for this subsection: *For example, this section is not intended to limit a court's power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.*

Recent caselaw indicates that where a permanent stay has been granted, it is due to the consequences of the lengthy passage of time and a fair adjudication of the serious allegations made is not possible.

However, there is now an acknowledgement by the High Court that there are common denominators in many historical child abuse matters meaning the bar is raised high in terms of the extreme circumstances in which a permanent stay, now emphasised as an exceptional remedy or tool of last resort, is justified.⁴⁴¹

Ugle v Masters [2021] WADC 8

The plaintiff claimed damages for alleged sexual abuse perpetrated while in the defendant's care at the Roelands Mission between 1960 to 1964. The defendant sought a permanent stay due to his medical conditions which included a cognitive impairment, and the effect of the delay since the alleged abuse is said to have occurred.

The court dismissed the application for a permanent stay as the defendant failed to discharge the burden in bringing a permanent stay application.

Shepherd DCJ (27 January 2021)

JD v ZYX [2022] WASCA 136

The appellant appealed a decision to dismiss an application for a permanent stay on the basis that the judge should have found that evidence destroyed by the respondent would have the effect that the appellant is unable to have a fair trial.

The court found that there is no basis for concluding that the loss of the diaries would contribute to oppression or any other form of unfairness to the appellant at trial. Furthermore, there was no ground for finding that the loss of the destroyed diaries would render the proceeding more expensive or arduous than otherwise would be the case.

The appellant pointed to the detailed statement of claim which was derived from a deposition of the first respondent which was from the destroyed diaries. The appellant argued this created a disadvantage to the appellant. The court found that the statement of claim was not admissible as proof of the allegations, and the trial judge's powers would extend to ensuring the deposition was not misused.

The court dismissed the appeal.

Buss P, Murphy JA and Fraser AJA (27 October 2022)

GMB v UnitingCare West [2022] WASCA 92

The appellant appealed the decision of the court in the first instance to grant the respondent a permanent stay. The court found that the continuation of the proceedings would be unfairly or unjustifiably oppressive as the respondent could not make a meaningful defence. The appellant alleged that he was physically and sexually abused when he was a resident at Mofflyn House.

The appellant appealed on two grounds, that the primary judge proceeded on the wrong principle, and failed to take into account material considerations. The grounds of appeal both contend that the inability to investigate or defend the allegations was the fault of the respondent.

⁴⁴¹ *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; *Wilmot v State of Queensland* [2024] HCA 42; *RC v The Salvation Army (Western Australia) Property Trust* (2024) 419 ALR 677

Firstly, the court found that the primary judge did not apply the principle which the appellant had identified, and this ground must therefore fail. Secondly, the court found that the facts which the appellant alleges the court did not take into account, were not brought to the primary judge's attention. The appellant argued that the facts were obvious to the primary judge despite those being brought to the judge's attention.

The court dismissed the appeal finding that the court had not identified the incorrect principles, and His Honour did not fail to take into account any of the considerations drawn to his attention.

Quinlan CJ, Beech and Vaughan JJA (26 July 2022)

GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore (2023) 414 ALR 635

The High Court allowed an appeal from the NSW Court of Appeal and determined that the fact that an alleged perpetrator and/or witnesses are unable to give evidence is not on its own a reason to grant a permanent stay in historical child sexual abuse claims. The defendant must demonstrate real prejudice in order to be successfully granted a permanent stay of proceedings and such a remedy should be one of last resort for historical child sexual abuse claims.

GLJ alleges that Father Anderson sexually abused her on one occasion in 1968 at her home when she was 14 years old. Father Anderson passed away in 1996 and the plaintiff did not commence her claim for damages until 2019. Four other witnesses provided statements claiming they were sexually abused by Father Anderson. The diocese also had documents confirming other members of clergy were aware of other sexual abuse allegations against Father Anderson.

The diocese alleged that it could not have a fair trial because the allegations were never put to Father Anderson before his death and the claim was not made until 2019, which due to the passage of time, other witnesses were deceased or documents unavailable. The High Court did not agree with this argument because there was other evidence available to the diocese such as evidence indicating inconsistencies in the plaintiff's version of events and other complaints made against Father Anderson, and therefore there were no extenuating circumstances warranting a permanent stay.

RC v Salvation Army (Western Australia) Property Trust (2024) 419 ALR 677

The appellant alleged that he was sexually abused while placed in the Nedlands Boys' Home in 1959 and 1960 which was owned and operated by the respondent. The respondent sought a permanent stay on the basis that having exhausted reasonable enquiries, more than 60 years had passed and it could not meaningfully defend the action.

The respondent asserted that:

- material witnesses were not available to it, as the perpetrator, his wife, and the person the appellant allegedly reported the abuse to, were all deceased. The respondent contacted the perpetrator's two children who were not able to provide information which would allow the respondent to deal with the allegations; and
- it had been denied the opportunity to meaningfully investigate whether there were documents relevant to the issues in the action.

The District Court of WA granted the respondent a permanent stay on the basis that it had no contemporaneous material to evaluate the claim, and it would not be in a position to determine whether or not to admit or deny any relevant fact on an informed basis and a fair trial was not possible.

The appeal to the Court of Appeal of the Supreme Court of WA was dismissed. However, the High Court recently unanimously allowed the appeal, concluding that the District Court was wrong to conclude there could be no fair trial of the proceeding. The High Court held that evidentiary tools were available to attempt to alleviate unfairness in the prospective trial. The respondent had an opportunity to identify contextual information with reasonable level of specificity. The respondent's claim of its inability to find external evidence to challenge the appellant's evidence did not show that a trial of appellant's allegations would be unfair.

The High Court endorsed the principle that a heavy onus of proof applies in order to obtain a stay in such proceedings, which it held had not been discharged here because the respondent did not identify that the trial of the joined issues would be unfair. Their Honours variously pointed to the failure to establish:

- that it had taken any steps in relation to the army officer and appellant's claim;
- the nature of, even in general terms, the documentary evidence claimed to have been lost during the lapse of time between the time of the alleged assaults and the time when the appellant brought claims against the respondent; and
- that all other potential witnesses had died.

The permanent stay was overturned.

Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ (13 November 2024)

Recent damages awards

Lawrence v Province Leader of Oceania Province of Congregation of Christian Brothers [2020] WADC 27

Plaintiff, a 45-year-old male at the time of the trial, was at an orphanage for eight years where he was repeatedly subjected to various forms of sexual abuse by the brothers of the orphanage.

Injuries: Psychiatric injury, which has impacted upon all aspects of his life, including his ability to work and earn an income. In particular, he was diagnosed with major depressive disorder and PTSD. Further, the plaintiff suffered depersonalisation, lack of individual care or mentoring, malnourishment, insufficient clothing, and a poor education at the orphanage.

Damages awarded:

- Non-pecuniary damages: \$400,000
- Aggravated damages: Not awarded
- Exemplary damages: Not awarded
- Loss of earnings (including loss of superannuation benefits): \$620,000
- Interest on past loss (s 32 of the Supreme Court Act): \$400,000
- Future medical expenses: \$5,000
- Future medication expenses: \$1,000
- Special damages (as agreed): \$1,440,500:
 - Past gratuitous care and assistance: \$5,000 (including interest)
 - Past special damages: \$7,500 (including interest)
 - Past travel: \$2,000 (including interest)
- Less: \$111,000 (agreed deduction pursuant to s 15K of the CLA)
- Total: \$1,329,500

Herron DCJ (11 March 2020)

Herron DCJ's assessment of damages was upheld on appeal in *Province Leader of Oceania Province of Congregation of Christian Brothers v Lawrence* [2021] WASCA 77 per Buss P, Murphy and Vaughan JJA (6 May 2021)

PLA (a pseudonym) v DEF (a pseudonym) [2024] WADC 53

The Plaintiff, a 39-year-old woman at the time of the trial, was sexually abused by her uncle as a child. She obtained default judgment against him, and the matter proceeded as an assessment of damages only. Interestingly the defendant appeared in person but did not apply to set aside the default judgment, nor challenge the plaintiff's assessment of damages.

Injuries: PTSD, a Panic Disorder and a Stimulant Use Disorder

Damages awarded:

- Non-pecuniary loss \$300,000.00

- Aggravated damages: Not awarded
- Exemplary damages: Not awarded
- Past loss of earning capacity: \$638,735.00
- Interest on past loss of earning capacity: \$430,735.05
- Future loss of earning capacity: \$716,443.02
- Past and future loss of superannuation (inc interest on past loss of superannuation): \$220,404.87
- Future medical expenses: \$123,618.35
- Total: \$2,429,936.29

Palmer DCJ (24 June 2024)

Assessment of damages for personal injury

Non-pecuniary loss (general damages)

Non-pecuniary loss is defined to include:⁴⁴²

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

The award of damages for non-pecuniary loss is restricted as follows:

- Damages are not awarded if the amount of non-pecuniary loss is assessed to be not more than Amount A;⁴⁴³
- If the amount of non-pecuniary loss is assessed to be more than Amount A but not more than Amount C, damages for non-pecuniary loss are not to be awarded in an amount that is more than the excess of the amount assessed over Amount A (i.e. the amount assessed is reduced by Amount A);⁴⁴⁴
- 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, 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:⁴⁴⁵

$$\text{Amount A} - (\text{Amount assessed} - \text{Amount C})$$

There are no restrictions if the amount of non-pecuniary loss is assessed to be more than the sum of Amount A and Amount C.

Amounts A and C are updated each financial year by reference to the Labour Price Index for Western Australia.⁴⁴⁶ On or before 1 July each year, the Minister publishes a notice in the Gazette specifying the amounts that are Amount A and Amount C for the financial year commencing on that 1 July, relevant to the calculation of damages for non-pecuniary loss.⁴⁴⁷

As at 1 July 2024 the amounts are as follows:

- Amount A: \$25,500
- Amount C: \$73,500

⁴⁴² Section 9(4) "non-pecuniary loss" CLA WA

⁴⁴³ Section 9(1) CLA WA

⁴⁴⁴ Section 9(2) CLA WA

⁴⁴⁵ Section 9(3) CLA WA

⁴⁴⁶ Sections 10(2) and 4 CLA WA

⁴⁴⁷ Section 10(3) CLA WA

Amount A - (Amount assessed - Amount C)

The relevant values of Amount A and Amount C are summarised below:

Period	Amount A	Amount C
1 July 2003 - 30 June 2004	\$12,500	\$38,000
1 July 2004 - 30 June 2005	\$13,000	\$39,500
1 July 2005 - 30 June 2006	\$13,500	\$41,000
1 July 2006 - 30 June 2007	\$14,000	\$42,500
1 July 2007 - 30 June 2008	\$14,500	\$44,500
1 July 2008 - 30 June 2009	\$15,500	\$47,000
1 July 2009 - 30 June 2010	\$16,500	\$49,500
1 July 2010 - 30 June 2011	\$17,000	\$51,000
1 July 2011 - 30 June 2012	\$17,500	\$53,000
1 July 2012 - 30 June 2013	\$18,000	\$55,000
1 July 2013 - 30 June 2014	\$19,000	\$57,500
1 July 2014 - 30 June 2015	\$19,500	\$59,000
1 July 2015 - 30 June 2016	\$20,000	\$60,500
1 July 2016 - 30 June 2017	\$20,500	\$61,500
1 July 2017 - 30 June 2018	\$21,000	\$62,500
1 July 2018 - 30 June 2019	\$21,500	\$63,500
1 July 2019 - 30 June 2020	\$22,000	\$64,500
1 July 2020 - 30 June 2021	\$22,500	\$65,500
1 July 2021 - 30 June 2022	\$23,000	\$66,500
1 July 2022 - 30 June 2023	\$23,500	\$68,000
1 July 2023 - 30 June 2024	\$24,500	\$70,500
1 July 2024 - 30 June 2025	\$25,500	\$73,500

In determining general damages, a court may refer to earlier decisions of that or other courts of any jurisdiction within Australia, for the purpose of establishing the appropriate award in the proceedings. For that purpose, the parties to the proceedings may bring the court's attention to awards of damages for non-economic loss in those earlier decisions.⁴⁴⁸

When applying the caps, the Courts will:

- First, assess the non-pecuniary loss according to the circumstance of the case & by reference to case law (**Assessed Amount**).
- Second, determine if the Assessed Amount is less than or equal to Amount A (currently \$25,500). If so, the plaintiff is not entitled to non-pecuniary loss damages.
For example, if the Assessed Amount is \$20,000, the plaintiff will receive \$0.
- Third, determine if the Assessed Amount is above Amount A but equal to or less than Amount C (currently between \$25,501 and \$73,500). If so, the plaintiff is entitled to the Assessed Amount minus Amount A.
For example, if the Assessed Amount is \$60,000, this translates to:
\$60,000 - \$25,500
= \$34,500

⁴⁴⁸ Section 10A CLA WA

- Fourth, determine if the Assessed Amount is above Amount C but equal to or less than the sum of Amount A and Amount C (currently between \$73,501 and \$99,000). If so, the plaintiff is entitled to Amount A minus (Assessed Amount minus Amount C).
For example, if the Assessed Amount is \$80,000, this translates to:
\$25,500 - (\$80,000 - \$73,500)
= \$19,000
- Fifth, determine if the Assessed Amount is above the sum of Amount A and Amount C (currently \$99,001). If so, there is no cap.
For example, if the Assessed Amount is \$120,000, the plaintiff will receive \$120,000.

Economic loss

In assessing damages for loss of earnings (both past and future), a court must disregard earnings lost 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.⁴⁴⁹

Aside from this cap, there are no further provisions under the CLA WA that relate to the calculation of economic loss.

Gratuitous care and services (home care services)

Damages for the provision of home care services relate to gratuitous services of a domestic nature or gratuitous services relating to nursing and attendance that have been or are to be provided to a plaintiff by a member of the same household or family.⁴⁵⁰

The minimum threshold for awards for gratuitous assistance requires the award to be equal to, or more than the Amount B.⁴⁵¹

Amount is updated each financial year by reference to the Labour Price Index for Western Australia.⁴⁵² The Amount B is published by the Minister in the Gazette on or before 1 July each year.⁴⁵³ As at 1 July 2024 Amount B is \$8,800.

The relevant values of Amount B are summarised below:

Period	Amount B
1 July 2003 - 30 June 2004	\$5,000
1 July 2004 - 30 June 2005	\$5,000
1 July 2005 - 30 June 2006	\$5,000
1 July 2006 - 30 June 2007	\$5,000
1 July 2007 - 30 June 2008	\$5,000
1 July 2008 - 30 June 2009	\$5,500
1 July 2009 - 30 June 2010	\$6,000
1 July 2010 - 30 June 2011	\$6,000
1 July 2011 - 30 June 2012	\$6,000
1 July 2012 - 30 June 2013	\$6,000
1 July 2013 - 30 June 2014	\$6,500
1 July 2014 - 30 June 2015	\$7,000
1 July 2015 - 30 June 2016	\$7,000

⁴⁴⁹ Section 11 CLA WA

⁴⁵⁰ Section 12 CLA WA

⁴⁵¹ Section 12(3) CLA WA

⁴⁵² Sections 13(2) and 4 CLA WA

⁴⁵³ Section 13 CLA WA

1 July 2016 - 30 June 2017	\$7,000
1 July 2017 - 30 June 2018	\$7,000
1 July 2018 - 30 June 2019	\$7,000
1 July 2019 - 30 June 2020	\$7,000
1 July 2020 - 30 June 2021	\$7,000
1 July 2021 - 30 June 2022	\$6,500
1 July 2022 - 30 June 2023	\$7,000
1 July 2023 - 30 June 2024	\$7,500
1 July 2024 - 30 June 2025	\$8,000

The following further restrictions for awards for gratuitous services apply:

- Damages for gratuitous services will only be awarded if the services are provided as a result of the personal injury suffered by the plaintiff.⁴⁵⁴
- If services are provided or to be provided for 40 hours per week or more, then the amount of damages awarded for such services is not to exceed the amount calculated on a weekly basis at the rate of:
 - the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in Western Australia for the relevant quarter;⁴⁵⁵ or
 - if the Australian Statistician ceases to make such estimate, the weekly amount fixed by, or determined in accordance with, the regulations.⁴⁵⁶

If services are provided or to be provided for less than 40 hours per week, the amount of damages awarded for such services is not to exceed the amount calculated on an hourly basis at an hourly rate that is 1/40 of the weekly rate estimated by the Australian Statistician as the average weekly total earnings of all employees in Western Australia for the relevant quarter.⁴⁵⁷

Interest

Interest is payable at the interest rate fixed by the *Supreme Court Act 1935* (WA).

Discount rate

The present value of future losses, referable to:

- loss or impairment of capacity to earn;⁴⁵⁸
- loss or diminution of probable future earnings;⁴⁵⁹ or
- a liability to incur expenditure in the future;⁴⁶⁰

will be quantified by adopting a discount rate of 6%⁴⁶¹ (or fixed by Order of the Governor⁴⁶²).

⁴⁵⁴ Section 12(2) CLA WA

⁴⁵⁵ Section 12(5)(a) CLA WA

⁴⁵⁶ Section 12(5)(b) CLA WA

⁴⁵⁷ Section 12(5)(c) CLA WA

⁴⁵⁸ Section 5(1)(a) *Law Reform (Miscellaneous Provisions) Act 1941*

⁴⁵⁹ Section 5(1)(b) *Law Reform (Miscellaneous Provisions) Act 1941*

⁴⁶⁰ Section 5(1)(c) *Law Reform (Miscellaneous Provisions) Act 1941*

⁴⁶¹ Section 5(1)(e) *Law Reform (Miscellaneous Provisions) Act 1941*

⁴⁶² Section 5(1)(d) *Law Reform (Miscellaneous Provisions) Act 1941*

Present value of \$1 per week over 1 to 80 years at 6% pa

No. of years	6% Multiple	No. of years	6% Multiple	No. of years	6% Multiple	No. of years	6% Multiple
1	51	21	632	41	813	61	870
2	98	22	647	42	818	62	871
3	144	23	661	43	822	63	873
4	186	24	674	44	826	64	874
5	226	25	687	45	830	65	875
6	264	26	699	46	834	66	876
7	300	27	710	47	837	67	877
8	334	28	720	48	841	68	878
9	365	29	730	49	844	69	879
10	395	30	739	50	847	70	880
11	424	31	748	51	849	71	881
12	450	32	757	52	852	72	882
13	476	33	764	53	855	73	883
14	499	34	772	54	857	74	883
15	522	35	779	55	859	75	884
16	543	36	785	56	861	76	885
17	563	37	792	57	863	77	885
18	582	38	798	58	865	78	886
19	599	39	803	59	867	79	886
20	616	40	808	60	868	80	887

Present lump sum equivalent in value to an income of \$1 deferred for periods from 1 to 80 years calculated at an interest rate of 6%

No. of years	Lump Sum 6%	No. of years	Lump Sum 6%	No. of years	Lump Sum 6%	No. of years	Lump Sum 6%
1	0.943	21	0.294	41	0.092	61	0.029
2	0.890	22	0.278	42	0.087	62	0.027
3	0.840	23	0.262	43	0.082	63	0.025
4	0.792	24	0.247	44	0.077	64	0.024
5	0.747	25	0.233	45	0.073	65	0.023
6	0.705	26	0.220	46	0.069	66	0.021
7	0.665	27	0.207	47	0.065	67	0.020
8	0.627	28	0.196	48	0.061	68	0.019
9	0.592	29	0.185	49	0.058	69	0.018
10	0.558	30	0.174	50	0.054	70	0.017
11	0.527	31	0.164	51	0.051	71	0.016
12	0.497	32	0.155	52	0.048	72	0.015
13	0.469	33	0.146	53	0.046	73	0.014
14	0.442	34	0.138	54	0.043	74	0.013
15	0.417	35	0.130	55	0.041	75	0.013
16	0.394	36	0.123	56	0.038	76	0.012
17	0.371	37	0.116	57	0.036	77	0.011
18	0.350	38	0.109	58	0.034	78	0.011

No. of years	Lump Sum 6%	No. of years	Lump Sum 6%	No. of years	Lump Sum 6%	No. of years	Lump Sum 6%
19	0.331	39	0.103	59	0.032	79	0.010
20	0.312	40	0.097	60	0.030	80	0.009

Dust diseases

Limitation period for claiming damages

Section 14 of the *Limitation Act 2005 (WA)* provides that an action for damages relating to a personal injury to a person cannot be commenced if three years have elapsed since the cause of action accrued. Section 55 of the *Limitation Act 2005 (WA)* outlines that action relating to a personal injury accrues when:

1. the person becomes aware that he or she has sustained a not insignificant personal injury; or
2. the first symptom, clinical sign or other manifestation of personal injury consistent with the person having sustained a not insignificant personal injury.

Where the injury is a result of the inhalation of asbestos, and the person did not have knowledge of the relevant facts before 1 January 1984 section 56 of the *Limitation Act 2005 (WA)* outlines that the cause of action accrues when the person has knowledge of the relevant facts.

The *Civil Liability Amendment (Provisional Damages for Dust Diseases) Bill 2024* imposes a new provisional damages regime and allows plaintiffs to seek a subsequent award for damages under certain circumstances. The *Limitation Act 2005* is amended so that no limitation period is applicable for any action of claiming subsequent damages. However, a limitation period will continue to apply to the original dust disease action outside of the provisional damages regime.

Procedure - how a claim is instituted

Where the injury was the result of their employment, the claim for damages is governed by the *Workers Compensation and Injury Management Act 2023 (WA)*.

Section 421 of the *Workers' Compensation and Injury Management Act 2023 (WA)* places constraints of the award of damages. An award of damages can only be awarded where:

1. the worker elects, in the manner prescribed in the regulations, to retain the right to seek damages and the Director registers the election in accordance with the regulations;
2. court proceedings are commenced after the Director gives the worker written notice that the election has been registered; and
3. the court is satisfied that the workers degree of permanent whole person impairment is at least 15%.

Once the claimant has complied with the above requirements, the claimant can commence litigated proceedings to recover damages for the dust-related condition. Where a claimant's whole person impairment is 15% or more but less than 25% the quantum of damages they can claim is limited. Where the whole person impairment is 25% or more, the damages are unlimited.

Where a claimant alleges a dust-related condition, their degree of permanent whole person impairment must either be agreed by between the parties and approved by the Director, or assessed by a Dust Disease Medical Panel in accordance with section 186(2) and 426.

This process differs to the process for other workers, whose impairment can be assessed by an approved independent medico-legal expert. However, certain claimants will be deemed to have a whole person impairment of at least 25% if the Dust Disease Medical Panel determines that they have or have had:

- mesothelioma; or
- diffuse pleural fibrosis, lung cancer, pneumoconiosis or silicosis and the condition is likely to cause their death within two years.

Where the injury involves dust exposure, but does not involve an employee/employer relationship, a claim may be commenced by filing a:

1. writ of summons - used to commence all civil actions in the District Court and Supreme Court;
2. originating summons - used to commence civil actions to be heard in chambers;

3. originating motion - used to commence actions where there is no defendant or the action is authorised by legislation.

The most common way to commence a claim is by writ of summons. This document contains a broad general statement outlining the nature and basis of a claim. Once the writ is filed, a statement of claim must be filed. A writ and a statement of claim may be filed at the same time. The defendant is then required to file a defence.

Section 3A of the *Civil Liability Act 2002 (WA)* excludes certain provisions for a claim relating to the inhalation of asbestos, including the exclusion of Part 2, Awards of personal injury damages.

The effect of these exclusions are that the court is not subject to certain restrictions on the award of damages for claimants who have made a claim for damages due to a disease resulting from the inhalation of asbestos. These exclusions are only applied for the inhalation of asbestos, and do not relate to other dust-related diseases.

Recent changes in legislation

The *Civil Liability Amendment (Provisional Damages for Dust Diseases) Bill 2024 (the Bill)* amends the *Civil Liability Act 2002 (WA)* by introducing a new provisional damages regime which allows a plaintiff who has suffered a dust disease arising from exposure to asbestos or silica dust to seek a provisional award of damages and then later seek a subsequent award of damages under certain circumstances.

According to subdivision 2 - Provisional damages, section 15AC, a plaintiff is entitled to an award of provisional damages if the initial action is commenced in the Court by an indorsed writ or a writ indorsed with a statement of claim (as the case may be) that:

1. nominates provisional damages as the remedy required; and
2. specifies another dust disease (a subsequent dust disease) or more than 1 subsequent dust disease that the plaintiff may develop, wholly or partly as a result of the act or omission giving rise to the cause of action.

Section 15AD provides that when determining the amount of provisional damages, a court must not assume that the plaintiff will develop a subsequent dust disease.

Section 15AE provides that a settlement agreement in the initial action must contain:

1. any subsequent dust disease that the plaintiff claims they may develop, wholly or partly as a result of the act or omission giving rise to the cause of action;
2. whether or not the defendant admits liability for the dust disease and any subsequent dust disease;
3. whether or not the plaintiff is barred from commencing a subsequent action in relation to a subsequent dust disease

According to subdivision 3 - Subsequent Damages, section 15AG, a plaintiff is entitled to subsequent damages if:

1. the subsequent action is commenced in the court;
2. the subsequent action is in respect of a subsequent dust disease specified in the indorsed writ or a writ indorsed with a statement of claim (as the case may be) that commenced the initial action;
3. a plaintiff may commence more than 1 subsequent action, with each subsequent action relating to a subsequent dust disease or more than 1 subsequent dust disease;
4. a plaintiff cannot commence a subsequent action in relation to a subsequent dust disease that has already been the subject of a subsequent action.

This varies from the "one and for all basis" on which damages were determined whereby a plaintiff might receive lump sum compensation and is then disentitled to claim again if a related, more serious disease

develops. This allows plaintiffs in Western Australia to seek further damages and aligns with legislation in New South Wales, Victoria, Tasmania and South Australia.

What is considered a dust related condition? Definitions in specific legislation

The *Workers Compensation and Injury Management Bill 2023* (WA) defines a dust disease to include:

- pneumoconiosis or silicosis;
- mesothelioma;
- lung cancer; and
- diffuse pleural fibrosis contracted on or after 19 September 2009.

The *Civil Liability Amendment (Provisional Damages for Dust Diseases) Bill 2024* defines dust disease to include:

- Asbestosis;
- asbestos induced carcinoma;
- asbestos related pleural disease;
- lung cancer;
- mesothelioma;
- pneumoconiosis or silicosis; and
- silico - tuberculosis.

Significant cases regarding civil procedure, awards of damages, etc.

Amaca Pty Ltd (ACN 000 035 512) v Ellis (as executor of the estate of Cotton (dec'd)) and Others (2010) 263 ALR 576

This case was an appeal from the Court of Appeal of the Supreme Court of Western Australia. The appellant's appealed the decision that they had breached their duty of care.

The trial judge found that all three appellants had been negligent and breaches of their duty of care resulted in Mr Cotton being exposed to respirable asbestos fibres which caused, or materially contributed to, Mr Cotton's contraction of lung cancer.

Mr Cotton had died as a result of lung cancer. The question for determination by the High Court was whether it was more probable than not that his exposure to respirable asbestos fibres was the cause of Mr Cotton's cancer.

Mr Cotton had smoked on average between 15 and 20 cigarettes a day for over 26 years before he was diagnosed with lung cancer. The claimant was exposed to respirable asbestos fibres while working with two separate employers between 1975 and 1978.

The High Court allowed the appeal and found that saying the exposure to asbestos *may* have caused Mr Cotton's lung cancer is not sufficient to attribute legal responsibility. Furthermore, they found that observing that a small percentage of cases of cancer were caused by exposure to asbestos, does not identify an individual as part of that group.

Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd) v Hannell [2007] WASCA 158

This case was an appeal from the decision of the Supreme Court of Western Australia in which the respondent was awarded damages for mesothelioma. The respondent had been exposed to non-occupational respirable asbestos fibre released as a result of work which he carried out on asbestos cement products manufactured by the Appellant.

The trial judge found that the risk to persons carrying out work on asbestos cement products even when it is only a limited number of times and was very occasional was sufficiently foreseeable to impose a duty upon the appellant to warn persons against carrying out work on the products.

The Court of Appeal allowed the appeal, and found that:

1. The limited exposure did not cause the respondent's mesothelioma;
2. The risk of contracting mesothelioma from the limited exposure was but sufficiently foreseeable at the time the products were manufactured to warrant labels to be placed on them;
3. It was not sufficiently reasonably foreseeable to require the appellant to embark upon an advertising campaign; and
4. If the appellant had affixed labels on the products, or embarked on an advertising campaign, the respondent would not have been exposed to respirable asbestos fibres on the identified occasions.

Rose v MacMahon Contractors Pty Ltd [2024] WASC 214

This case sought to extend the validity of the writ of summons for a period 12 months until further medical evidence could be obtained. Order 7 rule 1(1) of the *Rules of the Supreme Court 1971 (WA)* provides that a writ is valid in the first instance for 12 months beginning with the date of its issue. Order 7 rule 1(2) provides for a wide discretion to order an extension of the validity of a writ. The plaintiff's claim was for damages for personal injuries, loss and damage sustained as a consequence of his exposure to silica dust between October 1990 to June 1999. He was diagnosed with silicosis with progressive massive fibrosis on 26 June 2020 and then received treatment for tuberculosis. His treating respiratory physician opined that she would be unable to comment on the nature and severity of his condition for another twelve months.

The relevant considerations for an application to extend the validity of a writ of summons were:

1. the length of delay in service of the writ;
2. the reason for the delay;
3. the conduct of the parties; and
4. any hardship or prejudice caused to the plaintiff by refusing the renewal, or to the defendant by granting it.

It was observed that the factors were not exhaustive and the ultimate question must always be what the interests of justice require.

It was found that the applicant would suffer substantial prejudice if the validity of his writ was not extended and awaiting further medical results is a proper explanation for delay in service of the writ. Hence, the application was granted.

The type of industries that are affected

Workers may be exposed to dust or airborne particles in a number of industries, including:

- stonemasonry;
- excavation, earth moving and drilling plant operations;
- paving and surfacing;
- mining, quarrying and mineral ore processing;
- tunnelling;
- construction activities;
- brick, concrete or stone cutting (including grinding, jack hammering or chiselling);
- hydraulic fracturing of gas and oil wells;
- pottery making.

Appendix

Recent cases in relation to particular injuries in Western Australia

Back

Houlahan v Pitchen [2009] WASCA 104

Plaintiff was a 48-year-old male who injured himself after leaning over the balustrade of his first floor balcony which gave way causing him to fall.

Injuries: Two fractured ribs and soft tissue injuries to his lumbar spine. Plaintiff still experiences ongoing back pain.

Non-pecuniary damages awarded: \$65,000

Pullin, Miller and Newnes JJA (26 June 2009)

Espinos v Jane Elizabeth Popovic As Executor And Holder Of A Grant Of Probate Of The Estate Of The Late Emil Popovic [2018] WADC 94

Plaintiff was a 55-year-old man who had surgery performed on his back which fused the L4/5 level and stabilized to L3 above. The doctor was also supposed to perform a fusion operation at L5/S1 but did not do so.

Injuries: Damage to right S1 nerve and right S1 pedicle. Acceleration of degenerative back condition due to unnecessary L4/5 decompression and unnecessary fusion performed.

Non-pecuniary damages awarded: \$222,000

Braddock DCJ (8 August 2018)

Sulub v Tyres4u Pty Limited [2018] WADC 139

Plaintiff was a 24-year-old male who had been lifting and stacking truck tyres which had been laying around the defendant's premises. While he was doing that work, he suffered an injury to his lower back.

Injuries: Back strain and facet joint degeneration.

Non-pecuniary damages awarded: \$23,500

Glancy DCJ (28 November 2018)

Best Bar Pty Ltd v Warn [2019] WASCA 15

Plaintiff (male, age unknown) was working bending steel bars on the machines which cut or bent steel reinforcing rods in various shapes and sizes. He worked with short bars and therefore he was required to lift them out of the machine manually and place them on the finished goods table adjacent to the machine. He did this for some time. He claims he suffered an injury to his back during this process.

Injuries: Lytic spondylolisthesis grade 1 at L5/S1, moderate disc narrowing at L4/5 and L5/S1, a right L5/S1 foraminal disc protrusion with impingement onto a conjoined right L5/S1 nerve root.

Non-pecuniary damages awarded: \$135,000

Quinlan CJ, Murphy JA, Mitchell JA (29 January 2019)

Tristram-Howard v Morris (Aus) Pty Ltd [2023] WADC 60

Plaintiff was an active 21-year-old woman employed as an administrative role at an airport. She suffered injury to her back when she was required to undertake repetitive sweeping work for 3-4 hours on a 40 degree day without any breaks.

Injuries: Lumbosacral pain, treated with rhizotomy injections, and major depressive disorder with anxiety

Non-pecuniary damages awarded: \$110,000

Burrows DCJ (13 July 2023)

Boothman v George [2024] WADC 26

Plaintiff was a 37 year-old solicitor who attended a chiropractor for treatment of lower back pain. He suffered an exacerbation of his existing symptoms arising from the chiropractor's negligent treatment.

Injuries: Central right disc protrusion with slight inferior extrusion at L4/L5 vertebrae, impingement on right L5 nerve root, for which he underwent surgery.

Non-pecuniary damages awarded: \$88,500

Palmer DCJ (30 April 2024)

Brain

Cooper Ellis (By His Next Friend Christopher Graham Ellis) v East Metropolitan Health Service [2018] WADC 36

Plaintiff was a 9-year-old male who suffered brain damage when he was instrumentally delivered by his mother's obstetrician.

Injuries: Developmental and cognitive impairments.

Non-pecuniary damages awarded: \$275,000

Gething DCJ (9 March 2018)

Meldrum v Vassallo [2020] WADC 71

Plaintiff (27-year-old male) suffered a serious brain injury from a collision with the defendant while riding his motorcycle. The plaintiff had previously sustained a brain injury in an earlier motorcycle accident.

Non-economic loss: \$212,500

Burrows DCJ (4 June 2020)

Leg

Bicknell v Pickard [2018] WADC 174

Plaintiff injured in a collision between motorcycles ridden by himself and the defendant. Suffered severe crush injuries to the lower left leg requiring extensive treatment.

Non-economic loss: \$125,400

McCann DCJ (14 December 2018)

Chamberlain v Scentre Shopping Centre Management (WA) Pty Ltd [2023] WADC 145

The Plaintiff was a 23-year-old woman injured while walking past an obscured and sharp hazard at a shopping centre.

Injuries: Laceration to the lateral aspect of her left knee requiring stitches

Non-pecuniary damages agreed and awarded: \$15,000

Shepherd DCJ (30 November 2023)

Shoulder

Robinson v The Owners of Reflections Waterfront Apartments West Tower Strata Plan 58085 [2016] WADC 22

Plaintiff was a 72-year-old female who injured herself after slipping over a tiled surface and colliding with the wall of a brick garden bed.

Injuries: Fractured right shoulder.

Plaintiff's claim dismissed, but non-pecuniary damages assessed: \$40,000

Stone DCJ (18 March 2016)

Watson v Gregory Spencer Ward T/As Ward's Stock Transport [2019] WADC 118

Plaintiff was a 52-year-old male who had been assisting another driver to load up his cattle truck. He had been delayed by a bull that was stopped at a gate, and was not moving as required into one of the trailer pens. When the plaintiff entered the pen to help encourage the bull past the gate, the bull turned on him. The plaintiff was caught and forced up against part of the loading dock, suffering injury.

Injuries: Disrupted supraspinatus in the right shoulder and subacromial bursitis and impingement. He also suffered a posterolateral disc protrusion at left L5/S1 with a sequestered fragment migrating into the left S1 lateral recess compressing the left S1 root.

Non-pecuniary damages awarded: \$130,000

O'Neal DCJ (16 August 2019)

Dental

Banerjee v Shah [2012] WADC 28

Plaintiff was a 58-year-old male who suffered injuries from negligent dental work.

Injuries: No lower teeth, speech problems, breathing problems and embarrassment.

Non-pecuniary damages awarded: \$80,000

Commissioner Gething (27 February 2012)

Arm

Leheste v The Minister for Health [2002] WADC 92

Plaintiff was a 62-year-old female who suffered injuries from a negligent medical surgery.

Injuries: Burning sensation to right forearm, hand and fingers.

Non-pecuniary damages awarded: \$22,500

Commissioner Gething (20 June 2012)

Smith v The Housing Authority [2008] WADC 171

Plaintiff was a 72-year-old female who injured herself falling in the rear garden of the unit block that she was living in.

Injuries: Pain in left arm, shoulder, elbow, wrist and hand.

Non-pecuniary damages awarded: \$37,500

Keen DCJ (28 November 2008)

Carter v Railway Motel Pty Ltd [2016] WADC 102

Plaintiff (male, age unknown) slipped on a sloped kerb as he was exiting his room at the Railway Motel.

Injuries: Fractured elbow.

Non-pecuniary damages awarded: \$28,000

Braddock DCJ (1 July 2016)

Sanders v Multiplex Engineering & Infrastructure Pty Ltd [2022] WADC 31

Plaintiff (male, age unknown) was working on a construction project when a purlin, which weighed approximately 60kg and was secured in the wall overhead, fell onto his left arm.

Injuries: There was a complete tear of his biceps tendon where it attached to the radius bone causing a deformity of his bicep muscle. Plaintiff was required to undergo three operations on the biceps tendon. Plaintiff has been left with significantly reduced strength and stamina in his left arm and a chronic tendency to cramping.

Plaintiff's claim was dismissed, but non-pecuniary damages assessed: \$37,000

Sweeney DCJ (7 April 2022)

Allen v Merym Pty Ltd t/as Emco Building [No 3] [2023] WADC 55

The Plaintiff was a 52 year old concrete form worker who suffered injury when he walked into protruding scaffolding at the construction site where he was working.

Injuries: Fractured elbow with ongoing pain and stiffness and radiculopathy

Non-pecuniary damages awarded: \$40,000

Commissioner Collins (26 May 2023)

Neck

Smith v BHP Billiton Iron Ore Pty Ltd [2013] WASCA 111

Plaintiff was a 43-year-old male who injured himself from falling off his bike after riding over a pothole.

Injuries: Shoulder and especially neck pain.

Non-pecuniary damages awarded: Nominal amount for the injuries was \$3,500. Since it is less than Amount A (\$14,000) (as stipulated by section 9 of the *Civil Liability Act*), damages for non-pecuniary loss could not be awarded.

Yeats DCJ (7 November 2007)

Galipo v Roos [2016] WADC 163

Plaintiff who was driving at 60km/h was t-boned by the defendant. The plaintiff suffered serious and ongoing neck injuries.

Non-economic loss: \$16,040

Gething DCJ (25 November 2016)

Greenslade v Hiew [2020] WADC 120

Plaintiff was a tenant of a property owned by the defendant. He was injured when the ceiling of the family room collapsed striking him on the head and causing him to fall to the floor.

Injuries: compression of left C6 nerve, and radiculopathy, requiring cervical epidural steroid and facet joint injections and left cervical foraminotomy

Plaintiff's claim was dismissed, but non-pecuniary damages assessed: \$75,000

Staude DCJ (1 September 2020)

Ankle

Naiken v City of Gosnells [2005] WADC 177

Plaintiff was a 53-year-old female who injured herself after slipping on the dance floor.

Injuries: Fractured ankle.

Non-pecuniary damages awarded: \$25,000

Commissioner Archer (16 September 2005)

Carusi v St Mary's Anglican Girls School Inc [2023] WADC 103

Plaintiff was a 44-year-old female. She suffered injury while traversing stairs while volunteering at her daughter's dancing competition held at the defendant's performing arts centre.

Injuries: Comminuted, intra articular, open fracture dislocation of the right ankle, requiring two surgeries

Plaintiff's claim dismissed, but non-pecuniary damages assessed: \$110,000

Stewart DCJ (1 September 2023)

Knee

Wheare v Geroheev Pty Ltd [2005] WADC 67

Plaintiff was a 38-year-old male whose left foot became trapped in a drainage grate at a car park.

Injuries: Severe ongoing pain to both knees.

Non-pecuniary damages awarded: \$60,000

Groves DCJ (14 April 2005)

Fabrizi v Masters Home Improvement Australia Pty Ltd [2023] WADC 97

The Plaintiff, suffered injury to his left knee when he slipped on some spilled liquid on the floor of the defendant's retail store.

Injuries: Alleged that as a result of his initial injury he suffered a further injury when his knee later gave way causing him to fall and hit his head injuring his neck, back and left shoulder aggravating his pre-existing depression.

Non pecuniary damages awarded: \$500 (\$25,000 less amount A \$24,500)

Kidney

Spaseski v Chin [2018] WADC 81

Plaintiff was a 16-year-old male who fell through an uncovered soakwell at a house party when he walked to the backyard to call a taxi.

Injuries: A grade 3 kidney injury. This included part of his right kidney being severed. Plaintiff has lost 20% of his overall kidney function and now is at an increased risk of suffering high blood pressure later in life.

Non-pecuniary damages awarded: \$50,500

Judge Levy (22 June 2018)

Multiple injuries

Petrovic v City of Gosnells [2006] WADC 164

Plaintiff was a 49-year-old male who injured himself from falling into a 30 centimetre deep hole.

Injuries: Pain in right knee and hand.

Non-pecuniary damages awarded: \$26,000

Fenbury DCJ (18 October 2006)

M R & R C Smith Pty Ltd T/As Ultra Tune (Osborne park) v Wyatt [No 2] [2012] WASCA 110

Plaintiff was a 40-year-old male who injured himself from slipping over a step while at work.

Injuries: Fractured knees and back pain.

Non-pecuniary damages awarded: \$75,000

Pullin, Newnes and Murphy JJA (21 May 2012)

Kelly v Humanis Group Ltd [2012] WADC 43

Plaintiff injured his neck and back during the course of his employment as a result of another employee's negligent actions.

Injuries: The incident caused the pre-existing asymptomatic changes in the plaintiff's spine primarily at the L5/S1 level to become symptomatic which have caused him to suffer pain and discomfort. The plaintiff also suffered a soft tissue injury to the neck which resolved not long after the incident.

Non-pecuniary damages award: \$11,000

Stavrianou DCJ (3 April 2014)

Wishart v Manna [2017] WADC 104

Plaintiff (age unknown) was riding his quad bike when at the same time the defendant was riding a motorbike on the incorrect side of the road and they collided.

Injuries: Fractured tibia and left shoulder slight deformity around the acromioclavicular joint and tenderness in the subacromial region. A mild permanent residual disability in relation to the left shoulder and right knee.

Non-pecuniary damages awarded: \$90,000.

Stone DCJ (18 August 2017)

Vincent v Atkinson [2017] WADC 155

Plaintiff was a 7-year-old who was a passenger in a car when her mother crashed the vehicle negligently into the rear of a parked car.

Injuries: Physical injuries include fracture through the left lateral orbital wall with mild posterior displacement of the posterior orbital rim on the left side. Psychological injuries which includes post-traumatic stress disorder and mixed anxiety depressive order and cognitive deficits related to the left frontal lobe injury.

Non-pecuniary damages awarded: \$206,000

Stavrianou DCJ (8 December 2017)

Bothma v Hildebrand [2019] WADC 92

Plaintiff assaulted in bar leaving him multiple abrasions and contusions on the face and neck area. Soft tissue damage as well to the neck.

General damages: \$5,000

Gething DCJ (4 July 2019)

Setanton v Insurance Commission of Western Australia [2020] WADC 10

Plaintiff (44 -year -old male) was knocked off his bicycle by a motorcycle.

Injuries: Suffered injuries to both shoulders, including a partial thickness articular surface tear of the supraspinatus in his left shoulder and a compression fracture of the greater tuberosity with a full thickness tear of the rotator cuff of the right shoulder, as well as a right hip injury, fractured right ankle, lower back injury and psychological injury.

Non-pecuniary damages awarded: \$106,250

Vernon DCJ (24 January 2020)

Murrell v Brosna Construction Pty Ltd (in liq) [2022] WADC 68

Plaintiff, a 31-year-old male, at the time of the incident was working as a concreter. Plaintiff suffered injury to his foot when a formwork collapsed causing him to fall 3.6 metres to the ground.

Injuries: Plaintiff suffered non-displaced fractures to his left third and fourth metatarsal bone in the foot and a thoracic spine wedging at T11 of the back. The accident also caused a aggravation of pre-existing asymptomatic degenerative changes in the spine that resulted in the plaintiff being unable to work.

Non-pecuniary damages awarded: \$60,500

Bowden DCJ (4 August 2022)

Ciesla v Mosman Bay Construction (in liq) [2022] WADC 3

Plaintiff, a 29-year-old male at the time of the trial, fell from a ladder at work causing multiple injuries.

Injuries: Fractured both wrists, forearm and fractured eye socket with displacement of eyeball.
Plaintiff continued to suffer with pain of both wrists, intermittent elbow and shoulder pain.
Plaintiff suffered permanent disabilities in his right shoulder, right wrist, left elbow, left wrist and left knee and was unable to return to work.

Non-pecuniary damages awarded: \$150,000

Sharp DCJ (29 March 2022)

Mesothelioma

Hannell v Amaca Pty Ltd (Formerly James Hardie and Co Pty Ltd) [2006] WASC 310

Plaintiff was a 63-year-old male who suffered mesothelioma from exposure to asbestos.

Injuries: Chest pains, breathing difficulties, life expectancy reduced to 12 months.

Non-pecuniary damages awarded: \$180,000

Le Miere J (22 December 2006)

Kennedy v CIMIC Group Limited and CPB Contractors Pty Ltd [2020] NSWDDT 7

Plaintiff was an 82 year-old-man at the time of the trial. He developed mesothelioma from exposure to asbestos during his employment as a surveyor by the defendants working in NSW and WA.

Injuries: Pain and fluid in his pleura, life expectancy reduced, stress associated with loss of capacity to care for family

Non-pecuniary damages awarded (as against CPB for WA aspect of claim): \$430,000

Scotting J (31 June 2020)

Parkin v Amaca Pty Ltd (formerly James Hardie & Coy Pty Ltd) [2020] WASC 306

Plaintiff (63-year-old female) suffers from mesothelioma caused by exposure to asbestos-containing products manufactured by James Hardie Industries. The plaintiff was exposed to asbestos while working with her father, constructing an extension to their home using asbestos cement sheets in the 1970s and again in the 1980s.

Non-pecuniary damages awarded: \$360,000

Le Miere J (27 August 2020)

Eye

Wreford v Lyle [2019] WASCA 57

Plaintiff (female, age unknown) was riding her bicycle when she was hit by the defendant's vehicle.

Injuries: Multiple serious injuries, some of which were life threatening. She suffers ongoing pain, scarring, and eye problems. She already suffered a pre-existing congenital abnormality of the vascular system in the right eye, which made her more vulnerable to greater injury in this accident to the eyes.

Non-pecuniary damages awarded: \$125,000

Murphy and Pritchard JJA (5 April 2019)

Sidhoun v Minister for Education [2022] WADC 35

Plaintiff was a 16-year-old male at the time of the incident. He suffered an injury to his eye when another student at school threw a stand at him that caused a sharp part to penetrate the eye.

Injuries: Full-thickness laceration of the eye and the plaintiff was required to undergo four surgeries to repair the left eye. The injury impacted the plaintiff's enjoyment of life as it impacted his ability to graduate from year 12, engage in recreational activities and has caused a slight cosmetic defect.

Non-pecuniary damages awarded: \$225,000

Judge Troy (22 April 2022)

Internal

Spaseski v Chin [2018] WADC 81

Plaintiff was a 16-year-old male who attended a formal after-party. When he needed to call a taxi to go home, he walked around the back of the shed to make the call. As he was looking at his phone, he fell into an uncovered soakwell, resulting in him striking his abdomen on the side of the soakwell.

Injuries: Plaintiff suffered excruciating pain and 20% loss of his overall kidney function, and now is at an increased risk of suffering high blood pressure later in life.

Non-pecuniary damages awarded: \$50,500

Judge Levy (22 June 2018)

Lazarevski v North Metropolitan Health Service [2019] WADC 84

Plaintiff was a 28-year-old female who suffered a spontaneous coronary artery dissection. Although she was treated at the hospital, it did not include the administration of a series of blood tests designed to measure the level of a particular protein complex called troponin in the blood. Three days after being released, she suffered a serious heart attack.

Injuries: Very serious heart attack.

Judgment awarded to plaintiff in total of \$450,000 (no breakdown as to what is delegated to certain heads of damage)

Troy DCJ (27 June 2019)

Pringle v Tabloid Pty Ltd [2023] WADC 18

Plaintiff was a 26-year-old who purchased hot chips contaminated with caustic soda.

Injuries: Caustic burns to upper intestinal tract, which resolved. Neuropathic pain disorder and PTSD.

Non-pecuniary damages awarded: \$100,000

Non-pecuniary damages awarded at first instance not the subject of the successful appeal and reduction of award of past and future pecuniary damages in *Tabloid Pty Ltd v Pringle [2024] WASCA 152* per Vaughan and Vangongen JJA, Tottle J (5 December 2024)

Lonsdale DCJ (24 February 2023)

Burns

Burns v Boc Gases Australia Ltd [2001] WADC 113

Plaintiff was a 30-year-old male who was advised he could empty a gas cylinder himself by opening the cylinder valve and letting the gas escape, and that if he desired to empty the cylinder quickly, it should be inverted. He went back and did this. Several hours later, noting that the cylinder had not emptied, he inverted it, and there was an immediate explosion.

Injuries: Second and third degree burns, particularly to the right forearm and hand. On occasions this area became infected and he also developed a severe dermatitis to the right hand.

Non-pecuniary damages awarded: \$28,000

Wisbey DCJ (17 May 2001)

Foot

Wright v Minister For Health [2016] WADC 93

Plaintiff was a 25-year-old male who decided to go for a ride on his motorcycle while still under the influence of alcohol from the night before.

Injuries: Serious fracture of his calcaneus.

Non-pecuniary damages awarded: \$10,500 (Was not awarded, but was assessed)

Sweeney DCJ (23 June 2016)

Hand

Younger v Reid [2010] WADC 84

Plaintiff was a 45-year-old-female who was serving as a hostess on a sea vessel, when she reached up with her right hand to fix a spring line rope from the top of a pylon on the jetty and place the loop of the spring line over a wooden bollard on the vessel. The spring line suddenly became taut and jerked upwards catching the fingers on her left hand pinning them between the rope and the bollard. Before she could release her hand, the distal phalanx of the index finger, middle finger and ring finger of her left hand were amputated. She stood back and she was struck by the bollard as it was pulled from its mounting by the spring line.

Injuries: Amputation of plaintiff's distal phalanx of the index finger, middle finger and ring finger of her left hand.

Non-pecuniary damages awarded: \$70,000

Stone DCJ (16 June 2010)

Essaiyd v Saint [2021] WADC 61

Plaintiff, a 44-year-old male, injured his hand while he was on a shipping vessel, the NW Carnarvon II, as a share fisherman. A hopper lid closed on the plaintiff's hand and immediately caught it. He could not pull his hand away.

Injuries: Injury to his right hand, including wounds to three fingers, a fracture of one finger and tendon damage. As he was not able to lift more than 10kgs, the plaintiff could not return to work as a deckhand or fisherman.

M.E.C.: \$20,000 below the statutory threshold of \$21,500. Therefore, Nil.

Gillan DCJ (18 June 2021)

Ribs

Broekhuysen v Greenbank [2010] WADC 72

Plaintiff was a 58-year-old female who was crossing the street when she was hit by the defendant's motor vehicle.

Injuries: Plaintiff suffered a cracked right pelvis bone, cracked left hip, four fractured right ribs, three fractured left ribs, cracked sternum, back injuries, a partially collapsed left lung, severe bruising of her hip and right buttock, cuts, bruising and abrasions on her left shin and knee, a cut on her left breast, and a laceration to the left side of her head.

Non-pecuniary damages awarded: \$48,450 (17.5% Most Extreme Case)

Scott DCJ (18 May 2010)

Hip

Espinov v Jane Elizabeth Popovic (As Executor And Holder Of A Grant Of Probate Of The Estate Of The Late Emil Popovic) [2018] WADC 94

Plaintiff was a 55-year-old male who had negligent surgery performed on his back. The first surgery that he underwent was not one he consented to, the next one was to rectify it, however, the screws were misplaced and penetrated his spinal cord, resulting in constant pain and the inability to walk unaided.

Injuries: Damage to his right S1 nerve and right S1 pedicle, an acceleration of degenerative back condition, psychological injury, weakness in his left hip flexion and left knee extension. His main pain is described as being situated in the region of both hips in the form of a constant ache with some radiation down the posterior lateral aspect of both thighs at times to the calves.

Non-pecuniary damages award: \$220,000

Braddock DCJ (8 August 2018)

Spinal cord

Mawdesley v The Owners of Careening Gardens Being Strata Plan 3848 [2012] WADC 103

Plaintiff was 59-year-old who fell through a skylight from a roof onto the paving at the common property of the block of units where he lived.

Injuries: Burst fractures of T12 and L1, resulting in incomplete paraplegia below L4 with altered sensation, muscle weakness, and difficulty with bowel and bladder function, as well as fractures of T8 and right transverse process of C2, Fracture of greater trochanter of right femur. He also developed pneumonia.

Non-pecuniary damages awarded: \$180,000

Wager DCJ (2 July 2012)

Lightfoot v Rockingham Wild Encounters Pty Ltd [2017] WADC 62

Plaintiff was a 33-year-old female was touring on a boat and sitting near the front of the boat. As the vessel was headed back, it encountered some waves, when the largest wave hit, it caused the plaintiff to rise from her seat and come down hard onto the same seat, striking her back against its edge. As a result of the impact she received a serious spinal injury, which required her to be transferred to hospital, ultimately undergoing surgery two days later.

Injuries: L2 burst fracture, also described as L2 compression fracture extending through the anterior and middle column and L2 transverse process fracture.

Non-pecuniary damages awarded: \$95,000

Braddock DCJ (9 May 2017)

Wrist

Thompson v J.Corp Pty Ltd [2018] WADC 164

Plaintiff was a 24-year-old male, working as a roof carpenter on a house being built by the defendant. He suffered injury when he fell from a wooden beam when the pillar beneath it collapsed and he fell 2.4 m.

Injuries: Comminuted distal radial fracture to the left wrist, associated tear of the triangular fibrocartilage requiring multiple surgeries.

Non-pecuniary damages awarded: \$45,000

Bowden DCJ (30 November 2018)

Watson v Gregory Spencer Ward T/As Ward's Stock Transport [2019] WADC 118

Plaintiff was a 52-year-old male who had been assisting another driver to load up his cattle truck. He had been delayed by a bull that was stopped at a gate, and was not moving as required into one of the trailer pens. When the plaintiff entered the pen to help encourage the bull past the gate, the bull turned on him. The plaintiff was caught and forced up against part of the loading dock, suffering injury.

Injuries: Disrupted supraspinatus in the right shoulder and subacromial bursitis and impingement. He also suffered a posterolateral disc protrusion at left L5/S1 with a sequestered fragment migrating into the left S1 lateral recess compressing the left S1 root.

Non-pecuniary damages awarded: \$104,000

O'Neal DCJ (16 August 2019)

Amputation

George v Bailey [2015] WADC 50

Plaintiff was a 49-year-old female who had been riding her motorcycle on the highway, when the defendant crossed the middle lane and collided with her.

Injuries: Multiple injuries, mostly to her right leg. These comprised a comminuted fracture of the mid-shaft of the femur, compound comminuted degloving fractures involving the tibia and fibula, a fracture of medial malleolus with posterior subluxation of the ankle, a fracture of the fifth metatarsal, a plantar wound of the big toe and ruptures of the posterior cruciate, medial and lateral collateral ligaments of the knee. The fractures could not be repaired and the leg was amputated below the knee on 22 March 2010. Her head injuries included swelling of the mid-face with a laceration of the right forehead, which was sutured. Her right pupil was fixed in a mildly dilated position (known as mydriasis). The plaintiff also suffered a minimally displaced fracture of the right first rib and a significant laceration of the liver without a large amount of arterial bleeding. This was managed conservatively.

Non-pecuniary damages award: \$253,500

McCann DCJ (6 May 2015)

Psychological injury

Wreford v Lyle [2018] WADC 173

Plaintiff was a 49-year-old female who had been riding her bicycle. She went around a car to get onto the small grass strip and into the cycle lane. The defendant had not seen her at any stage. As he turned onto the road, she was hit and run over.

Injuries: Plaintiff received life threatening injuries. She had broken ribs on both sides of her body, a broken shoulder and collar bone and bilateral pneumothoraces. She has been left with significant permanent disabilities, affecting her left shoulder and collarbone, her ribcage and her eyesight. As a result of the accident, it is claimed that she suffers from continuing post-traumatic stress disorder with other psychological symptoms.

Non-pecuniary damages award: \$125,000

Braddock DCJ (17 December 2018)

O'Loughlin v McCallum [2021] WADC 77

Plaintiff (female, age unknown) fell pregnant and gave birth after the failure of a sterilisation procedure. Plaintiff was unaware that the defendant was unsuccessful in completing the procedure. Plaintiff already had six children and her sole source of income had been social security payments.

The general damages are not compensation for mental harm; rather, for loss of amenities and to her enjoyment of life. There was no evidence of psychiatric illness established, however, damages were awarded for compensation of the anxiety experienced about the risk of her pregnancy with the child, her experience of being pregnant, and the pain and trauma of the birth process.

Non-pecuniary damages award: \$22,000

Flynn DCJ (9 August 2021)

Respiratory

D'Souza v Barclays Building Services (WA) Pty Ltd [2020] WADC 87

Plaintiff (70-year-old male) was the occupant of a house that had repairs done to it by the defendant. The repairs involved rectifying water damage to the flooring. The timber laminate used on the floor caused the plaintiff to develop respiratory and cardiac injury.

Non-pecuniary damages assessed at \$8,000

Gething DCJ (19 June 2020)

Below the threshold

Avsar v Richwood [2019] WADC 51

Plaintiff (female, age unknown) who was a passenger on a bus. The defendant braked suddenly at an intersection, which resulted in her being thrown from her seat and into the ticketing machine.

Injuries: Plaintiff suffered a concussive head injury, right sided facial and dental injuries, soft tissue injury to the cervical spine, facet joint strain, rotator cuff injury to the right shoulder, and injury to the right eye.

Non-pecuniary damages assessed at \$3,000 therefore not awarded

O'Neal DCJ (10 May 2019)

Manowski v Sealanes (1985) Pty Ltd [2019] WADC 90

Plaintiff (female, age unknown) suffered injuries in an accident on 22 July 2014 inside a refrigerated trailer, when he was hit on the head from behind by a falling bulkhead.

Injuries: Plaintiff suffered a closed head injury with a moderate degree of concussion.

Non-pecuniary damages assessed at \$12,500 therefore not awarded

Vernon DCJ (4 July 2019)

Gladstone v Public Transport Authority of Western Australia [2022] WADC 6

Plaintiff suffered injury when walking from the verge of a temporary car park at his local train station onto the road, rolling his ankle and partially collapsing.

Injuries: Pain and discomfort of his right ankle, minimal loss of function to his right leg below the knee, development of phobia of re-injuring his right ankle

Plaintiff's case was dismissed, but non-pecuniary damages assessed, although as assessed at \$20,000, would fall below threshold.

MacLean DCJ (11 February 2022)

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