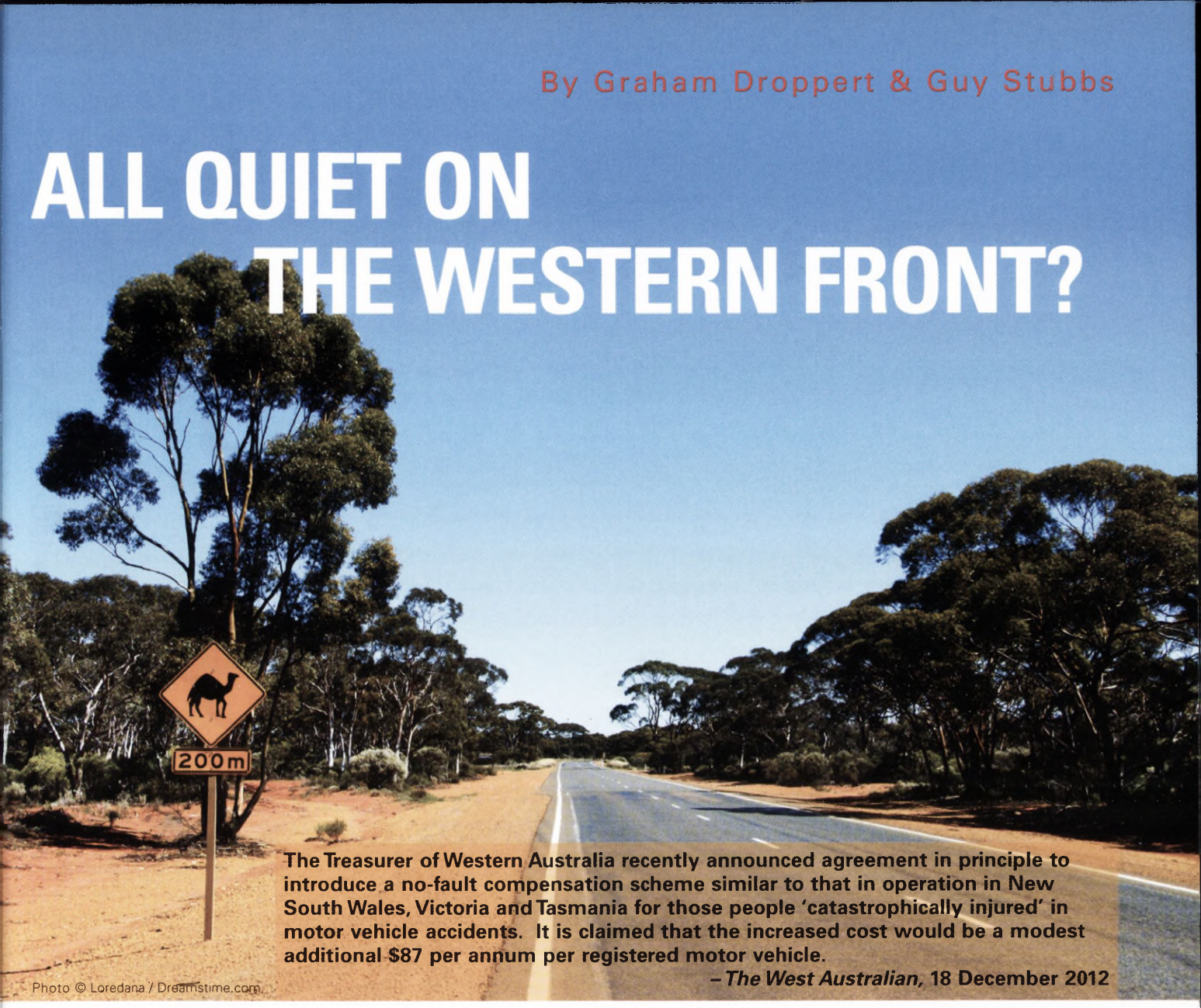
By Graham Droppert & Guy Stubbs

ALL QUIET ON THE WESTERN FRONT?



The Treasurer of Western Australia recently announced agreement in principle to introduce a no-fault compensation scheme similar to that in operation in New South Wales, Victoria and Tasmania for those people 'catastrophically injured' in motor vehicle accidents. It is claimed that the increased cost would be a modest additional $87 per annum per registered motor vehicle.

–*The West Australian*, 18 December 2012

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LEGISLATIVE FRAMEWORK

In Western Australia (WA), there is only a fault-based system of compulsory insurance for motor vehicles and those injured in motor vehicle accidents. The sole statutory compulsory third party insurer is the Insurance Commission of Western Australia (ICWA) which receives the insurance policy fees for vehicles registered in WA and meets claims made against drivers of vehicles registered in WA or which should have been registered. The motor vehicle third party personal injury insurance policy is combined with the registration premium for every licensed vehicle.

The *Motor Vehicle (Third Party Insurance) Act* 1943 (the MVTPI Act) is the legislation that governs the CTP scheme. The ICWA has a division which administers claims to which the MVTPI Act applies. The MVTPI Act is to be read in conjunction with the *Road Traffic Act* 1974 (the RT Act) which defines a 'motor vehicle'. The *Motor Vehicle (Third Party Insurance) Regulations* 1962 deals with the costs and payment of emergency treatment by hospitals and doctors and also prescribes the forms necessary to give notice of a claim.

TIME LIMITS: LODGING A CLAIM, INITIATING PROCEEDINGS, REPORTING TO POLICE

Section 29 of the MVTPI Act requires a person claiming for bodily injury or death caused by another person driving a motor vehicle to give notice in writing of their intention to make a claim 'as soon as practicable' after the accident.

Section 29A of the MVTPI Act gives the court power to disregard the failure of the plaintiff to notify ICWA, or to grant leave to proceed with an action notwithstanding the failure to notify ICWA, if it considers that the failure was caused by mistake, inadvertence or any other reasonable cause, or that ICWA is not materially prejudiced[1] in its defence or otherwise by the failure to notify. The applicant for leave bears the onus of satisfying the court that ICWA is not materially prejudiced. There is an evidentiary onus on ICWA to show some basis in fact for prejudice.[2]

The *Limitations Act* 2005 applies to causes of action arising on or after 15 November 2005. An action cannot be commenced if three years have elapsed since the cause of action accrued. There are exceptions for children and those who are incapacitated. >>

For injuries occurring prior to 15 November 2005, a six-year limitation period applied, although time did not run for minors until they attained 18 years. The claims which have not been commenced and to which the *Limitation Act* 1935 applied are now, in effect, limited to a very small number of catastrophic brain injuries in children. Practitioners should be alert to the fact that the application of the *Limitation Act* 1935 is not overlooked for those who were young enough as at the accident date to fall under that Act.

Section 56 of the RT Act requires the driver of a vehicle involved in an incident causing bodily harm to report it forthwith to the officer in charge of a police station. It is not a pre-condition to the maintenance of a claim for damages. It does mean, however, that almost all traffic accidents are reported and then driver details and/or registration are usually accessible.

CAPS, THRESHOLDS AND DEDUCTIBLES

The MVTPI Act imposes restrictions on three classes of damages.

1. **The recovery of damages for non-pecuniary loss**
   No damages may be awarded where damages are assessed at less than the deductible statutory minimum of $18,000. The deductible then applies on a reducing basis until over 20 per cent of the most extreme case, when the deductible ceases to have effect. The statutory maximum, currently set at $364,000, may be awarded only in a 'most extreme case'.[3]
2. **Restrictions on damages for provision of gratuitous 'home care' services**
   If the services, which include domestic, nursing and attendant care, are provided for 40 hours or more per week, then the amount of damages is not to exceed the average weekly total earnings of all employees in Western Australia for the relevant quarter, as published by the Australian Bureau of Statistics: s3D(3) and (4). If services are provided for fewer than 40 hours per week, damages are calculated on an equivalent hourly rate – that is, one-fortieth of the weekly rate: s3D(5).
   Section 3D(6) imposes a threshold for an award of damages for home care services. It rises each year, but is currently $6,000.
3. **Restrictions on damages for economic loss**
   For causes of action arising after 17 May 2006, s3F(4) imposes a limit on the calculation of past and future economic loss, in that earning capacity is to be disregarded to the extent that it would have exceeded a capacity to earn three times the average weekly earnings at the date of the award. As in other states applying *Civil Liability Act* caps, there remain arguments as to how, for example, tax-effective strategies adopted pre-accident may influence the calculation of a 'nett' weekly equivalent.

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FORMAL AND INFORMAL RESOLUTION MECHANISMS

When liability is admitted on behalf of an insured, many motor vehicle claims will be dealt with informally through direct negotiation with ICWA and/or its panel of lawyers. It is not uncommon for ICWA to make offers of settlement direct to unrepresented claimants. There is no formal process of automatically advising those claimants that they should or may seek professional advice with respect to the offer. If the matter is not resolved through informal negotiations, or when liability remains in issue, then proceedings may be issued in the District Court, which has the same jurisdiction (that is, unlimited) as the Supreme Court.

Unlike in other states, motor vehicle claims are almost never commenced in the Supreme Court, even for catastrophic injuries. In September 2012, the Chief Justice of the Supreme Court announced that the policy of remitting motor vehicle claims back to the District Court would no longer apply to cases involving complex factual or legal issues. Where that line comes to fall awaits further developments.

MEDICAL EVIDENCE

No guides are used to assess the level of disability or impairment in motor vehicle accident-caused injuries. ICWA may require that an injured person submit to medical examinations by a legally qualified medical practitioner. Failure to do so may result in a bar to commencing or continuing an action for damages: s30 MVTPI Act. An interesting aspect of s30 is that it does not require the

examining doctor to prepare a report, nor for ICWA to provide it to the claimant. Legal authority in WA on what might constitute 'reasonable excuse' for not attending remains largely unexplored. Seeking undertakings that a report will be both obtained and provided provides an imperfect protection to claimants. Contrary to standard practice by ICWA and its solicitors, it is doubtful that s30 extends to vocational rehabilitation providers, psychologists, neuropsychologists or even dentists. The Rules of the Supreme Court – Order 28A – have a more comprehensive procedure than s30.

Both parties are entitled to obtain and rely on medical evidence regarding a claimant's injuries and disabilities. Neither opinion is binding on the parties.

LEGAL COSTS AND DISBURSEMENTS

Section 27A of the MVTPI Act restricts the recovery of costs as between solicitor and client. In an action for damages to which the MVTPI Act applies, solicitors cannot enter an agreement to represent a person for any greater reward than is allowed in the designated scale of costs: usually this means *The Supreme Court Scale of Costs*. ICWA sometimes argues that the provision precludes party-party costs orders in excess of the applicable court scale of costs. There are cases which lift scale limits on a party-party basis, notwithstanding s27A.[4]

The scales impose maximum hourly and daily rates for lawyers and counsel as well as amounts for items necessary to progress the claim, such as pleadings, discovery, pre-trial conferences and trial.

The 2012 Legal Costs Determination abolishes the scale limit for 'getting up' in respect of a new category of 'catastrophic claims'.

CASES

Trustee fees

In *Traeger v Harris*[5] and *Best v Greengrass*,[6] two different District Court judges considered whether incapacitated plaintiffs requiring a trustee to manage the judgment ought to have the fees set on the basis of the trustee chosen by the plaintiff, and whether it should include the full cost of managing the total judgment. In *Traeger*, Schoombee DCJ found against the 'fees on fees' argument, but did allow the trustee of choice to apply. In *Best*, Wager DCJ allowed both, applying the principles in the NSW *Gray v Richards* cases.

Contributory negligence

The Western Australian Court of Appeal in *Town of Port Hedland v Hodder*,[7] by majority, found that the contributory negligence law in WA requires application of an 'objective test' rather than an open-ended consideration of the subjective capacities of the plaintiff. It does not follow that all subjective elements are irrelevant, as both Martin CJ and McLure P considered that the characteristics of the class of persons to whom a duty was owed might operate >>

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to determine the standard of care required to discharge it. Murphy JA applied the objective test and found that the other issue did not arise in the appeal.

While being an occupiers' liability case, *Hodder* raised issues which applied the *Civil Liability Act* provisions. These also apply to motor vehicle accidents. It remains to be seen what effect the decision may have on claims by pedestrians with some form of disability, who are unable to avoid being struck by a motor vehicle when their more able-bodied or sighted neighbours would have avoided the accident.

Indemnity

For almost 20 years, the workers' compensation legislation in WA has had a range of disability/ impairment/ election requirements before damages can successfully be claimed against an employer.

In *De Coito v Leonard*,[8] the plaintiff was walking towards the power house at an Alcoa refinery when a truck driven by the defendant (not his employer) reversed into him, knocking him to the ground. The judgment for damages entered by consent in favour of the plaintiff had by consent been reduced by 25 per cent for contributory negligence.

The plaintiff's employer was joined as fourth party on the basis that it was the 'occupier' and owner of the vehicle, an 'insured person' as defined by the MVTPI Act.

The employer sought to strike out the contribution proceedings on the basis that it could not be held liable to make contribution to the third party for breach of any duty because the plaintiff had not made an election as provided in the *Workers' Compensation and Injury Management Act* (the WCA). It argued that it thereby had immunity from making any contribution because it was the plaintiff's employer.

Deputy Registrar Harman considered the reasons for decision in *Brinkley v P & O Trans Australia WA Pty Ltd*,[9] where, in similar circumstances, he dismissed a case made against an employer.

Harman DR distinguished *Brinkley* on the facts and therefore considered it was arguable that the constraints of the WCA would not apply to the claim for contribution. The claim was therefore not struck out.

A legacy decision

In *Gibbs v Haoma Mining NL*,[10] Schoombee DCJ considered whether a personal injury suffered during the course of employment and directly caused by the driving of a motor vehicle was subject to s93B(3) of the WCA, and therefore whether the plaintiff required a determination of disability of not less than 16 per cent.

Ms Gibbs, the plaintiff, who was an employee of Haoma Mining NL (Haoma), drove a vehicle to a mine site operated by Haoma, when the left rear wheel disengaged, the vehicle skidded to the other side of the road, hit the embankment and came to a standstill. Ms Gibbs claimed that as a result she was injured.

The accident occurred on 27 September 2003.

Haoma denied any liability for the accident and pleaded that Ms Gibbs was not entitled to recover any damages from it, her employer, because she had failed to obtain a determination of her disability and had failed to elect to make a common law claim against her employer as required by s93E(3) of the WCA.

Section 93B(3) of the WCA provided that a determination of a disability and the election to claim common law damages do not apply to the awarding of damages to which the MVTPI Act applied.

Haoma claimed that s93B(3) of the WCA did not assist Ms Gibbs by reason of the interpretation given to this section by the Full Court of the Supreme Court of Western Australia in *Western Metals Zinc NL v Wesfarmers Transport Ltd*.[11]

Haoma made a third-party claim against ICWA, claiming that it was entitled to indemnity from ICWA under its motor vehicle (third party insurance) policy.

Her Honour, applying *Western Metals Zinc NL v Wesfarmers Transport Ltd*, found that because ss3A to 3F of the MVTPI Act modified the entitlement to common law damages – that is, they were now 'hybrid damages' – they were not included within the exemption to make the necessary elections under the WCA.

Accordingly, without the required level of disability and the necessary election required by the WCA, Her Honour found that the employer could not be liable for damages, even though the MVTPI Act would otherwise have applied, irrespective of whether the damages resulted from negligent driving.

The situation is now regulated by s3G of the MVTPI Act, which came into operation on 1 July 2006, and provides as follows:

'(1) This section has effect if the death of, or bodily injury to, a person is directly caused by, or by the driving of, a motor vehicle in circumstances giving rise to the owner of the motor vehicle being liable to pay compensation under the WCA in respect of that death or bodily injury or which would have given rise to liability of that kind but for section 22 of that Act.

(2) If this section has effect, neither this Act nor a contract of insurance under this Act apply in respect of liability for negligence which may be incurred by the owner in respect of the death or bodily injury other than liability for the negligent driving of the motor vehicle.

(3) In subsection (2), 'owner' includes any person for whose negligence the owner is legally responsible.'

Section 3G therefore excludes the application of the MVTPI Act where the defendant is an employer, even though it may also be the owner of the vehicle, unless the claim arose from negligent driving.

The *Gibbs* decision highlights that under a modified/ hybrid damages system in motor vehicle accidents involving an employer as defendant, the provisions of the WCA take 'priority'. Practitioners should ensure that the WCA is considered and complied with if the plaintiff wishes to take common law action against an employer-defendant, which would otherwise fall to be determined under the MVTPI Act.

Intoxication

Many of the liability provisions in the *Civil Liability Act* 2002 (WA) apply to motor vehicle accident claims. *Durnin*

v Noori[12] considered the application of s5L – the deemed contributory negligence provision. The plaintiff was a drunk passenger who, when alighting from a taxi, had his foot run over. O'Neal DCJ found that the plaintiff's intoxication did not contribute in any way to the cause of the harm.

CONCLUSION

As a fault-based common law system, the WA scheme works reasonably well for represented claimants. The authors' impression is that some unrepresented claimants may be offered and accept amounts less than they might otherwise recover. Speed, no legal costs and convenience are factors that may outweigh larger payments at a later stage.

The thresholds imposed by the legislation are effective in reducing the number of claims for damages for minor personal injuries, and discourage even some moderately large claims.

The restriction on gratuitous services operates directly to the disadvantage of those who are not well off in our society. If the plaintiff can afford to pay for carers, then the actual cost can be recovered. If provided gratuitously, they are capped at 40 hours per week at $30 per hour. The injured parties who most need support are penalised by the provision. Reform of it is long overdue, especially in claims with large care components. The costs of medical and ancillary treatment can be claimed – without having to meet specific criteria or reach specific impairment or disability thresholds – on usual common law causation principles. ICWA usually pays for treatment costs as they arise – despite being a fault-based insurer liable to make only a single lump sum payment. The benefits to the claimants are obvious. The benefit to ICWA is that it operates *de facto* control over the cost and amount of treatment, including surgery and ancillary care.

When disputes arise prior to finalisation of the claim concerning a claimant's treatment, only informal negotiations between the parties are available. There is no mechanism for enforcing interim payments. Issues are usually resolved between the parties without the need for formal court proceedings, but the negotiating advantage of the paying party is considerable.

It is hoped that any 'no-fault' scheme will avoid perpetuation of the major injustice arising from the caps and thresholds applicable to care from family members and provide the opportunity to restore what Justice Stephen described as the century-old principle that "*(an injured) plaintiff is entitled to such compensation as will, as nearly as may be, make good the financial loss which he has suffered…*"[13] As ever, the risk is that underfunding injury compensation schemes inevitably leads to the restriction of benefits to those most in need. ■

Notes: **1** As to obtaining evidence regarding the circumstance of the accident or quantum of damages. **2** *Hall v Motor Vehicle Insurance Trust* [1984] WAR 111 at 113-14 and *Stevens v Motor Vehicle Insurance Trust* [1978] WAR 232. In *Lazar v State Government Insurance Commission* Lib. No. D970385 del. 28/11/1997, notification to the Transport Accident Commission, but not ICWA, was not sufficient to ground the discretion and the claim failed for failure to notify. **3** The WA courts have adopted the principles that there is not a single worst case as per *Southgate v Waterford* (1990) 21 NSWLR 427; *Wylde v Arriaza* [1997] WASCA (23.07.97) Lib. No. 970359; (1997) 25 MVR 539. **4** *Wyatt v Mr & RC Smith Pty Ltd* [2010] WADC 178; *James v Grant* [2009] WADC 201 (S2). **5** *Traeger v Harris* [2011] WADC 45. **6** *Best v Greengrass* [2012] 44. **7** *Town of Port Hedland v Hodder* [No. 2][2012] WASCA 212. **8** *De Coito v Leonard* [2012] WADC 112. **9** *Brinkley v P & O Trans Australia WA Pty Ltd* [2009] WADC 16. **10** *Gibbs v Haoma Mining NL* [2012] WADC 127. **11** *Western Metals Zinc NL v Wesfarmers Transport Ltd* [2003] WASCA 152. **12** *Durnin v Noori* [2009] WADC 190. **13** *Todorovic v Waller* [1981] HCA 72.

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