

# DAMAGES CLAIMABLE

# STATE-BY-STATE SUMMARY

ACT	NORTHERN TERRITORY	NSW	QUEENSLAND	SOUTH AUSTRALIA	TASMANIA	VICTORIA	WESTERN AUSTRALIA
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## 1. WORKERS COMPENSATION DAMAGES

TYPES/HEADS OF DAMAGES	ACT	NORTHERN TERRITORY	NSW	QUEENSLAND	SOUTH AUSTRALIA	TASMANIA	VICTORIA	WESTERN AUSTRALIA	TYPES/HEADS OF DAMAGES
	<p><b>Unfettered common law damages</b></p> <p><b>General damages or non-economic loss</b></p> <p><b>Economic loss, including loss of superannuation</b></p> <p><b>Past &amp; future out-of-pocket expenses</b></p> <p><b>Past &amp; future gratuitous care</b> (<i>Griffiths v Kerkemeyer</i> damages)</p> <p><i>Civil Law (Wrongs) Act 2002 (ACT), s100</i></p> <p><i>Workers Compensation Act 1951 (ACT)</i></p>	<p><b>Compensation for permanent impairment (PI)</b></p> <p><b>Total incapacity &amp; loss of earning capacity (LOEC)</b></p> <p><b>Compensation for medical &amp; surgical treatment, etc</b></p> <p><b>Rehabilitation training &amp; workplace modification (RT)</b></p> <p><b>Medical travel costs</b></p> <p><b>Home modifications, vehicle modifications &amp; household &amp; attendant care services (HVMA)</b></p>	<p><b>Modified common law damages</b> (<i>Workplace Injury Management &amp; Workers Compensation Act 1998</i>): work injury damages for past &amp; future loss of earnings &amp; superannuation, <i>Fox v Wood</i>.</p> <p><b>No-fault statutory scheme</b> (<i>Workers Compensation Act 1987</i>) – lump sum for whole person impairment (WPI) if over 10%.</p> <ul style="list-style-type: none"> <li>Weekly payments: 1<sup>st</sup> 13 weeks at 95% pre injury average weekly earnings (PIAWE); then 95% if working 15 hours per week (or 80% if not working) up to 130 weeks; then 80% if working 15 hours per week or no work capacity up to 260 weeks; then no entitlement unless over 20% WPI.</li> <li>Reasonably necessary medical &amp; related expenses, medical travel costs, domestic assistance if over 15% WPI for a maximum 6 hours per week for 3 months.</li> <li>Artificial aids, home &amp; vehicle modifications</li> <li>Death benefit &amp; funeral expenses</li> </ul>	<p><b>General damages</b></p> <p><b>Past &amp; future out-of-pocket expenses</b></p> <p><b>Past &amp; future loss of earnings (LOE)</b></p> <p><b>Past &amp; future care</b></p> <p><i>Fox v Wood</i> (income tax paid on refundable workers compensation weekly benefits)</p> <p><i>Workers' Compensation &amp; Rehabilitation Act 2003 (WCRA)</i></p>	<p><b>Lump sum – both economic and non-economic loss</b></p> <p>Where whole person impairment (WPI) is 5% or more (ss56 &amp; 58, <i>Return to Work Act 2014 (SA) (RTWA)</i>).</p> <p><b>Income support</b></p> <p>Assessed as % of 'average weekly earnings' (AWE): 100% AWE paid for first 52 weeks following injury; 80% for remaining 52 weeks.</p> <p><b>Common law damages</b></p> <p>Available for economic loss (part 5, RTWA).</p> <p><b>Worker's dependant</b></p> <p>Lump sum payment of prescribed sum to dependant on death of worker (s61, RTWA).</p> <p><b>Medical expenses</b></p>	<p><b>General damages</b></p> <p><b>Past &amp; future loss of earning capacity</b></p> <p><b>Superannuation</b></p> <p><b>Special damages</b></p> <p><b>Future medical &amp; associated expenses (including attendant care)</b></p> <p><i>Fox v Wood</i> (additional income tax paid in respect of refundable workers compensation receipts)</p>	<p><b>'No-fault' statutory scheme</b></p> <ul style="list-style-type: none"> <li>Weekly payments</li> <li>Medical &amp; like expenses</li> <li>Lump sum (impairment benefit)</li> </ul> <p><b>Common law</b></p> <ul style="list-style-type: none"> <li>General damages</li> <li>Past &amp; future loss of earnings (LOE)</li> <li><i>Fox v Wood</i></li> </ul> <p>Injuries sustained &amp; lodged after 1/7/2014 are covered under the <i>Workplace Injury Rehabilitation and Compensation Act 2013 (WIRC Act)</i>.</p> <p>Injuries sustained prior to 1/7/2014 are covered under the <i>Accident Compensation Act 1985 (ACA)</i>.</p>	<p><b>Whole person impairment (WPI)</b></p> <p><b>Past &amp; future loss of earnings (LOE)</b></p> <p><b>Past &amp; future medical treatment</b></p> <p><b>Vocational rehabilitation</b></p> <p><b>Travel</b></p> <p><b>Out-of-pocket expenses</b></p> <p><i>Workers Compensation &amp; Injury Management Act 1981</i></p>	

	ACT	NORTHERN TERRITORY	NSW	QUEENSLAND	SOUTH AUSTRALIA	TASMANIA	VICTORIA	WESTERN AUSTRALIA	
LIMITATIONS	<p><b>No caps or thresholds on damages</b> Costs limited to \$10,000 plus disbursements, if damages recovered by settlement or verdict do not exceed \$50,000 (s181, <i>Civil Law (Wrongs) Act 2002</i> (ACT) (CLA)).</p> <p>3% multiplier applies.</p>	<p><b>Compensation for PI</b> Maximum 208 x AWE \$314,808 (2016) (s71, <i>Return to Work Act</i> (NT) (RTWA)).</p> <p>Compensation payable as a % of the maximum determined by assessed % WPI for WPI of 15% or more. Maximum is payable for 85% or more.</p> <p><b>Compensation for LOEC</b> First 26 weeks of incapacity (difference between normal weekly earnings pre-injury and actual earnings (if any) post injury) (s64, RTWA).</p> <p><b>Compensation for LEC</b> Long-term incapacity post-26 weeks – the lesser of 75% of the worker’s loss of earning capacity (as defined) and 150% of AWE (s65, RTWA). Limited up to a maximum of 260 weeks unless the worker suffers PI not less than 15% WPI.</p> <p><b>Compensation for RT</b> For a worker who suffers a permanent or long-term incapacity (s76, RTWA)</p> <p><b>Compensation for HVMA</b> For a worker who suffers a permanent or long-term incapacity (s78, RTWA).</p>	<p><b>No pain &amp; suffering damages.</b></p> <p><b>Work injury damages</b> Only if over 15% WPI &amp; negligence.</p> <p><b>WPI lump sum</b> Only if over 10% WPI &amp; over 15% WPI for psychological injury.</p> <p><b>Only one WPI claim</b> Even if condition significantly deteriorates.</p> <p><b>Weekly payments</b> For maximum of 5 years unless over 20% WPI.</p> <p>Weekly payments cease if insurer makes work capacity decision, which is not reviewable in Workers Compensation Commission.</p> <p><b>Pre-approved medical expenses</b> Payable 2 years after weekly payments cease or date of injury; 5 years if 10-20% WPI; for life if over 20% WPI.</p>	<p><b>General damages</b> Injuries are assigned an Injury Scale Value (ISV) between 0 to 100, each having a monetary value. On 1/7/2015, 100 = \$349,400. No entitlement to interest on general damages (ss306O &amp; 306N(1) WCRA).</p> <p><b>Out-of-pocket expenses</b> Calculated by reference to actual loss.</p> <p><b>Past &amp; future LOE</b> Max award = 3x the average weekly earnings (AWE) of a full-time adult in QLD (s 306I, WCRA). For future LOE, a 5% multiplier applies (s306L, WCRA), with a further discount for contingencies &amp; vicissitudes of life.</p> <p><b>Past &amp; future loss of superannuation</b> Employer currently pays minimum of 9.5% (may be varied by contract). Rate for future depends on anticipated years until retirement, taking into account increase in contributions to 12% by 1/7/2025.</p> <p><b>Past &amp; future care</b> Limited scope for recovery where care provided partly gratuitously and partly paid at commercial rates.</p> <p><b>Future out-of-pocket expenses</b> A discount rate of 5% is applied in deciding actual multiplier (s306L, WCRA).</p>	<p>A claim must be made within 6 months from the day the entitlement to claim arose (s30, RTWA).</p> <p><b>Economic loss</b> Lump sum payments not available for hearing loss or psychiatric injury (s56, RTWA).</p> <p><b>Medical expenses</b> Entitlement to medical expenses ends if worker has not been entitled to receive income support payments for 12 months, unless worker is ‘seriously injured’ (WPI of 30% or more) (s33, RTWA).</p> <p><b>Income support</b> Paid for 102 calendar weeks only following injury unless worker is ‘seriously injured’ (WPI of 30% or more) (s39, RTWA).</p> <p><b>Common law damages</b> Can be claimed only if the worker is ‘seriously injured’ (WPI of 30% or more) (s72, RTWA). Damages are payable only in respect of future economic loss.</p>	<p>Threshold of 20% whole person impairment (WPI) must be met in order to bring common law claim.</p> <p><i>Civil Liability Act 2002</i> (Tas) (CLA) does not apply.</p>	<p><b>Statutory scheme</b> Claim should be lodged ‘as soon as practicable’.</p> <p>Lump sum impairment thresholds (s98C, ACA or s211, WIRC Act):</p> <ul style="list-style-type: none"> <li>• 10% physical</li> <li>• 5% for musculoskeletal</li> <li>• 30% psychiatric</li> </ul> <p><b>Common law</b> 6-year limitation period applies.</p> <p>Worker must have a ‘serious injury’, satisfying: <b>Deeming test</b> - 30% WPI or more (s134AB(15), ACA or s335, WIRC Act); or <b>Narrative test</b> (s134AB(37), ACA or s325, WIRC Act)</p> <ol style="list-style-type: none"> <li>Permanent serious injury or loss of a body function; or</li> <li>Permanent serious disfigurement; or</li> <li>Permanent severe mental or permanent severe behavioural disturbance or disorder; or</li> <li>Loss of a foetus</li> </ol> <p><b>For LOE</b>, worker must establish permanent loss of 40% earning capacity or 30% WPI (s134AB(38), ACA or s325, WIRC Act). Damages capped at \$1,325,390, indexed.</p> <p><b>General damages</b> Capped at \$577,050, indexed.</p> <p>6% multiplier applies.</p>	<p>12-month termination date may be extended with medical evidence that injury has not stabilised &amp; application to WorkCover to extend termination date for up to 12 months.</p> <p>Claim should be lodged within 12 months of injury.</p> <p>At least 15% WPI needed to claim common law damages. For 15% - 24% WPI maximum payable is \$457,740 (capped). This amount increases every financial year. For 25% WPI or more, common law damages are uncapped.</p>	LIMITATIONS
RECENT OR PROPOSED CHANGES	None.	<p>RTWA (commenced 1/10/2015):</p> <ul style="list-style-type: none"> <li>• Limits workers compensation for LOEC to 5-years unless WPI is 15% or more.</li> <li>• Modified how lump-sum settlements are calculated.</li> <li>• Introduced specific provisions regarding heart attack &amp; stroke.</li> <li>• Further modified the calculation of a worker’s normal weekly earnings.</li> <li>• Redefined when/what circumstances a mental injury arises from the course of employment (COE).</li> </ul>	<p>Recent changes increased benefits for seriously injured workers after 2012 changes ended pain &amp; suffering entitlements and reduced period of weekly payments.</p> <p>WC regulation amended 26/10/2015 to allow one more WPI claim if significant deterioration, as long as initial claim made before 19/6/2012.</p>	<p>No entitlement to pursue a common law damages claim for workers who:</p> <ol style="list-style-type: none"> <li>sustained injury on/ after 15/10/2013 &amp; before 31/1/2015; &amp;</li> <li>have a degree of permanent impairment (DPI) of 5% or less.</li> </ol> <p>However, workers with a DPI of 5% or less are entitled to additional lump sum compensation as long as they have not accepted or rejected an offer &amp; insurer is satisfied that their employer would have been liable to pay damages (s193A, WCRA).</p>	<p>RTWA (came into operation on 1/7/2015) restored common law damages (although limited to future economic loss for seriously injured workers) but significantly capped entitlements to medical expenses &amp; income support unless worker is ‘seriously injured’.</p> <p>SA government about to restore entitlements for medical expenses &amp; income support to police officers who are not ‘seriously injured’.</p>	None.	None.	None.	RECENT OR PROPOSED CHANGES

## 2. TRANSPORT ACCIDENTS

	ACT	NORTHERN TERRITORY	NSW	QUEENSLAND	SOUTH AUSTRALIA	TASMANIA	VICTORIA	WESTERN AUSTRALIA	
TYPES/HEADS OF DAMAGES	<p><b>Unfettered common law damages:</b> <i>Road Transport (Third Party Insurance) Act 2008 (ACT) (RTA)</i>.</p> <p>3% multiplier applies.</p>	<p><b>Loss of limb or permanent impairment</b></p> <p><b>Loss of earning capacity (LOEC)</b></p> <p><b>Medical &amp; rehabilitation expenses</b></p> <p><b>Long-term attendant care services (LTAC)</b></p> <p><b>Emergency travel benefit</b></p> <p><b>Cost of providing appliances, alteration to motor vehicles, buildings</b></p>	<p><b>Non-economic loss</b> if WPI over 10% (<i>Motor Accidents Compensation Act 1999 (NSW)</i>)</p> <p><b>Past &amp; future economic loss</b></p> <p><b>Reasonable &amp; necessary treatment &amp; rehabilitation expenses &amp; treatment travel costs</b></p> <p><b>Gratuitous assistance</b> If personal/household tasks provided for over 6 hours per week for more than 6 months.</p> <p><b>Blameless accidents</b> Insurer liable.</p> <p><b>No-fault Lifetime Care and Support (LTCS) Scheme</b> For eligible participants.</p>	<p><b>General damages</b></p> <p><b>Past &amp; future out-of-pocket expenses</b></p> <p><b>Past &amp; future LOE</b></p> <p><b>Past &amp; future care</b></p> <p><i>Motor Accident Insurance Act 1994</i> <i>Civil Liability Act (CLA) 2003 (QLD)</i></p>	<p><b>Non-economic loss (general damages)</b> If significantly impaired for at least 7 days or prescribed minimum expenses have been incurred (s52(3), <i>Civil Liability Act 1936 (SA) (CLA)</i>).</p> <p><b>Out-of-pocket expenses including medical expenses and paid care</b></p> <p><b>Gratuitous services (s58, CLA)</b></p> <p><b>Past &amp; future economic loss</b></p> <p><b>Loss of dependency</b></p> <p><b>Loss of consortium</b></p> <p><b>Loss of solatium</b></p>	<p><b>General damages</b></p> <p><b>Past &amp; future loss of earning capacity</b></p> <p><b>Superannuation</b></p> <p><b>Special damages</b></p> <p><b>Future medical &amp; associated expenses (including attendant care)</b></p>	<p><b>General damages</b> Pain &amp; suffering and loss of enjoyment of life</p> <p><b>Past loss of earnings (LOE)</b> Excludes the first 18 months after the accident; and future LOE capacity.</p> <p><i>Transport Accident Act 1986 (VIC) (TAA)</i></p>	<p><b>Non-pecuniary loss – general damages</b></p> <p><b>Out-of-pocket expenses</b></p> <p><b>Gratuitous services</b></p> <p><b>Care services</b></p> <p><b>Vocational rehabilitation</b></p> <p><b>Past &amp; future economic loss</b></p> <p><b>Past &amp; future medical treatment</b></p> <p><b>Travel</b></p>	TYPES/HEADS OF DAMAGES
LIMITATIONS	<p>No damages for treatment and care if Lifetime Care &amp; Support Scheme (LTCS) participant.</p> <p>Significant costs restrictions if damages (not including non-economic loss) are less than \$50,000 or if mandatory final offer is not exceeded (s156D, RTA).</p>	<p>Common law damages are abolished. The compensation scheme is 'no fault' and covers persons injured as a result of a motor accident (s5, <i>Motor Accidents (Compensation) Act</i> (MACA)).</p> <p><b>PI</b> 208 times AWE x %WPI (s17, MACA).</p> <p><b>LOEC</b> Maximum amount 85% of AWE (s13, MACA).</p> <p><b>LTAC</b> For injuries prescribed in the regulations at maximum prescribed rates. Payable for life. (s18BC, MACA).</p>	<p>Claims within 6 months &amp; court proceedings within 3 years of accident.</p> <p><b>Non-economic loss</b> Maximum currently \$511,000.</p> <p><b>Contributory negligence</b> Applies.</p> <p><b>LTCS participation</b> Limited to spinal cord or brain injuries, serious burns, amputees or permanently blind.</p> <p><b>Lost income</b> Maximum of \$4,688 per week; 5% discount for future economic loss.</p> <p><b>Secondary psychological injuries</b> Not assessed.</p> <p><b>No exemplary or punitive damages.</b></p>	<p><b>General damages</b> Injuries are assigned an ISV between 0 to 100 (s61, CLA). On 1/7/2015, 100 = \$358,500. Interest cannot be awarded (s60(1)(a), CLA).</p> <p><b>Out-of-pocket expenses</b> Calculated by reference to actual loss.</p> <p><b>Past LOE</b> Maximum award is present value of 3x AWE earnings for the period of LOE (s54, CLA).</p> <p><b>Past loss of superannuation</b> As for workers compensation, above.</p> <p><b>Future LOE</b> As per past LOE above. Discount rates as per workers compensation.</p> <p><b>Future loss of superannuation</b> As for workers compensation.</p> <p><b>Past gratuitous care</b> Not recoverable unless care provided for at least 6 hours/week for at least 6 months (s59, CLA).</p>	<p>Time limit is 3 years from date of cause of action (s36, <i>Limitations of Actions Act 1936 (SA) (LAA)</i>). 12-month extension of time can be obtained from date of new material fact (s48, LAA).</p> <p><b>Loss of dependency</b> Claims must be lodged within 3 years of date of death (s25, CLA). Court must discount loss of financial dependency by at least 20% (s58B, CLA).</p> <p><b>Non-economic loss</b> ISV must exceed 10 to be awarded damages. No interest available on damages (s56, CLA). Maximum award until 1/7/2016 is \$312,340.</p> <p><b>Gratuitous services</b> Cannot exceed 4x AWE (s58(2), CLA). ISV must exceed 10 &amp; services must be rendered for at least 6 hours a week for 6 consecutive months (s58(4), CLA). No damages for treatment, or care for participants in the <i>Motor Vehicle Accidents (Lifetime Support Scheme) Act 2013 (SA) (MVA)</i>.</p>	<p><b>General damages</b> \$0 for amounts less than \$5,500. Amounts more than \$5,500 but less than \$27,000 (indexed yearly to CPI) are calculated at 1.25 x amount assessed. If damages exceed \$27,500, then the amount is equal to the amount assessed (s27, CLA).</p> <p><b>Loss of earning capacity</b> Cannot be calculated at a rate greater than 3 x the AWE calculated by ABS prior to accident (s26, CLA).</p> <p><b>Superannuation</b> The relevant % payable for the deprivation or impairment of the earning capacity on which the entitlement to those contributions is based (s25, CLA).</p> <p><b>Fox v Wood</b></p> <p><b>NOTE: Future medical expenses</b> can be excluded if court certifies that daily care is required.</p>	<p>Claim should be lodged within 12 months of the accident &amp; will not be accepted after 3 years (s68, TAA).</p> <p>6-year limitation period (s40 <i>Limitation of Actions Act 1958 (VIC)</i>).</p> <p><b>Common law damages</b> Capped, but the caps increase every financial year. The current pecuniary loss maximum is \$1,166,240.</p> <p><b>General damages</b> maximum is \$518,300 (s93, TAA).</p> <p><b>Threshold:</b> must have at least \$51,800 loss in a category to claim in it (s93, TAA).</p> <p>6% multiplier applies.</p>	<p>3-year limitation period (<i>Limitation Act 2005 (WA)</i>).</p> <p>Claim should be lodged within 12 months of injury.</p> <p><b>Common law damages</b> Maximum capped \$399,000; increases every financial year.</p> <p><b>Threshold</b> for entitlement to general damages is 5.5% non-pecuniary loss = \$21,945 (but deductible of \$20,000 means that claimant for 5.5% pain &amp; suffering gets \$1,945) (<i>Motor Vehicle (Third Party Insurance) Act 1943 (WA)</i>).</p>	LIMITATIONS

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LIMITATIONS				<p><b>Future gratuitous care</b> Only recoverable if s59 CLA threshold met. Paid care recoverable under common law.</p> <p>If a plaintiff is involved in a transport accident in the COE &amp; their employment is a significant contributing factor to the injury, damages against the non-employer defendant will be assessed under the common law rather than the CLA (s5, CLA).</p>	<p><b>Future economic loss (FEL)</b> ISV must exceed 7 to be awarded damages; court must discount at least 20% (s56A, CLA). Funds management not claimable (s57, CLA).</p> <p><b>Loss of consortium</b> ISV must exceed 10 to be awarded damages (s65, CLA).</p> <p><b>Loss of solatium</b> Not exceeding \$10,000 (s29(1)(b), CLA).</p> <p><b>Damages for mental harm</b> Awarded only for recognised psychiatric illness. Plaintiff must also have physical injury or be a parent, spouse or child of person killed, injured or endangered in an accident (s53, CLA).</p>				LIMITATIONS
RECENT OR PROPOSED CHANGES	None.	Changes to entitlement for attendant care services apply in respect of injuries received on or after 1/7/2014.	None.	The National Injury Insurance Scheme (NIIS) is scheduled to commence from 1/7/2016 in QLD for those 'catastrophically injured' in transport accidents. It is proposed that anyone who sustains a catastrophic injury in a transport accident, involving a registered vehicle, regardless of fault and age, will be eligible to receive lifetime care & support.	Significant changes, including introduction of ISV & thresholds, came into effect on 1/7/2013. Thresholds have left a large number of injured persons without entitlements to non-economic loss, gratuitous services & future economic loss.	None.	A Bill has been tabled to reverse the strict requirement that a person who suffers a mental injury has to receive mental treatment continuously for 3 years without improvement to access common law damages.	None.	RECENT OR PROPOSED CHANGES

### 3. ASBESTOS

TYPES/HEADS OF DAMAGES	ACT	NORTHERN TERRITORY	NSW	QUEENSLAND	SOUTH AUSTRALIA	TASMANIA	VICTORIA	WESTERN AUSTRALIA	TYPES/HEADS OF DAMAGES
	<p><b>Unfettered common law damages</b> See, for example, <i>Parkinson v Lend Lease Securities and Investments Pty Limited</i> [2010] ACTSC 49.  3% multiplier applies.</p>	<p><b>Common law damages</b> Apply if the cause of action arose prior to 1 January 1987, but a person may (elect to) claim compensation under workers compensation legislation regardless.</p> <p><b>Workers compensation</b> Payable according to provisions of RTWA.</p>	<p><b>General damages</b> Common law principles apply. Claims brought in the NSW Dust Diseases Tribunal.</p> <p><b>Loss of expectation of life</b> Assessed at \$1,000 for every year lost.</p> <p><b>Past and future out-of-pocket expenses</b> Plaintiffs exposed to asbestos in COE are entitled to benefits from the Dust Diseases Authority (DDA).</p>	<p><b>General damages</b></p> <p><b>Loss of expectation of life</b></p> <p><b>Past &amp; future out-of-pocket expenses</b></p> <p><b>Past &amp; future care</b></p> <p><b>Past &amp; future LOE</b></p>	<p><b>General damages</b></p> <p><b>Loss of expectation of life</b></p> <p><b>Past &amp; future out-of-pocket expenses including medical expenses and paid care</b></p> <p><b>Past &amp; future gratuitous care</b></p>	<p><b>General damages</b></p> <p><b>Past &amp; future loss of earning capacity</b></p> <p><b>Superannuation</b></p> <p><b>Special damages</b></p> <p><b>Future medical &amp; associated expenses (including attendant care)</b></p>	<p><b>General damages</b></p> <p><b>Past &amp; future loss of earning capacity</b></p> <p><b>Superannuation</b></p> <p><b>Special damages</b></p> <p><b>Future medical &amp; associated expenses (including attendant care)</b></p>	<p><b>General damages</b></p> <p><b>Loss of expectation of life</b></p> <p><b>Out-of-pocket expenses</b></p> <p><b>Past &amp; future medical expenses</b></p> <p><b>Past &amp; future gratuitous &amp; commercial care</b></p>	

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TYPES/HEADS OF DAMAGES			<p><b>Past &amp; future gratuitous care</b> (<i>Griffiths v Kerkemeyer</i> damages; s15A, CLA)</p> <p><b>Past &amp; future replacement services</b> (s15B, CLA 2005)</p> <p><b>Past &amp; future LOEC</b> Common law principles apply. Deduction is made for any DDA payments.</p> <p><b>Legal costs</b></p> <p><b>Provisional damages</b> (s11A, <i>Dust Diseases Tribunal Act</i> 1989 (DDTA))</p>		<p><b>Past &amp; future replacement services</b> (s9(3), <i>Dust Diseases Act</i> 2005 (SA) (DDA))</p> <p><b>Past &amp; future loss of earning capacity</b></p> <p><b>Exemplary damages</b> (s9(2), DDA)</p> <p><b>Loss of solatium</b></p> <p><b>Provisional damages</b> (s9(1), DDA)</p> <p>Provision has been enacted to overcome the decision in <i>Strikwerda</i> (s24(2aa)(f), CLA).</p>	<p>Gratuitous services</p> <p><i>Fox v Wood</i></p>	<p>Gratuitous services</p> <p><i>Fox v Wood</i></p> <p><b>Provisional damages available</b> (s4, <i>Asbestos Diseases Compensation Act</i> 2008)</p> <p><i>Wrongs Act</i> 1958</p>	<p><b>Past &amp; future LOEC</b></p> <p><b>Legal costs (party/party)</b></p> <p><b>Provision enacted to overcome <i>Strikwerda</i>.</b></p> <p><b>General damages for the benefit of a deceased's estate</b> Continues where claims are commenced in the deceased's lifetime &amp; the death resulted from asbestos disease.</p>	TYPES/HEADS OF DAMAGES
LIMITATIONS	Benefits provided by the Dust Diseases Board of NSW not deducted from general damages (s12D, <i>Dust Diseases Tribunal Act</i> 1989 (NSW)).	No limitation period applies to an action for damages for personal injury arising from a dust disease (s12(2)(a) <i>Limitation Act</i> 1981 (NT)).	<p><i>Limitation Act</i> 1969 (NSW) does not apply to a claim for a dust-related condition (s12A, DDTA).</p> <p>CLA does not apply save for s15A, s15B and s18(1)(c).</p>	<p><i>Limitations of Actions Act</i> 1974 (LAA) does not apply to an action for personal injury resulting from a dust-related condition (s11(2), LAA).</p> <p>No legislative caps on damages except s59A CLA threshold on gratuitous domestic services provided by an injured person.</p>	<p>Time limit is 3 years from date of knowledge of asbestos disease (s36(1a) <i>Limitation of Actions Act</i> 1936) (LAA).</p> <p>12-month extension of time possible from the date a new material fact is ascertained (s48, LAA).</p> <p><b>Loss of solatium</b> Not exceeding \$10,000 available to spouse of deceased (s29(1)(b), CLA 1936 (SA)).</p> <p><b>Loss of dependency</b> Claims must be lodged within 3 years of date of death (s25, CLA).</p>	You must apply for compensation and get a determination by the Asbestos Compensation Commissioner before commencing a common law action ( <i>Asbestos-Related Diseases (Occupational Exposure) Compensation Act</i> 2011 (TA)).	<p>3-year limitation period, calculated from the date of discoverability.</p> <p>For workplace exposure pre-1985, no cap or limitations on damages.</p> <p>3% multiplier applies.</p>	<p>In a common law action against an employer, a person must have at least a 15% WPI. Damages are capped at \$457,740 for WPI between 15-24% and uncapped over 25%.</p> <p>No provisional damages.</p> <p>No <i>Sullivan v Gordon</i> damages (third-party care).</p> <p>Time limit is 3 years from diagnosis with a 'significant' asbestos disease. 'Significant' is defined as 25% impaired for claims under the <i>Workers Compensation and Injury Management Act</i> 1981 (WA).</p>	LIMITATIONS
RECENT OR PROPOSED CHANGES	None.	High Court recently confirmed that a cause of action accrues when damage is first suffered as a result of the breach of duty in <i>Alcan Gove Pty Ltd v Zabic</i> [2015] HCA 33 – damage to mesothelial cells leading inexorably to mesothelioma.	None.	None.	None.	Amendment to CLA 6/11/2013 allowed for provisional damages in a dust diseases case and, if the person develops a different dust-related condition, damages at a future date.	The new <i>Wrongs Amendment Act</i> 2015 amends the <i>Wrongs Act</i> 1958 & creates an entitlement to damages for loss of capacity to care for others.	The <i>Asbestos Disease Compensation Bill</i> 2013, which seeks to introduce provisional damages and <i>Sullivan v Gordon</i> damages, was referred to the WA Law Reform Commission to examine the law & recommend reform by 30/6/2016.	RECENT OR PROPOSED CHANGES

## 4. MEDICAL NEGLIGENCE

	ACT	NORTHERN TERRITORY	NSW	QUEENSLAND	SOUTH AUSTRALIA	TASMANIA	VICTORIA	WESTERN AUSTRALIA	
TYPES/HEADS OF DAMAGES	<p><b>Unfettered common law damages</b> Pre-court procedures in Chapter 5 of the <i>Civil Law (Wrongs) Act 2002</i> (ACT) apply.</p> <p>3% multiplier applies.</p>	<p><b>Non-pecuniary loss (NPL)</b></p> <p><b>Pecuniary loss (PL)</b></p> <p><b>Future pecuniary loss (FPL)</b></p> <p><b>Gratuitous services (GS)</b></p> <p><b>Special damages, future medical &amp; associated expenses including attendant care</b></p>	<p><b>Non-economic loss</b> If over 15% of a most extreme case (s16, CLA 2002).</p> <p><b>Past &amp; future economic loss</b> (includes superannuation)</p> <p><b>Past &amp; future out-of-pocket expenses</b></p> <p><b>Past &amp; future gratuitous attendant care services</b></p> <p><b>Loss of capacity to provide domestic services</b></p>	<p><b>General damages</b></p> <p><b>Past &amp; future out-of-pocket expenses</b></p> <p><b>Past &amp; future LOE</b></p> <p><b>Past &amp; future care</b></p> <p><i>Personal Injuries Proceedings Act 2002</i> (QLD); CLA</p>	<p><b>Non-economic loss (general damages)</b> Awarded if person is significantly impaired for at least 7 days or expenses meet prescribed minimum.</p> <p><b>Out-of-pocket expenses</b> Including medical expenses and paid care.</p> <p><b>Gratuitous services</b></p> <p><b>Past (after the first week of incapacity) &amp; future economic loss</b></p> <p><b>Loss of dependency</b> For dependants in relation to the death of a person.</p> <p><b>Loss of consortium</b> For spouse of injured person.</p> <p><b>Loss of solatium</b> Not exceeding \$10,000.</p>	<p><b>General damages</b></p> <p><b>Past &amp; future loss of earning capacity</b></p> <p><b>Superannuation</b></p> <p><b>Special damages</b></p> <p><b>Future medical &amp; associated expenses (including attendant care)</b></p> <p><b>Gratuitous services</b></p>	<p><b>General damages</b></p> <p><b>Past &amp; future loss of earning capacity</b></p> <p><b>Superannuation</b></p> <p><b>Special damages</b></p> <p><b>Past &amp; future medical &amp; associated expenses (including attendant care)</b></p> <p><b>Gratuitous services</b> <i>Wrongs Act 1958</i> (WA)</p>	<p><b>General damages</b></p> <p><b>Out-of-pocket expenses</b></p> <p><b>Gratuitous services</b></p> <p><b>Care services</b></p> <p><b>Vocational rehabilitation</b></p> <p><b>Past &amp; future economic loss</b></p> <p><b>Past &amp; future medical treatment</b></p> <p><b>Travel</b></p>	TYPES/HEADS OF DAMAGES
LIMITATIONS	<p>Costs limited to \$10,000 plus disbursements, if damages recovered by settlement or verdict do not exceed \$50,000 (s181, <i>Civil Law (Wrongs) Act 2002</i> (ACT)).</p>	<p><b>NPL</b> \$585,500 (on 1 October 2015) for WPI of 85% or more (s27, <i>Personal Injuries (Liabilities and Damages) Act</i> (PILDA)). Common law principles of assessment abolished.</p> <p><b>PL</b> Limited to 3x AWE as (s20 PILDA).</p> <p><b>FPL</b> If the court is satisfied about assumptions about future earning capacity discounted by % possibility events might have occurred regardless of injury (s21, PILDA).</p> <p><b>GS</b> Only if the services are provided or are to be provided for 6 hours or more per week &amp; for 6 months or more (s23, PILDA).</p>	<p>3-year time limit from date of injury or date of discoverability.</p> <p><b>Non-economic loss</b> Maximum currently \$594,000.</p> <p><b>Economic loss</b> Capped at 3 times AWE; 5% discount for future economic loss.</p> <p><b>Gratuitous services &amp; loss of capacity damages</b> Threshold 6 hours per week for 6 consecutive months, at statutory rate.</p> <p><b>Contributory negligence</b> Up to 100%.</p> <p><b>No exemplary, punitive or aggravated damages</b></p>	<p>As per transport accident claims except public hospital refund also needs to be claimed (if applicable).</p>	<p>Time limit is 3 years from date of cause of action (s36, LAA). 12-month extension of time can be obtained from date of new material fact (s48, LAA).</p> <p><b>Loss of dependency</b> Must be lodged within 3 years of date of death (s25, CLA).</p> <p><b>Non-economic loss</b> No interest available on damages (s56, CLA).</p> <p><b>Gratuitous services</b> Cannot exceed 4x AWE (s58(2) CLA).</p> <p><b>Funds management</b> Not claimable (s57, CLA).</p> <p><b>Economic loss</b> Prescribed maximum applies (s54, CLA).</p>	<p>Same as for transport accidents (see above).</p> <p><b>Gratuitous services</b> Available when care is required for more than 6 hours per week &amp; for more than 6 consecutive months (s28B, CLA).</p>	<p>3-year limitation period, calculated from the date of discoverability.</p> <p><b>General damages</b> Must satisfy 'significant injury' threshold (s28LE &amp; s28LF, WA): (a) Greater than 5% WPI for physical injuries. Only 5% or more for injuries to the spine. (b) 10% WPI for psychiatric injuries. Statutory maximum \$577,050, indexed annually.</p> <p><b>Gratuitous care</b> Must have minimum of 6 hours per week or care for 6 months or more. Maximum value claimable is average weekly earnings (AWE).</p> <p><b>Economic loss</b> Capped at 3x AWE. 3% multiplier applies.</p>	<p>Whatever you are assessed at, but there is a threshold that you must meet (Amount A published in the Gazette every year).</p> <p>3-year limitation period. <i>Limitation Act 2005</i> (WA).</p>	LIMITATIONS

	ACT	NORTHERN TERRITORY	NSW	QUEENSLAND	SOUTH AUSTRALIA	TASMANIA	VICTORIA	WESTERN AUSTRALIA	
RECENT OR PROPOSED CHANGES	None.	None.	None.	None.	None.	None.	Notable amendments of the <i>Wrongs Amendment Act 2015</i> (VIC) include: <ul style="list-style-type: none"> <li>• Significant injury threshold for spinal injuries reduced to 5% or more, instead of greater than 5%.</li> <li>• Significant injury threshold for psychiatric injuries reduced to 10% or more instead of greater than 10%.</li> <li>• Damages can now be claimed for loss of capacity to care in limited circumstances.</li> <li>• Increased cap on P&amp;S damages.</li> <li>• Amendments apply retrospectively (even where proceedings already on foot).</li> </ul>	None.	RECENT OR PROPOSED CHANGES

## 5. PUBLIC LIABILITY

	ACT	NORTHERN TERRITORY	NSW	QUEENSLAND	SOUTH AUSTRALIA	TASMANIA	VICTORIA	WESTERN AUSTRALIA	
TYPES/HEADS OF DAMAGES	<b>Unfettered common law damages</b> Pre-court procedures in Chapter 5 of the <i>Civil Law (Wrongs) Act 2002</i> (ACT) apply.  3% multiplier applies.	As for medical negligence (see above).	As for medical negligence (see above).	<b>General damages</b>  <b>Past &amp; future out-of-pocket expenses</b>  <b>Past &amp; future LOE</b>  <b>Past &amp; future care</b>  <i>Personal Injuries Proceedings Act 2002</i> ; CLA	<b>Non-economic loss (general damages)</b> Awarded if injured person is significantly impaired for at least 7 days or prescribed expenses have been incurred (s52(2), CLA).  <b>Out-of-pocket expenses</b> Including medical and paid care.  <b>Gratuitous services</b>  <b>Past &amp; future economic loss</b>  <b>Loss of dependency</b>  <b>Loss of consortium</b>  <b>Loss of solatium</b>	<b>General damages</b>  <b>Past &amp; future loss of earning capacity</b>  <b>Superannuation</b>  <b>Special damages</b>  <b>Future medical &amp; associated expenses (including attendant care)</b>  <b>Gratuitous services</b>	<b>General damages</b>  <b>Past &amp; future loss of earning capacity</b>  <b>Superannuation</b>  <b>Special damages</b>  <b>Past &amp; future medical &amp; associated expenses (including attendant care)</b>  <b>Gratuitous services</b>  <i>Wrongs Act 1958</i> (VIC)	<b>General damages</b>  <b>Out-of-pocket expenses</b>  <b>Gratuitous services</b>  <b>Care service</b>  <b>Vocational rehabilitation</b>  <b>Past &amp; future economic loss</b>  <b>Past &amp; future medical treatment</b>  <b>Travel</b>	TYPES/HEADS OF DAMAGES
LIMITATIONS	Costs limited to \$10,000 plus disbursements, if damages recovered by settlement/verdict do not exceed \$50,000 (s181, CLA).			Same as for medical negligence (see above). CLA does not apply in certain categories of claims, generally labour hire situations (s5, CLA). Where CLA does not apply, damages against the non-employer defendant are assessed under the common law rather than the CLA.	Same as for medical negligence (see above).	Same as for medical negligence (see above).	3-year limitation period, otherwise same limitations and thresholds as for medical negligence claims (see above).	Same as for medical negligence (see above).	LIMITATIONS

	ACT	NORTHERN TERRITORY	NSW	QUEENSLAND	SOUTH AUSTRALIA	TASMANIA	VICTORIA	WESTERN AUSTRALIA	
RECENT OR PROPOSED CHANGES	None.			None.	None.	None.	Same relevant <i>Wrongs Amendment Act 2015</i> amendments apply as for medical negligence claims (see above).	None.	RECENT OR PROPOSED CHANGES

# Disability-related vehicle modifications

By Tom Eley

**'Mary' is a middle-aged woman with C5 quadriplegia who recently had her van modified so that she can drive it independently without leaving her powered wheelchair. She operates the steering, brakes and accelerator with a four-way joystick; she has a low-effort, push-button transmission control and a remote-controlled vehicle ramp access and ignition.**

**M**ary says that being able to drive independently has been 'like being released from prison'. The process of developing the modifications and teaching Mary how to use them cost just under \$250,000. The technology available for vehicle modifications for catastrophically injured people has advanced on all fronts over the last decade, both for those with a significant disability seeking to drive independently and for people travelling as passengers. The modifications often entail complex bespoke technological solutions and may therefore be expensive.

People with high-level spinal cord injuries, both complete and incomplete,<sup>1</sup> and people with multiple amputations, can now potentially drive themselves. The available technology may not be able to benefit everyone; but, for those who are both interested and capable, it can be life-changing. The increased independence afforded by vehicular mobility can have powerful psychological and rehabilitative benefits.

## DRIVING INDEPENDENTLY WITH A CATASTROPHIC INJURY

A small number of companies in Australia currently specialises in modifying vehicles to enable a catastrophically injured person, often seated in their own wheelchair, to drive independently

and safely. Following physical testing of what people can do, systems are developed to maximise independent access and control of the vehicle. Doors and ramps can be automated and operable from a wheelchair's native control panel, or even via a smartphone app. Driving controls for steering, braking and accelerating are available that require only grams of force to operate. Remote start systems and push-button automatic controls can be suitable for a wide range of disabilities and functions.

The associated costs of such modifications are significant. The base vehicle, wheelchair access modifications and specialised controls can add up to as much as \$250,000. These vehicles and control systems have a service life of about 10 years (or 160,000km) and therefore also represent a significant recurrent cost. As a result, some insurers (that is, bodies such as WorkCover or Victoria's Transport Accident Commission) are guarded about funding this available technology.

Assessing a person's ability to drive with the high-end modifications described above, together with the associated training and vehicle modification, are highly specialised areas of expertise. Currently only a few occupational therapists and vehicle conversion workshops can provide such services.

However, given the enormous benefits that accrue, there is a great need for an expansion of service providers. Having repeatedly seen the difference that travel independence can bring to someone's life, I believe that the possibility of independent driving should always be considered when looking at a person's post-injury needs.

## TRAVELLING AS A PASSENGER IN A WHEELCHAIR

'Kevin' is a young man living with quadriplegia who had an inappropriate vehicle with poor ride quality. He was only able to travel for periods of 15 minutes before having to be hoisted out of his chair for a rest. He is now able to travel in his properly modified vehicle for many hours at a time without experiencing pain, discomfort or fatigue.

Riding in a wheelchair can be far less comfortable than being seated in a normal vehicle seat. A normal vehicle seat has multiple springs and thick foam padding, while a wheelchair has a flat metal seat base covered by as little as 25mm of cushion under the occupant. It is therefore imperative that vehicles modified to accommodate people in wheelchairs, either as drivers or passengers, have a suspension that is designed to provide a comfortable ride. Ride quality impacts greatly on a person's endurance because people with limited musculature need to work hard to maintain their posture, while those with little or no available musculature will be displaced in their wheelchairs, and will inevitably require frequent stops for repositioning.

Given the available solutions, a modified commercial van and a simple hoist setup is no longer a reasonable outcome. Clients have likened travelling in such vehicles to 'travelling in a

washing machine'. Quite apart from this poor ride experience, the wheelchair's position in the vehicle makes for very poor communication for the disabled person with the driver. And this set-up in existing commercial vehicles often allows for very limited safety features.

The safety features available to disabled passengers should be identical to those that are standard for able-bodied passengers. If modifications are done correctly, a wheelchair-seated passenger in the front passenger position will not only have access to the safety features of the front and side airbags, but will also be able to converse with the driver.

## A FINAL WORD OF CAUTION

There is no one-size-fits-all solution, as every person's abilities are unique. It is imperative to have an individual's specific requirements assessed and the modifications implemented competently so that their needs are fully met and the options chosen last as long as is feasibly possible. ■

**Note: 1** A 'complete' spinal-cord injury is one in which the spinal cord has been completely severed or damaged such that no signals to or from the brain are able to be transmitted; an 'incomplete' spinal-cord injury is one in which permits some degree of voluntary movement and sensation.

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