

## 13. Damages

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### *Term of Reference*

- 2. Develop and evaluate principled options to limit liability and quantum of award for damages.***

### The Panel's approach to this Term of Reference

13.1 There are very many options — in the form, for instance, of thresholds and caps — that could be considered for limiting the quantum of awards of damages for negligently-caused personal injury and death. While the Terms of Reference make it clear that the Panel is to develop and evaluate proposals to limit the quantum of damages, we do not think that changes in the law should be recommended merely for the sake of reform or to reduce liability. As elsewhere in this Report (and as required by our Terms of Reference), we have sought to identify changes that can be justified in terms of principle.

13.2 A number of general principles have guided our deliberations in this area. First, we have taken the view that the resources devoted to compensation for negligently-caused personal injury and death should be allocated in such a way as to provide support and assistance where it is most needed. There is reason to think that, under personal injury law, the less seriously injured tend to be treated relatively more generously than the more seriously injured. In our view, if any group is to be treated relatively better than any other, it should be the more seriously injured.

13.3 Secondly, the basic principle underlying the assessment of damages for personal injury and death is the 'full compensation principle'. This principle applies most straightforwardly to damages for economic losses; and it requires that all such losses should be compensated for to their full extent. In relation to damages for non-economic losses, the principle is the basis for the idea that although such losses are non-economic, they are nevertheless 'real' losses that should be fairly compensated for. Although the full compensation principle is fundamental to personal injury law, it is often merely assumed to be the appropriate basis for the assessment of damages. The Panel does not believe that the full compensation principle is sacrosanct or that it should be beyond reconsideration and revision. The very many statutory provisions in various Australian jurisdictions that effectively qualify the full compensation principle reflect community attitudes that are supportive of such an approach.

13.4 Thirdly, the full compensation principle was first laid down before the welfare state developed. As was noted in paragraphs 1.29 and 1.30, only a very small proportion of disabled people recover compensation under personal injury law. Very many are more or less dependent on the social security system. Benefits for the disabled under the social security system are much lower than those available to people with similar disabilities under the full compensation principle of personal injury law, even taking account of statutory modifications of that principle. It is sometimes said that this differential properly reflects the fact that people who recover compensation under personal injury law have been injured by someone else's fault. But there is much evidence to suggest that only a relatively small proportion of those injured by the fault of others recover compensation under personal injury law.<sup>1</sup> Furthermore, it may be doubted that the fault factor justifies the potentially huge disparities between the treatment of the disabled under the social security system and personal injury law respectively.<sup>2</sup> It is the view of the Panel that in considering the quantum of damages available under personal injury law, it is relevant to consider the fact that only a very small proportion of disabled people receive the relatively generous levels of compensation that personal injury law allows and requires.

13.5 Fourthly, it is well known that in general, the smaller the personal injury claim, the higher the proportion of the total cost of meeting the claim attributable to legal expenses. For instance, the Trowbridge Report to the Insurance Issues Working Group of Heads of Treasuries, *Public Liability Insurance: Practical Proposals for Reform* (30 May 2002) ('the Trowbridge Report') estimates that for public liability claims of between \$20,000 and \$100,000, legal expenses account for about 35 per cent of the total cost of claims; whereas for claims over \$500,000 they account for about 20 per cent of the total cost. We also know that overall, the administrative costs of the personal injury compensation system are very much higher than those of other compensation systems, in particular the social security system. These facts support the conclusion that reducing the number, and the cost of resolving, smaller claims could make a significant contribution to reducing the overall cost of the system without disadvantaging those most in need of support and assistance.

13.6 Fifthly, without in any way denying or casting doubt on the suffering and impairment of quality of life experienced by victims of personal injury (and by relatives in the case of death), the Panel considers that it is more

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1 H. Luntz and D. Hamblly, *Torts: Cases and Commentary*, 5<sup>th</sup> edn (2002), 6-9; P. Cane, *Atiyah's Accidents, Compensation and the Law*, 6<sup>th</sup> edn (1999), 169-181.

2 For instance, the social security system provides no benefits on account of non-economic losses.

important to make sure that people's financial needs are met than that they are compensated for intangible and non-economic harm. In this respect, we are mindful of the fact that the social security system provides no compensation to disabled people for non-economic harm. This principle complements our fourth principle because it is clear from the research conducted for the Trowbridge Report that the smaller the claim, the higher the proportion of the compensation recovered attributable to non-economic loss (colloquially known as 'general damages').

13.7 Sixthly, the Panel has been told that one of the factors affecting the cost and availability of public liability insurance, especially to smaller organisations, is the risk of incurring a very large claim arising out of catastrophic injuries. While we consider that available resources should be concentrated in areas of greatest need, we are also mindful of the fact that compensation for loss of earning capacity can represent a very significant proportion of the total compensation payable in serious cases. We also note that while the full compensation principle supports fully earnings-related income replacement, the social security system operates under the principle of means-tested income support. In the view of the Panel, it would be consistent with the other principles we have adopted to expect high earners to take steps to protect themselves against the risk of severe impairment of their earning capacity.

## The need for national consistency

13.8 In paragraph 1.9 we expressed unqualified support for the aspiration that the law relating to negligence should be brought as far as possible into conformity in all Australian jurisdictions. In no area is the law more diverse, and (we are convinced) in no area is conformity more desirable, than in regard to the quantum of damages.

13.9 The law relating to compensation for personal injury and death is different in every State and Territory of Australia. Not only are there significant differences between jurisdictions, but also within jurisdictions there are different regimes of assessment of damages for different classes of personal injury claims. Typically, there will be separate statutes dealing with motor accidents, civil liability generally, and workers compensation. Some jurisdictions have statutes that deal with other classes of claims.

13.10 As a result, in any particular jurisdiction, a claimant may receive a different award for the same injury depending upon whether the injury was

sustained at work, in a motor accident, or in the course of some other activity. Then, again, a different award may be made for similar injuries depending upon the State or Territory in which the injury was sustained. The various statutory legal regimes for assessment of damages in the various Australian jurisdictions make up a highly complex mosaic, with many inconsistencies and unprincipled variations.

13.11 In addition to differences in statutory provisions, there are differences resulting from courts, in the various jurisdictions, not adopting a uniform approach to the assessment of damages. These judicial divergences of approach can produce significant variations in the amounts of damages awarded in similar cases, sometimes involving hundreds of thousands of dollars.

13.12 Insurers have made it clear to the Panel that the lack of national consistency in the law relating to quantum of damages makes it more difficult for them to predict reliably the likely extent of liability of insureds. This translates into difficulties in setting premiums (and, probably, results in higher premiums).

13.13 The differences between the law applicable in the various jurisdictions also give rise to perceptions of injustice. There is no principled reason, for example, why a person should receive less damages for an injury sustained in a motor accident than for one suffered while on holiday at the beach. There is also no principled reason why there should be large differences in damages awards from one jurisdiction to another.

13.14 Perceptions of injustice may also be caused by the fact that personal injury claims are decided according to the law of the State or Territory in which the negligent conduct occurred. Thus, if a person resident in WA is negligently injured while in NSW, the award of damages is likely to be different (and significantly higher) than it would be if the negligence had occurred in WA. Conversely, if a person resident in NSW were injured in WA, the damages recoverable would probably be considerably less than they would be if the negligence had occurred in NSW. The way to overcome this problem is the adoption of nationally uniform (or, at least, consistent) laws for the assessment of damages in personal injury cases. To this end, the Panel has attempted to formulate Recommendations relating to the assessment of damages that may be acceptable in all Australian jurisdictions and in relation to all categories of claims for personal injuries and death.

## Legal costs of smaller claims

13.15 It has been said that a key driver of the recent growth of public liability insurance costs is an increase of smaller claims in the range \$20,000 to \$50,000.<sup>3</sup> Figures in the Trowbridge Report suggest that claims of between \$20,000 and \$100,000 account for more than a third of the total cost of the personal injury compensation system. We have already noted that the smaller the claim, the greater the proportion of the cost attributable to legal expenses on the one hand, and damages for non-economic loss on the other.

13.16 The Panel's view is that proposals for limiting the number and cost of personal injury claims worth less than \$50,000 offer a good prospect of promoting objectives of the Terms of Reference consistently with the principles discussed in paragraphs 13.2-13.7. Such proposals would also be consistent with various existing statutory provisions around the country that are directed to reducing the number and cost of smaller claims.

13.17 Under legislation in Queensland<sup>4</sup>, an order that the defendant pay the plaintiff's legal costs may not be made in any case where the damages awarded are less than \$30,000. In cases where the damages awarded are between \$30,000 and \$50,000, the plaintiff may recover from the defendant no more than \$2,500 in legal costs. The Victorian Government has announced that legislation to like effect will be passed. The *Civil Liability Act 2002* (NSW) limits legal costs according to a more complex formula. It applies to awards of damages up to \$100,000. The *Civil Law (Wrongs) Bill 2002* (ACT) adopts a variation of the NSW model.

13.18 In the Panel's view, the Queensland scheme is preferable because it is simple and it deals with the category of cases that the Panel thinks deserve special attention in this context, namely claims for \$50,000 or less. We therefore recommend the national adoption of this scheme.

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3 D. Finnis, *Review of Cumpston Sarjeant Report to the Law Council of Australia — Draft III* (27 May 2002), <http://www.ica.com.au/hotissues/Finnisreport.asp>.

4 *Personal Injuries Proceedings Act 2002* (Qld).

## **Recommendation 45**

**The Proposed Act should embody the following principles:**

- (a) No order that the defendant pay the plaintiff's legal costs may be made in any case where the award of damages is less than \$30,000.**
- (b) In any case where the award of damages is between \$30,000 and \$50,000, the plaintiff may recover from the defendant no more than \$2,500 on account of legal costs.**

## General (or non-economic) damages

### A tariff system

13.19 General damages are damages for non-economic loss, including pain, suffering, loss of amenities, and loss of expectation of life. Underlying the award of damages for non-economic loss is the idea that money can provide the plaintiff with some consolation for having been injured.

13.20 Pain and suffering is a matter of subjective experience. Loss of amenities refers to the inability of an injured person to enjoy life as they did before the injury. This may relate to the ability to work, play sport, engage in hobbies, marry, have children, realise ambition or achieve sexual satisfaction. Loss of expectation of life is awarded for loss of prospective happiness resulting from reduction of an injured person's life expectancy.

13.21 Of all the different heads of damage, general damages, by their nature, are the most difficult to assess. There is no market for pain and suffering, loss of amenities or loss of expectation of life. The statement made by Professor Atiyah in 1970<sup>5</sup> remains as valid as ever:

There appears to be simply no way of working out any relationship between the value of money — what it will buy — and damages awarded for pain and suffering and disabilities. All such damages awards could be multiplied or divided by two overnight and they would be just as defensible or indefensible as they are today.

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<sup>5</sup> *Accidents, Compensation and the Law*, 1<sup>st</sup> edn, (1970), 204.

13.22 The fact that there is no obvious way of assessing damages for non-economic loss perhaps partly explains why the levels of damages under this head vary significantly from one jurisdiction to another.

13.23 Variation in the levels of awards of general damages has been exacerbated by the 1968 decision of the High Court in *Planet Fisheries Pty Ltd v La Rosa*.<sup>6</sup> This decision prevents counsel from referring to awards of general damages in earlier cases involving similar injuries in an attempt to establish an appropriate award for the case in hand. Importantly, *Planet Fisheries* has prevented the development of a system of tariffs — that is, conventional amounts (or ranges of amounts) for different types of injury — based on court decisions.

13.24 The absence of such a tariff system makes it more difficult for lawyers to advise their clients about the amount of general damages likely to be awarded. It makes the outcome of cases less predictable and hinders the settlement of claims.

13.25 The position in Australia is to be contrasted with that in England. There, the Judicial Studies Board sponsors a publication known as *Guidelines for the Assessment of General Damages in Personal Injury Cases*. The *Guidelines* contain upper and lower limits of awards of general damages in relation to many types of injuries. According to the *Guidelines*, these indicative amounts broadly reflect current consensus about appropriate awards for different types of injury. They indicate the awards likely to be made, on the basis of past practice, in the ordinary run of case.<sup>7</sup> The *Guidelines* facilitate settlements and promote consistency and certainty in the assessment of general damages in individual cases. By all accounts, the *Guidelines* have been markedly successful.

13.26 The Panel is strongly of the opinion, and recommends, that the decision in *Planet Fisheries* should be reversed. Moreover, the Panel is of the view that the Commonwealth Attorney-General, in consultation with the States and Territories, should appoint or nominate a body to compile, and maintain on a regular basis, a publication along the same lines as the Judicial Studies Board's *Guidelines*. The Panel considers that the Australian version of the *Guidelines* will eventually bring about far greater consistency in general damages awards throughout the country, and will achieve here what the English publication has brought about in that country. At first, the guidelines will more or less reflect current practice, including disparities between awards in the various

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6 (1968) 119 CLR 118.

7 Foreword to 4<sup>th</sup> edn (1998) by Henry LJ, quoting Sir Thomas Bingham.

jurisdictions. But provided it is regularly updated — preferably every year — the establishment of minimum and maximum figures for various injuries should, over time, considerably narrow the gap between minimum and maximum awards for particular injuries.

#### **Recommendation 46**

**The Proposed Act should embody the following principles:**

- (a) In assessing general damages, a court may refer to decisions in earlier cases for the purpose of establishing the appropriate award in the case before it.**
- (b) Counsel may bring to the court’s attention awards of general damages in such earlier cases.**
- (c) The Commonwealth Attorney-General, in consultation with the States and Territories, should appoint or nominate a body to compile, and maintain on a regular basis, a publication along the same lines as the English Judicial Studies Board’s *Guidelines for the Assessment of General Damages in Personal Injury Cases*.**

#### A threshold for general damages

13.27 According to the Trowbridge Report, ‘if a jurisdiction wishes to make a significant difference to the costs of claims through tort reform then reform to general damages will have the greatest impact among the range of reasonable reforms’.<sup>8</sup> The Report shows that general damages account for 45 per cent of the total cost of public liability personal injury claims between \$20,000 and \$100,000.<sup>9</sup>

13.28 From this the Panel concludes that imposing a threshold<sup>10</sup> for awards of general damages would be an effective and appropriate way of significantly reducing the number and cost of smaller claims.

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<sup>8</sup> The Trowbridge Report, 13.

<sup>9</sup> The Trowbridge Report, 85.

<sup>10</sup> A threshold should be distinguished from a deductible. For instance, imposing a deductible of \$10,000 would mean that no compensation would be payable for the first \$10,000 of any claim (for general damages). But a threshold of \$10,000 would have the effect that no compensation would be payable in respect of any claim (for general damages) worth less than \$10,000.



## The appropriate threshold

13.29 In considering what threshold to impose on claims for general damages, it is necessary first to examine relevant provisions in existing legislation relating to claims for personal injury and death in the States and Territories. We will confine our discussion to civil liability and motor accident legislation, which deal primarily with claims for negligence. We will not deal with workers compensation legislation because workers compensation is a no-fault system, and for that reason less relevant to this Review.

13.30 Tables 1 and 2, respectively, summarise the effect of relevant statutory provisions in civil liability and motor accident schemes in the various States and Territories.

Table 1: State and Territory civil liability schemes — general damages

Jurisdiction	Cap	Threshold
<b>New South Wales</b> <i>Civil Liability Act 2002</i> (NSW)	\$350,000*: s 16(2)	15% of a most extreme case: s 16(1)
<b>Victoria</b> Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002 (Vic)	\$371,380*: s 28G	No threshold
<b>Queensland</b> <i>Personal Injuries Proceedings Act 2002</i> (Qld)	No cap	No threshold
<b>Western Australia</b> Civil Liability Bill 2002 (WA)	No cap	General damages at least \$12,000*: ss 9(1) and 10(1)
<b>South Australia</b> <i>Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002</i> (SA)	\$240,000* (weighted scale, 0—60 x \$1,710*: ss 24B(2)(a), (b))	7 day impairment: s 24B(1)(a); or \$2,750* in medical costs: ss 24, 24B(1)(b)
<b>Australian Capital Territory</b> Civil Law (Wrongs) Bill 2002 (ACT)	No cap	No threshold
<b>Northern Territory</b> Personal Injuries (Liabilities and Damages) Bill 2002 (NT)	\$250,000*: s 24(a)	\$15,000*: s 25(a)

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Table 2: State and Territory motor accident schemes — general damages

Jurisdiction	Cap	Threshold
<b>New South Wales</b> <i>Motor Accidents (Compensation) Act 1999</i> (NSW)	\$296,000*: s 134	> 10% permanent impairment: s 131
<b>Victoria **</b> <i>Transport Accident Act 1986</i> (Vic)	\$360,000*: s 93(7)(b)	> 30% permanent impairment: s 93(3)
<b>Queensland</b> <i>Motor Accident Insurance Act 1994</i> (Qld)	No cap	No threshold
<b>Western Australia</b> <i>Motor Vehicle (Third Party Insurance) Act 1943</i> (WA)	\$232,000*: s 3C	\$11,500* (5% of maximum amount), deductible phases to nil to \$46,500* (20% of maximum amount): s 3C
<b>South Australia</b> <i>Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002</i> (SA)	\$240,000* (weighted scale, 0—60 x \$1,710*): s 24B(2)(a)	7 day impairment: s 24B(1)(a); or \$2,750* in medical costs: ss 24, 24B(1)(b)
<b>Tasmania **</b> <i>Motor Accidents (Liabilities and Compensation) Act 1973</i> (Tas)	No cap	No threshold
<b>Australian Capital Territory</b> <i>Road Transport (General) Act 1999</i> (ACT)	No cap	No threshold
<b>Northern Territory ***</b> <i>Motor Accident (Compensation) Act 1979</i> (NT)	208 x AWE*: s 17(3) [AWE = full-time adult persons, weekly ordinary time earnings for NT]	5% permanent impairment: s 17(1)(c); reduced awards apply if the degree of impairment is < 15%: s 17(2)

\* Indexed

\*\* No-fault scheme

\*\*\* No-fault for residents of the Northern Territory only

13.31 As Table 1 shows, there are no thresholds for general damages in the civil liability schemes proposed or in operation in Victoria, Queensland, and the ACT. There is no such scheme proposed in Tasmania.

13.32 In NSW the threshold is 15 per cent of a most extreme case, in WA a monetary amount of \$12,000, in the NT a monetary amount of \$15,000, and in SA a seven-day period of impairment or \$2,750 in medical costs.

13.33 Dealing next with the motor accident schemes (Table 2), it is to be noted that those in Tasmania and the NT<sup>11</sup> are no-fault schemes.

13.34 Under the Victorian scheme a claimant who has suffered more than 10 per cent whole body permanent impairment is eligible to receive *no-fault* benefits for non-economic loss. A claimant, who has suffered at least

11 For Northern Territory residents only.

30 per cent whole body permanent impairment and whose injury is deemed to be a 'serious injury' (defined in the Act), can, alternatively, bring a common law negligence claim, provided the claimant was not at fault in respect of the accident.

13.35 Under the Victorian scheme, impairment is assessed in accordance with the 'American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition, 1995' ('the AMA 4 Guides'). The degree of impairment is determined by an independent medical assessor, approved by the Victorian Transport Accident Authority (TAC).

13.36 The New South Wales Motor Accident Authority (MAA) administers a similar (fault-based) scheme for assessing impairment. Under this scheme, the threshold for general damages is 10 per cent whole body permanent impairment. If there is a dispute as to the degree of impairment, the injured person must be assessed by a medical practitioner approved by the MAA. If the person is assessed as less than 10 per cent permanently impaired, the decision may be reviewed by the MAA Medical Assessment Service (MAS) (an internal review mechanism, comprising a panel of three doctors).

13.37 The MAA bases its methodology on the 'Guidelines for the Assessment of Permanent Impairment of a Person Injured as the Result of a Motor Accident' ('the MAA Guidelines'). The MAA Guidelines are issued pursuant to s 44(1)(c) of the *Motor Accidents Compensation Act 1999* (NSW). The MAA Guidelines are based on the AMA 4 Guides, but modified to take account of Australian clinical practice and the purposes of the Act.

13.38 The Panel has been advised that the Victorian and the New South Wales schemes (described in paragraphs 13.32-13.35) are particularly effective, largely because of the independence and expertise of the medical assessor and the objective nature of the criteria used.

13.39 However, the NSW system described in paragraphs 13.34-13.35 has not been adopted in the *Civil Liability Act 2002* (NSW). In that Act, the threshold is 15 per cent of 'a most extreme case' as assessed by the court. The Panel understands that the reason why the former method of assessment was not adopted in the *Civil Liability Act 2002* (NSW) is that it was considered too costly and cumbersome.

13.40 Table 2 shows that the other types of thresholds in force in the States and Territories under the fault-based motor accident schemes include a period

of impairment (SA — seven days), a monetary amount of medical costs (SA — \$2,750), and a monetary amount (WA — \$11,500).<sup>12</sup>

13.41 There are no thresholds for general damages in the motor accident schemes in Queensland, the ACT and Tasmania.

13.42 The Panel's view is that of all the threshold options, one based on a system of independent assessment of impairment using objective criteria is the best because it is likely to produce the most reliable and consistent results. However, the Panel does not recommend the adoption of such a system. The NSW motor accident scheme is the only fault-based scheme that uses such a system; and (as we have noted) it has not been adopted in the *Civil Liability Act 2002* (NSW). As a result, there seems little prospect of a Recommendation based on such a system achieving the uniform support and implementation that is desirable. The independent medical assessment system, however, is an option that should be considered carefully, if not now then at some appropriate future time.

13.43 The other two options most worth considering are a monetary amount and assessment in terms of a percentage of a most extreme case. In assessing the appropriateness of the former for adoption as a nationally uniform provision, it must be remembered that the level of general damages varies from jurisdiction to jurisdiction, and that awards in NSW and Victoria are far higher than in other States. The Panel's view is that if Recommendation 46 is implemented, differences in the level of general damages between jurisdictions will, in time, be substantially reduced (see paragraph 13.26). Once this happens, a national threshold based on a monetary amount may be feasible and preferable to one based on a percentage assessment in terms of a percentage of a most serious case. But that stage has not yet been reached.

13.44 Therefore, the Panel recommends the adoption of a threshold for general damages in terms of 15 per cent of a most extreme case. Such a threshold provision has been the subject of judicial interpretation in NSW,<sup>13</sup> and the Panel understands that it is now well understood in practice and is regarded as reasonably fair.

13.45 The Panel has been informed that, in practice, cases that are assessed as below the threshold of 15 per cent of a most extreme case are typically cases of soft-tissue injury, which heals relatively rapidly. We understand that such

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<sup>12</sup> This is a deductible rather than a threshold.

<sup>13</sup> *Southgate v Waterford* (1990) 21 NSWLR 427; *Dell v Dalton* (1991) 23 NSWLR 528; *Malah v Keti* (1999) 46 NSWLR 291.

cases tend to be those in which the total compensation claim is the region of \$50,000. In this category of cases, general damages represent a very significant proportion of the total amount recovered (as do legal costs), and damages for economic loss a small proportion. Thus the effect of the threshold in practice will probably be to cut out of the compensation system cases where the injuries sustained are relatively minor and where the economic loss, if any, is relatively insignificant. The Panel therefore supports a threshold for general damages of 15 per cent of a most extreme case.

13.46 One drawback of a threshold of this kind — as opposed to one based on assessment by an independent medical practitioner according to objective medical criteria of impairment — is that it depends on subjective assessment on the basis of expert evidence. This brings into focus the Panel's concerns with expert evidence generally as expressed in paragraphs 3.70-3.80. Some who have given evidence before the Panel have warned that thresholds not based on independent assessment according to objective criteria of impairment are subject to a creeping effect. That is to say, regardless of the level of the threshold, sympathy with plaintiffs encourages the assessment of marginal cases as being above rather than below the threshold.

13.47 While the Panel recognises the force of these warnings, it considers that at the present time, a threshold based on 15 per cent of a most extreme case is more likely to be adopted and effectively implemented in all jurisdictions than one based either on a monetary amount or on a system of objective assessment of impairment.

#### **Recommendation 47**

**The Proposed Act should impose a threshold for general damages based on 15 per cent of a most extreme case.**

#### **A cap on general damages**

13.48 From the evidence given to the Panel, it seems capping general damages would not have as significant effect on the cost of claims as would the imposition of an appropriate threshold. Nevertheless, for the following three reasons, the Panel considers that it is desirable that general damages be capped on a national basis.

13.49 Firstly, levels of awards of general damages in NSW and Victoria are far higher than in the other States and the Territories. The highest awards in these two States are at least \$100,000 more than elsewhere. This appears to be the result of the very litigious culture in these two States. Whatever the reason

for the difference, it is undesirable. A strong argument can be made that levels of compensation for pain and suffering and loss of the amenities of life should be more or less uniform throughout the country. 'Pain is pain whether it is endured in Darwin, Townsville, Burnie or Sydney'.

13.50 Secondly, a cap would have the effect of bringing down the level of general damages in all cases proportionately, thus promoting an objective of the Terms of Reference.

13.51 Thirdly, the Panel will recommend that other heads of damage should be capped. As a result, it is likely that pressure will develop for offsetting increases in the levels of general damages. A cap on general damages will forestall such increases.

### The appropriate cap

13.52 The caps under existing motor accident schemes (see Table 2) are disparate indeed: \$360,000 in Victoria, \$296,000 in NSW, \$240,000 in SA, \$232,000 in WA, and four years worth of average weekly earnings in the NT. On the other hand, there are no caps in Queensland, the ACT and Tasmania.

13.53 The caps under the civil liability schemes (see Table 1) are also disparate: \$371,380 in Victoria, \$350,000 in NSW, \$250,000 in the NT, and \$240,000 in SA. There are no caps elsewhere.

13.54 Lawyers from States other than Victoria and NSW have told the Panel (and the Panel accepts) that a cap at the level of the caps in those two States would have the effect of significantly raising awards for general damages in their States.

13.55 In the light of the variety of caps that exist and the disparity in the levels of awards in the various jurisdictions, it might be thought impractical, at this stage, to recommend a national cap fixing a single monetary amount for all States and Territories. On the other hand, because of the absence of any measurable correlation between money, on the one hand, and pain, suffering, loss of amenities and loss of expectation of life, on the other, a reasonable cap on damages could not be said to be unprincipled.

13.56 In the Panel's view, an appropriate cap would be \$250,000. The implementation of such a cap would go a long way to achieving national consistency in awards of general damages, and would have the additional merit of reducing awards most in the two States with the greatest amount of personal injury litigation.

13.57 If this Recommendation proves not to be acceptable, the Panel would merely recommend that each State and Territory have its own cap (which should be consistently applied in all relevant legislation within each particular jurisdiction) and those States and Territories which do not have caps should introduce caps. Should that occur, the Panel suggests that consideration be given at some later time (if Recommendation 46 is implemented) to introducing a nationally uniform cap on general damages.

#### **Recommendation 48**

- (a) The Proposed Act should provide for a cap on general damages of \$250,000.**
- (b) If such a provision is not enacted, each State and Territory should enact legislation providing for a single cap on general damages that will apply to all claims for personal injury and death.**

### Damages for loss of earning capacity

13.58 Tables 3 and 4, respectively, summarise the effect of relevant statutory provisions in civil liability and motor accident schemes in the various States and Territories.

13.59 The SA civil liability scheme provides, in effect, for a deductible from damages for loss of earning capacity of earnings lost in the first week of incapacity for work.<sup>14</sup> No other civil liability scheme provides for such a deductible, and none provides legislation for a threshold in respect of damages for loss of earning capacity.

13.60 As appears from Table 3, NSW, Victoria, Queensland, WA, the ACT and the NT have legislated in their civil liability schemes, or proposed a cap on claims for loss of earning capacity of three times average weekly earnings. SA has an overall cap of \$2,200,000 on the global award for loss of earning capacity.

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14 *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA), s 24D.

Table 3: State and Territory civil liability schemes — loss of earnings

Jurisdiction	Cap	Threshold
<b>New South Wales</b> <i>Civil Liability Act 2002 (NSW)</i>	3 x AWE*: ss 12(2), (3) [AWE of all employees in NSW]	No threshold
<b>Victoria</b> Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002 (Vic)	3 x AWE*: s 28F(2) [AWE of all employees in Victoria]	No threshold
<b>Queensland</b> <i>Personal Injuries Proceedings Act 2002 (Qld)</i>	3 x AWE*: ss 51(1), (2) [AWE = Qld full-time adult persons ordinary time]	No threshold
<b>Western Australia</b> Civil Liability Bill 2002 (WA)	3 x AWE*: s 11(1) [AWE for full-time adult employees in WA]	No threshold
<b>South Australia</b> <i>Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002 (SA)</i>	\$2,200,000*: ss 24, 24D	No damages for first week of work lost through incapacity: s 24D(1)
<b>Australian Capital Territory</b> Civil Law (Wrongs) Bill 2002 (ACT)	3 x AWE*: ss 38(1), (2) [AWE = all male total earnings in ACT]	No threshold
<b>Northern Territory</b> Personal Injuries (Liabilities and Damages) Bill 2002 (NT)	3 x AWE*: s 20(1) [AWE = full time adult persons, weekly ordinary time earnings for the NT]	No threshold

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Table 4: State and Territory motor accident schemes — loss of earnings

Jurisdiction	Cap	Threshold
<b>New South Wales</b> <i>Motor Accidents (Compensation) Act 1999 (NSW)</i>	\$2,712pw*: s 125	No damages for first 5 days of incapacity: s 124
<b>Victoria **</b> <i>Transport Accident Act 1986 (Vic)</i>	80% of pre-accident earnings up to \$781* pw: s 44	No damages for first 5 days of incapacity: s 43
<b>Queensland</b> <i>Motor Accident Insurance Act 1994 (Qld)</i>	3 x AWE*: s 55A [AWE = Qld full-time adult persons ordinary time]	No threshold
<b>Western Australia</b> <i>Motor Vehicle (Third Party Insurance) Act 1943 (WA)</i>	No cap	No threshold
<b>South Australia</b> <i>Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002 (SA)</i>	\$2 200 000*: ss 24, 24D	No damages for first week of work lost through incapacity: s 24D(1)
<b>Tasmania **</b> <i>Motor Accidents (Liabilities and Compensation) Act 1973 (Tas)</i>	4.25 x AWE*: s 22(5) [AWE = full-time adult ordinary time earnings for Australia]	No threshold
<b>Australian Capital Territory</b> <i>Road Transport (General) Act 1999 (ACT)</i>	No cap	No threshold
<b>Northern Territory ***</b> <i>Motor Accident (Compensation) Act 1979 (NT)</i>	85% x AWE*: s 13(2) [AWE = full-time adult persons, weekly ordinary time earnings for NT]	No damages for the day of the accident: s 13

\* Indexed

\*\* No-fault scheme

\*\*\* No-fault for residents of the NT only



13.61 As appears from Table 4, the NSW and Victorian motor accident legislation provides for a threshold of the first five days' lost earnings. In SA and Tasmania the threshold is the first seven days' lost earnings. In the NT the threshold is earnings lost on the day of the accident. In Queensland, WA, Tasmania and the ACT there is no threshold.

13.62 As also appears from Table 4, there is no uniformity between the States and Territories as to the caps imposed on damages for loss of earning capacity under the motor accident legislation, although several jurisdictions (Queensland, SA, WA and the ACT) adopt the same threshold in both the civil liability statute and motor accident statute.

13.63 In the view of the Panel, it is neither necessary nor desirable to impose a threshold on damages for loss of earning capacity, and we propose not to make any Recommendation in this respect. We have detected little or no pressure for thresholds on this head of damages. In our view, thresholds on general damages and on damages for gratuitous services (see paragraphs 13.48-13.57 and 13.72-13.87 respectively) and related heads of damage will be a sufficient filter against smaller claims.

13.64 On the other hand, we consider it important to impose a cap on damages for loss of earning capacity. Such a cap provides high earners with a desirable incentive to insure against loss of the capacity to earn more than the amount of the cap. The views of the Panel are best explained against the background of Table 5, which is set out below.

Table 5: Loss of earnings

Description	Current (\$) value per year*	Percentage of employees earning above (\$) value**
3 times average weekly full-time adult ordinary time earnings (FTOTE) in Australia	135,486	1.4%
2 times average weekly FTOTE in Australia	90,324	2.4%
1.5 times average weekly FTOTE in Australia	67,743	6.4%
Average weekly FTOTE in Australia	45,162	29.1%
Federal minimum wage	22,433	72.7%
Disability support pension (single over 21)	10,966	87.7%

\* ABS figures for May 2002, publication no. 6302.0.

\*\* ABS figures for May 2000, publication no. 6306.0.

13.65 Table 5 shows that, currently, three times average annual full-time adult ordinary time earnings (FTOTE) in Australia is \$135,486 and only 1.4 per cent of employees earn more than this amount. Twice FTOTE is \$90,324 and only 2.4 per cent of employees earn more than this amount.

13.66 A cap of twice FTOTE would not affect a significant proportion of employees (only 2.4 per cent). In our view, persons who earn more than twice average weekly earnings can reasonably be expected to protect themselves against the effects of the proposed cap by insuring against loss of income above that amount.

13.67 It is salutary, in this regard, to note that the annual value of the disability support pension payable to a person who is totally incapacitated for work is \$10,966. It is also worth noting that the annual value of unemployment benefits is \$9,620. It seems to us difficult to accept that a very high earner who is totally incapacitated in circumstances that give rise to a successful negligence claim should receive fully earnings-related income replacement, while a totally incapacitated person who is not able to make a successful negligence claim may have to manage on modest means-tested income support benefits from the social security system.

#### **Recommendation 49**

**The Proposed Act should provide for a cap on damages for loss of earning capacity of twice average full-time adult ordinary time earnings (FTOTE).**

### **Cost of care**

13.68 The Australian Health Ministers Advisory Council (AHMAC) Legal Process Reform Group has recommended that provision of long-term treatment, rehabilitation and care to those seriously injured by negligence be removed from the common law compensation system and dealt with by some other mechanism. At the moment, it is unclear whether access to such provision would continue to be dependent on proof of negligence. Such a scheme is beyond our Terms of Reference, and we make no comment on it.

13.69 Under the full compensation principle of personal injury law, the injured person is entitled to recover the full cost of medical treatment, nursing care, medication (and so on) reasonably incurred in the past and likely to be incurred in the future — that is, full compensation for the cost of reasonable care, which may not be the most expensive available. The question that typically arises in this context is the appropriate benchmark against which to

assess reasonableness. Defendants usually contend that the benchmark should be use of public hospital facilities and Medicare scheduled fees (where applicable). Plaintiffs usually contend that the benchmark should be treatment in private hospitals and by practitioners who charge more than the scheduled fees.

13.70 In the view of the Panel, having regard again to the principles outlined at the beginning of this Chapter, damages for health care costs should be calculated by reference to a benchmark constituted by the use of public hospital facilities, and Medicare scheduled fees (where applicable). It seems to us reasonable (and consistent with objectives underlying the Terms of Reference) to expect those who wish to use private hospital facilities, or to be treated by practitioners who charge more than Medicare scheduled fees, either to insure against the cost or to bear it themselves.

13.71 The term 'benchmark' is intended to indicate that use of public hospital facilities, and Medicare scheduled fees, are to be used only as guides to what, in a particular case, might be reasonable. Much will depend on the availability to a particular plaintiff of particular services at the benchmark. For example, if a plaintiff needs a certain medical procedure that can only be provided by a small number of medical practitioners, all of whom charge significantly more than the Medicare scheduled fee for the procedure, it would not be reasonable to apply the benchmark fee. The reason for the availability of only a small number of practitioners may be that the plaintiff resides in a country town, or it may be that the procedure is so unusual and specialised that few are qualified to undertake it. Each case will depend on its own circumstances.

#### **Recommendation 50**

**The Proposed Act should embody the following principle:**

**For the purposes of assessing damages for health care costs, the issue of reasonableness should be determined by reference to a benchmark constituted by the use of public hospital facilities, and Medicare scheduled fees (where applicable).**

#### **Gratuitous care**

13.72 It is not uncommon for an injured person's need for care and assistance as a result of the injuries to be met by relatives and friends without payment or

the expectation of payment from the injured person. In *Griffiths v Kerkemeyer*<sup>15</sup> in 1977 the High Court decided that compensation could be awarded in respect of the injured person's need for care and assistance even if that need was met gratuitously by relatives or friends at no cost to the plaintiff. The quantum of damages under this head is the value of the services required to meet the need, and this is measured by the market value of the services. In England, damages under this head are held by the injured person 'on trust' for the carer(s). But in Australia, this has been said to be inappropriate because such damages represent the plaintiff's need for care rather than the cost to the carer of providing them.<sup>16</sup> Nevertheless, damages under this head recognise that negligence can generate non-financial as well as financial costs, and that such costs should be borne by those who generate them.

13.73 Damages for gratuitous services often represent a large portion of the total award. According to the Trowbridge Report,<sup>17</sup> damages under this head represent, on average, about 25 per cent of the total award in claims for more than \$500,000.

13.74 The rule in *Griffiths v Kerkemeyer* is often criticised on the basis that it allows plaintiffs to be compensated when they have suffered, and will suffer, no actual financial loss because the relevant care is provided free-of-charge. In principle, this criticism misses the mark because compensation under this head is for loss of the capacity to care for oneself and the consequent need to be cared for by others.<sup>18</sup> This loss of capacity and consequent need exists regardless of whether the person who meets the need does so gratuitously. On the other hand, it is important to acknowledge that a plaintiff may recover very substantial damages under this head even though the services they relate to may never be paid for, and even if none of the damages awarded will ever be paid over to the carer.

13.75 Another criticism of the *Griffiths v Kerkemeyer* rule is that claims by plaintiffs about the nature and extent of their need for gratuitous services are easy to make and difficult to refute. The needs of a plaintiff are partly subjective, and often dependent not only on the level of injury but on the

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15 (1977) 139 CLR 161.

16 *Kars v Kars* (1996) 187 CLR 354.

17 The Trowbridge Report, 85.

18 In *Griffiths v Kerkemeyer* (1977) 139 CLR 161 Mason J said that the relevant loss was the plaintiff's 'incapacity to look after himself as demonstrated by the need for nursing services' (192) and that the 'true loss' was 'the loss of capacity which occasions the need for the service' (193). Later High Court cases (*Van Gervan v Fenton* (1992) 175 CLR 327; *Kars v Kars* (1996) 187 CLR 354; *Grincelis v House* (2000) 201 CLR 321) have reaffirmed that the 'true basis' of the claim is the need by the plaintiff for those services.

plaintiff's age, general state of health, personality and state of mind. Typically, they will be proved not only by medical evidence, but also by the plaintiff's own testimony and that of the carer. It is often difficult for a medical practitioner to gainsay the evidence of the plaintiff as to subjective needs, particularly when the plaintiff's case is supported by testimony of the carer about the care that has in fact been provided in the past. In many cases, too, little evidence is available to refute assertions of the plaintiff and the carer. Thus, while judges may be suspicious of the validity of such claims, and may suspect that the gratuitous care that will in fact be provided in the future will be less than the need asserted, they are often required by the state of the evidence to make awards based on little more than the say-so of the plaintiff and the carer.

13.76 Notwithstanding these criticisms, there is only one statutory provision in Australia that abolishes *Griffiths v Kerkemeyer* damages,<sup>19</sup> and few submissions received by the Panel supported their abolition. This suggests that there is a reasonable level of acceptance within the community that some compensation should be payable for gratuitous services.

13.77 In any event, it might be counter-productive to abolish claims for gratuitous services, thus giving plaintiffs a strong incentive to retain professional carers to provide the services, and perhaps leading to an increase in total damages awards. The Panel, therefore, does not recommend that claims for loss of gratuitous services should be abolished.

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<sup>19</sup> *Common Law (Miscellaneous Actions) Act 1986* (Tas) abolishes damages for gratuitous services in motor vehicle cases.

Table 6: State and Territory civil liability schemes — gratuitous care

Jurisdiction	Cap	Threshold
<b>New South Wales</b> <i>Civil Liability Act 2002</i> (NSW)	> 40h pw, 1 x AWE*; < 40h pw, hourly rate = 1/40 x AWE*: ss 15(4), (5) [AWE of all employees in NSW]	At least 6h pw for 6 months: s 15(3)
<b>Victoria</b> Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002 (Vic)	No cap	No threshold
<b>Queensland</b> <i>Personal Injuries Proceedings Act 2002</i> (Qld)	No cap	At least 6h pw for 6 months: s 54(2)
<b>Western Australia</b> Civil Liability Bill 2002 (WA)	> 40h pw, 1 x AWE*; < 40h pw, hourly rate = 1/40 x AWE*: s 12(7) [AWE for full-time adult employees in WA]	\$5,000* deductible: ss 12(3), (13)
<b>South Australia</b> <i>Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002</i> (SA)	4 x AWE*: s 24H [AWE of the State of SA]	No threshold
<b>Australian Capital Territory</b> Civil Law (Wrongs) Bill 2002 (ACT)	No cap	No threshold
<b>Northern Territory</b> Personal Injuries (Liabilities and Damages) Bill 2002 (NT)	> 40h pw, 1 x AWE*; < 40h pw, hourly rate = 1/40 x AWE*: ss 23(3), (4) [AWE for all employees in the NT]	At least 6h pw for 6 months: s 23(2)

\* Indexed

Table 7: State and Territory motor accident schemes — gratuitous care

Jurisdiction	Cap	Threshold
<b>New South Wales</b> <i>Motor Accidents (Compensation) Act 1999</i> (NSW)	> 40h pw, 1 x AWE*; < 40h pw, hourly rate = 1/40 x AWE*: ss 128(4), (5) [AWE of all employees in NSW]	At least 6h pw for 6 months: s 128(3)
<b>Victoria **</b> <i>Transport Accident Act 1986</i> (Vic)	> 40h pw, 1 x AWE*; < 40h pw, hourly rate = 1/40 x AWE*: ss 174(1)(b), (d) [AWE of all employees in Victoria]	No threshold
<b>Queensland</b> <i>Motor Accident Insurance Act 1994</i> (Qld)	No cap	No threshold
<b>Western Australia</b> <i>Motor Vehicle (Third Party Insurance) Act 1943</i> (WA)	> 40h pw, 1 x AWE*; < 40h pw, hourly rate = 1/40 x AWE*: s 3D [AWE for full-time adult employees in WA]	\$5,000* deductible: s 3D(7)
<b>South Australia</b> <i>Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002</i> (SA)	4 x AWE*: s 24H [AWE of the State of SA]	No threshold
<b>Tasmania **</b> <i>Motor Accidents (Liabilities and Compensation) Act 1973</i> (Tas)	No cap ****	No threshold ****
<b>Australian Capital Territory</b> <i>Road Transport (General) Act 1999</i> (ACT)	No cap	No threshold
<b>Northern Territory ***</b> <i>Motor Accident (Compensation) Act 1979</i> (NT)	Hourly rate 2% x AWE* not exceeding 28h pw: s 8A [AWE = full-time adult persons, weekly ordinary time earnings for NT]	Period of impairment likely to endure > 2 years: s 18A

\* Indexed

\*\* No-fault scheme

\*\*\* No-fault for residents of the Northern Territory only

\*\*\*\* Damages for gratuitous care abolished: *Common Law (Miscellaneous Actions) Act 1986* (Tas)

13.78 It is apparent, however, that many legislatures in the States and Territories consider that awards for gratuitous services have gone too far. This can be seen from the legislative provisions the effect of which is summarised in Tables 6 (dealing with State and Territory civil liability schemes) and 7 (dealing with State and Territory motor accident schemes).

13.79 As appears from Table 6, under the NSW and Queensland civil liability legislation there is a threshold for damages for gratuitous services based on the requirement that the services be provided for six hours per week for six months. The NT proposes a similar scheme. WA provides for a deductible of \$5,000. No other State or Territory has a threshold under its civil liability legislation.

13.80 As also appears from Table 6, under the NSW civil liability legislation there is a cap on damages for gratuitous services of average weekly earnings. WA and the NT propose a similar cap. SA has a cap based on four times average weekly earnings.

13.81 Table 6 also shows that, under the NSW civil liability legislation, and proposed legislation in WA and the NT, damages under this head are to be calculated by reference to average weekly earnings on the basis of a 40 hour week.

13.82 As appears from Table 7, under the NSW motor accident legislation there is a threshold based on the requirement that the services be provided for six hours per week for six months. WA has a deductible of \$5,000 and the NT has, as a threshold, the requirement that the plaintiff has a period of impairment likely to endure for a period of more than two years.

13.83 As also appears from Table 7, under the motor accident legislation in NSW, Victoria and WA there are caps based on average weekly earnings; and damages are to be calculated by reference to average weekly earnings on the basis of a 40 hour week. SA has a cap based on four times average weekly earnings. The NT has a cap based on 2 per cent of average weekly earnings.

13.84 In the Panel's view, the recent legislative developments in the area are illustrative of community dissatisfaction with aspects of the *Griffiths v Kerkemeyer* rule and its operation, based on the belief that damages for gratuitous services are sometimes excessive, particularly having regard to the fact that the plaintiff suffers no actual financial loss.

13.85 The Panel considers that there should be national uniform legislation that sets an appropriate threshold and cap for damages for gratuitous services. We recommend that the threshold presently in place under the civil liability and motor accident legislation in NSW should be adopted nationally.

13.86 We also recommend that the cap and the hourly rate presently in place under the civil liability legislation in NSW (proposed in WA and the NT), and under the motor accident legislation in NSW, Victoria and WA should be adopted nationally.

13.87 There is one other aspect of this head of damages that deserves some discussion. It seems reasonable that damages for gratuitous care should only be awarded in respect of services that have become necessary as a result of the injury. Damages should not be awarded in respect of services that were not being provided to the plaintiff before the injury was suffered (whether because



the plaintiff was caring for himself or herself, or for any other reason). On the other hand, since compensation under this head is for loss of the capacity to care for oneself it might, in principle, be thought irrelevant whether or not the plaintiff would have exercised it but for the injury. As far as we are aware, this issue has never been expressly addressed by Australian courts.<sup>20</sup> We therefore recommend the enactment of a provision to the effect that damages for gratuitous services may be awarded only in respect of services required by the plaintiff as a result of the injuries caused by the negligence of the defendant.

### **Recommendation 51**

**The Proposed Act should embody the following principles:**

- (a) Damages for gratuitous services shall not be recoverable unless such services have been provided or are likely to be provided for more than six hours per week and for more than six consecutive months.**
- (b) The maximum hourly rate for calculating damages for gratuitous services shall be one fortieth of average weekly FTOTE.**
- (c) The maximum weekly rate for calculating damages for gratuitous services shall be average weekly FTOTE.**
- (d) Damages for gratuitous services may be awarded only in respect of services required by the plaintiff as a result of the injuries caused by the negligence of the defendant.**

## Damages for loss of capacity to care for others

13.88 An injured person who has lost the capacity to care for others is entitled to compensation for that loss even in relation to care provided gratuitously.<sup>21</sup> In *Sullivan v Gordon*,<sup>22</sup> Beazley JA in the New South Wales Court of Appeal said that this head of damages is related to damages for gratuitous care awarded under the principle in *Griffiths v Kerkemeyer*.<sup>23</sup> This means that the loss being compensated for is loss of *capacity* rather than financial loss as such. As in the

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<sup>20</sup> It is addressed in the *Personal Injuries Proceedings Act 2002* (Qld), s 54(3).

<sup>21</sup> *Sullivan v Gordon* (1999) 47 NSWLR 319; *Sturch v Wilmott* [1997] 2 Qd R 310; but see *Kite v Malycha* (1998) 71 SASR 321.

<sup>22</sup> (1999) 47 NSWLR 319.

<sup>23</sup> (1977) 139 CLR 161.

case of *Griffiths v Kerkemeyer* damages, damages under this head are measured by the value of the services.

13.89 It would also seem to follow that damages could be awarded under this head even if the plaintiff had not been performing services prior to being injured, provided it could be shown that the plaintiff would, in the future, have provided services had the injuries not been suffered. If this is correct, the Panel perceives a real danger that this head of damages may give rise to highly speculative claims that are extremely difficult to assess or challenge. The risk of speculative claims is increased if damages under this head can be awarded in respect of services that would, if the injuries had not been suffered, have been performed for *anyone*.

13.90 A way of addressing the first of these issues would be to provide that damages for loss of capacity to perform gratuitous services would be available only if it could be shown that the plaintiff was actually providing gratuitous services before he or she was injured. A way of addressing the second issue would be to limit the class of actual or potential beneficiaries of the services. Queensland has enacted legislation that limits such claims to services provided for members of the plaintiff's household.<sup>24</sup> Another possibility would be to limit such claims to services performed for members of the class of persons who could bring a claim for loss of support (under 'fatal accident' or 'compensation to relatives' legislation) if the plaintiff had been killed. This latter possibility is attractive because it utilises a long-standing and well-tried mechanism. The Panel recommends this approach.

13.91 We also recommend that damages under this head (unlike damages for loss of support) should be available only in respect of services that the plaintiff was actually providing before he or she was injured. Furthermore, because this head of damages is closely related to that for gratuitous services, the Panel recommends that it should be subject to similar limitations as we have recommended in relation to claims for such damages.

## **Recommendation 52**

**The Proposed Act should embody the following principles:**

- (a) Damages for loss of capacity to provide gratuitous services for others shall not be recoverable unless, prior to the loss of capacity, such**

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<sup>24</sup> *Personal Injuries Proceedings Act 2002* (Qld), s 54(4); see also Civil Law (Wrongs) Bill 2002 (ACT), cl 39(1).

**services were being provided for more than six hours per week and had been provided for more than six consecutive months.**

- (b) Such damages are recoverable only in relation to services that were being provided to a person who (if the provider had been killed rather than injured) would have been entitled to recover damages for loss of the deceased's services.**
- (c) The maximum hourly rate for calculating damages for loss of capacity to provide gratuitous services for others shall be one fortieth of average weekly FTOTE.**
- (d) The maximum weekly rate for calculating damages for loss of capacity to provide gratuitous services shall be average weekly FTOTE.**

## Property modifications

13.92 Where, as a result of injuries suffered, a plaintiff is, for instance, confined to a wheelchair, the plaintiff's home or motor vehicle may need to be altered to accommodate the plaintiff's post-injury lifestyle. The plaintiff can normally recover the difference between the actual cost of the conversion and the increased capital value of the property attributable to the improvements.

13.93 No submissions identified this area of the law to be problematic. Therefore, the Panel does not make any recommendation in regard thereto.

## Expenses of visits by relatives

13.94 Occasionally, seriously injured persons being treated in hospital have a need for visits by their family. There is authority that they are entitled to compensation for that need. The compensation is measured by the reasonable costs incurred by the family members in visiting the plaintiff.

13.95 No submissions were made to the Panel suggesting that any reform was required to this head of damages and the Panel, accordingly, makes no Recommendation in respect thereof.

## Discount rates

13.96 When a court awards a lump sum for future economic loss or future expenses that will be suffered or incurred periodically, it assumes that the plaintiff will invest the lump sum and receive a stream of income from the investment. As a result, to ensure that the plaintiff does not receive too much, the sum of the expected total future losses and expenses needs to be reduced by using a 'discount rate' in order to calculate its present value. That is, the court arrives at a figure for future economic loss that takes into account the capacity of the plaintiff to invest the lump sum and generate income thereby. The discount rate is a technical mechanism used to arrive at the present value of compensation for future losses and expenses.

13.97 Three significant factors need to be taken into account in determining the appropriate discount rate: likely future tax rates, the expected rate of return on investment of the lump sum and likely real growth in wages. Tax rates are relevant because although the lump sum itself is not taxable, income earned on investment of the lump sum usually will be (although the Commonwealth Government's proposed structured settlements legislation should make such payments tax-free in certain circumstances).

13.98 In 1981 the High Court set the discount rate for personal injury and death claims at 3 per cent ('the default rate').<sup>25</sup> The default rate still applies today (in the absence of any statutory provision to the contrary) despite various changes in inflation, wages and taxation rates over the last 30 years. In a number of jurisdictions discount rates higher than the default rate are established by statute. These are set out in Table 8 below.

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<sup>25</sup> *Todorovic v Waller* (1981) 150 CLR 402.

Table 8: Discount rates

Jurisdiction	Name of Instrument	Discount Rate
NSW	<i>Civil Liability Act 2002</i> (NSW) <i>Motor Accidents (Compensation) Act 1999</i> (NSW)	5%: s 14(2)(b) 5%: s 127
Victoria	<i>Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002</i> (Vic) <i>Transport Accident Act 1986</i> (Vic)	5%*: s 281(2) 6%: s 93(13)
Queensland	<i>Personal Injuries Proceedings Act 2002</i> (Qld) <i>Motor Accident Insurance Act 1994</i> (Qld)	5%: s 52(2) 5%: s 55B
WA	<i>Law Reform (Miscellaneous Provisions) Act 1941</i> (WA)	6%: s 5
SA	<i>Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002</i> (SA)	5%: s 24
Tasmania	<i>Common Law (Miscellaneous Actions) Act 1986</i> (Tas)	7%: s 4
ACT	Default rate	3%
NT	<i>Personal Injuries (Liabilities and Damages) Bill 2002</i> (NT) <i>Motor Accident (Compensation) Act 1979</i> (NT)	5%*: s 22(2)(b) 6%: s 5(2)(b)

\* The current rate is the default rate, set at 3 per cent.

13.99 In terms of the levels of damages awards, the important point is that the higher the discount rate the smaller the lump sum awarded for future economic losses and expenses. In addition, the higher the discount rate the greater the impact on awards for people who are incapacitated at a younger age. This can be illustrated by some examples.

13.100 Assume that a 25 year old is totally and permanently incapacitated for work. This means that damages for future loss of earning capacity will be calculated to cover a 40-year period. The effect of increasing the discount rate from 3 per cent to 5 per cent would be to reduce the lump sum to 75 per cent of its 3 per cent level. Thus, an increase of 2 percentage points in the discount rate would lead to a reduction of 25 per cent in the award.

13.101 Assume that a 45 year old is totally and permanently incapacitated for work. This means that damages for future loss of earning capacity will be calculated to cover a 20-year period. The effect of increasing the discount rate from 3 per cent to 5 per cent would be a reduction in the award for future loss of earning capacity to 85 per cent of the 3 per cent figure. An increase of 2 percentage points in the discount rate leads to a reduction of 15 per cent in the award.

13.102 Table 9 gives further examples of the difference an increase in the discount rate from 3 per cent to 5 per cent would produce.

13.103 Table 9 shows that a 35 year old earning \$100,000 per annum would receive \$269,113 less in damages for future loss of earning capacity were the

discount rate to be increased from 3 per cent to 5 per cent; and a 45 year old would receive \$151,386 less. A 35 year old earning an annual income of three times average weekly earnings would receive \$347,777 less, and a 45 year old would receive \$195,638 less.

Table 9: Loss of future earnings

Loss of Future Earnings — to age 65	Discount Rate	Age			
		20	35	45	55
Average Weekly Earnings Less Tax (about \$35,000)					
	3%	\$870,932	\$696,230	\$528,465	\$303,002
	5%	\$637,455	\$551,323	\$446,949	\$276,935
<b>Difference</b>		<b>\$233,477</b>	<b>\$144,907</b>	<b>\$81,516</b>	<b>\$26,067</b>
Income \$100,000 Less Tax (about \$65,000)					
	3%	\$1,617,445	\$1,292,998	\$981,434	\$562,719
	5%	\$1,183,845	\$1,023,885	\$830,048	\$514,308
<b>Difference</b>		<b>\$433,600</b>	<b>\$269,113</b>	<b>\$151,386</b>	<b>\$48,411</b>
3 times Average Weekly Earnings Less Tax (about \$84,000)					
	3%	\$2,090,237	\$1,670,951	\$1,268,315	\$727,206
	5%	\$1,529,892	\$1,323,174	\$1,072,677	\$664,611
<b>Difference</b>		<b>\$560,345</b>	<b>\$347,777</b>	<b>\$195,638</b>	<b>\$62,595</b>

13.104 It is obvious, therefore, that an increase in the discount rate would have a marked effect on the compensation payable. Indeed, increasing the discount rate would be the easiest and most effective way of reducing damages in cases of continuing loss and permanent impairment.

13.105 But, in the Panel’s opinion, using a discount rate higher than can reasonably be justified by reference to the appropriate criteria would be an unfair and entirely arbitrary way of reducing the total damages bill. Furthermore, we have seen that the group that would be most disadvantaged by doing so would be those who are most in need — namely the most seriously injured. It would be inconsistent with the principles that have guided our thinking in this area to reduce the compensation recoverable by the most seriously injured by increasing the discount rate, simply because damages awards in serious cases could thereby be significantly reduced. In this context, it should be noted that although an increase in the discount rate can yield large reductions in awards in serious cases, such cases represent only a relatively small proportion of the total compensation bill.

13.106 The remaining question, therefore, is what an appropriate discount rate would be. We have seen that in 1981 the High Court, taking all the relevant factors into account, settled on a rate of 3 per cent. Table 8 shows that legislatures in recent years have chosen 5 per cent instead. However, the Panel has been informed by the Australian Government Actuary that, in his view, at present, a realistic after-tax discount rate might be in the order of 2 to 4 per cent. (Of course, as he pointed out, the discount rate is only one of many factors that need to be taken into account in an individual case when determining the present value of the particular plaintiff's economic loss.) This suggests to the Panel that 3 per cent remains a reasonable rate, and does not appear to be any good reason to go above 4 per cent. We therefore recommend a nationally uniform discount rate of 3 per cent.

13.107 Many people have emphasised to us the importance of stability and uniformity in the discount rate. This is desirable for both plaintiffs and defendants. Insurers are much more concerned that the discount rate should be stable over time than that it should be set at any particular level. In fact, recent history suggests that there is unlikely to be a strong economic case for anything more than small changes in the discount rate over the longer term. On this basis, it might be suggested that the costs of change are likely to outweigh the advantages.

13.108 However, if the discount rate is changed, this should be done only with reasonable notice so that insurers are able to adjust premiums appropriately. It has been suggested to the Panel that an appropriate notice period would be six months.

13.109 Given the complexity and technical nature of the task of setting an appropriate discount rate, the Panel's opinion is that it should be given to an appropriate regulatory body.

### **Recommendation 53**

**The Proposed Act should embody the following principles:**

- (a) The discount rate used in calculating damages awards for future economic loss in cases of personal injury and death is 3 per cent.**
- (b) An appropriate regulatory body should have the power to change the discount rate, by regulation, on six months notice.**

## Interest

13.110 The only submissions that the Panel received proposing reforms of the law relating to interest on damages for personal injury and death was that pre-judgment interest should not be awarded on damages for non-economic loss. The principle underlying awards of pre-judgment interest is that the plaintiff's entitlement to be compensated arises at the date the cause of action is complete (that is, the date on which compensable damage first occurs). If the plaintiff does not actually receive the compensation until some time later, she has been 'kept out of' money to which she is entitled, and so should be awarded interest to compensate her for not having had the use of the money.

13.111 Pre-judgment interest is normally awarded at a 'market' rate that includes a margin for expected future inflation. However, damages for pre-judgment non-economic loss (unlike damages for pre-judgment economic loss) are calculated according to the value of money at the date of judgment. This means that the amount awarded for pre-judgment non-economic loss automatically makes allowance for inflation in the pre-judgment period. For this reason, it is argued, the rate of interest on damages for pre-judgment non-economic loss should be the 'real' rate net of inflation, not the 'market' rate that includes allowance for inflation.

13.112 In those jurisdictions where pre-judgment interest is awarded on damages for non-economic loss, the current practice, generally, is to award interest based on a rate of 4 per cent per annum. Where the loss accrues evenly between the date of the injury and date of judgment, the rate is halved. But when the bulk of the non-economic loss is incurred at the beginning of the period, it is not.<sup>26</sup>

13.113 WA has abolished pre-judgment interest on non-economic loss.<sup>27</sup> The *Civil Liability Act 2002 (NSW)* has abolished pre-judgment interest on damages for non-economic loss in certain cases (s 18(1)). There is legislation in NSW and Victoria abolishing pre-judgment interest on damages for non-economic loss in motor accident and industrial accident cases.<sup>28</sup> The *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002 (SA)* (s 24F) abolishes pre-judgment interest on damages for non-economic loss.

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<sup>26</sup> H. Luntz, *Assessment of Damages for Personal Injury and Death*, 4<sup>th</sup> edn, (2002), para 11.3.15

<sup>27</sup> *Supreme Court Act 1935 (WA)*, s 32(2).

<sup>28</sup> *Motor Accidents Compensation Act 1999 (NSW)*, s 137(3); *Workers Compensation Act 1987*, s 151M(3); *Transport Accident Act 1986 Vic*, s 93(15); *Accident Compensation Act 1985 (Vic)*, s 134AB(34).



13.114 In the Panel's view, there is force in the submission that the award of pre-judgment interest on damages for non-economic loss is inappropriate. Damages for pre-judgment non-economic loss do not represent income forgone or expenses incurred. Such awards have been abolished in several jurisdictions. In the interests of uniformity, we consider that they should be abolished everywhere.

#### **Recommendation 54**

**The Proposed Act should provide that pre-judgment interest may not be awarded on damages for non-economic loss.**

### **Damages recoverable by dependants of persons killed as a result of wrongful acts or omissions**

13.115 The law governing the assessment of damages in claims by dependants of persons killed as a result of negligent acts or omissions (often called 'fatal accident claims' or 'compensation to relatives claims') is complex, and varies considerably between jurisdictions.

13.116 Nevertheless, no submissions have been made to the Panel to the effect that this is an area in which there are particular problems that need to be resolved by limiting the damages recoverable in such cases. The Panel, itself, has not identified any such problems.

13.117 In regard to collateral benefits, the Panel makes Recommendations that bear specifically upon dependants' claims.

13.118 While it is desirable that the law relating to dependants' claims should be uniform throughout the country, the task of making recommendations in this respect would be time-consuming. The Panel does not regard the task of rationalising this area of the law to be an urgent one. In view of the time constraints on the Panel, we do not consider it appropriate to embark upon it. Accordingly, we make no recommendations for reform on this topic.

13.119 However, the recommendations that the Panel has made in regard to damages generally should be adapted and applied to dependants' claims. The principles contained in Recommendation 55 embody such adaptations.

### **Recommendation 55**

**The Proposed Act should embody the following principles:**

- (a) In calculating damages for loss of financial support any amount by which the deceased's earnings exceeded twice average FTOTE shall be ignored.**
- (b) A dependant may not recover damages for the loss of gratuitous services the deceased would have provided unless such services would have been provided for more than six hours per week and for more than six consecutive months.**
- (c) The maximum hourly rate for calculating damages for loss of gratuitous services the deceased would have provided is one fortieth of average weekly FTOTE.**
- (d) The maximum weekly rate for calculating damages for loss of gratuitous services the deceased would have provided is average weekly FTOTE.**
- (e) A dependant shall be entitled to damages for loss only of those gratuitous services that the deceased would have provided to the dependant but for his or her death.**

13.120 In all jurisdictions except Victoria and the ACT, contributory negligence on the part of the deceased has the effect of reducing the damages payable to the dependants in the same proportion as it would reduce the damages paid to the estate of the deceased suing on the deceased's cause of action after his or her death. Such a provision should be introduced nationally.

### **Recommendation 56**

**The Proposed Act should provide that in a claim by dependants for damages in respect of the death of another as a result of negligence on the part of the defendant, any damages payable to the dependants shall be reduced on account of contributory negligence on the part of the deceased by the same proportion as damages payable in an action by the estate of the deceased person would be reduced.**

## Structured settlements

13.121 A 'structured settlement' is a settlement agreement between a plaintiff and a defendant pursuant to which the defendant is required to pay at least part of the agreed damages periodically rather than in a single lump sum. Unlike periodical payments (such as are provided under the social security system), which are assessed from time to time, a structured settlement is based on the lump sum to which the plaintiff is entitled according to the ordinary rules for assessment of damages. Some or all of that lump sum is used to buy an annuity which generates income out of which payments are made to the plaintiff from time to time according to an agreed schedule.

13.122 In general, Australian courts may only award damages for personal injury or death in the form of a single ('once-and-for-all') lump sum. They have no power to order a defendant to pay damages periodically or to require the parties to enter into a structured settlement. In some States there has been limited legislative departure from this rule, but courts have made little or no use of the powers so conferred.<sup>29</sup>

13.123 The Panel received submissions concerning structured settlements from persons representing the interests of both plaintiffs and defendants. None supported a system under which a court could require the parties to enter into a structured settlement against their wishes. In the circumstances, the Panel makes no recommendation in this regard, although it does believe that careful consideration should be given to the implementation of such a system at some future time.

13.124 The Panel believes, however, that structured settlements have significant advantages over lump sum compensation, at least in serious cases. Structured settlements are in the interests of plaintiffs because the plaintiff is relieved of the need to manage their compensation. Various studies have shown that where the lump sum award covers a long period, the amount awarded often runs out before the end of that period, even if it is well and wisely invested. A structured settlement provides the plaintiff with a more secure source of income in the longer term. This is good for society generally, as well as for injured persons. It is therefore in the public interest that in cases where large sums of damages are awarded for personal injury or death, the parties have both the opportunity and incentive to conclude a structured settlement.

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<sup>29</sup> H Luntz, *Assessment of Damages for Personal Injury and Death*, 4<sup>th</sup> edn (2002), para 1.2.24.

13.125 For this reason, the Panel believes (along with many who made submissions to us) that structured settlements should be encouraged, and that incentives should be provided to overcome the apparent reluctance of both plaintiffs and defendants to enter into structured settlements.

13.126 The Panel welcomes the announcement made in September 2001 by the Federal Government to the effect that it would introduce amendments to tax legislation designed to encourage the use of structured settlements in cases of personal injury and death. Apart from tax arrangements, the other major requirement for a successful structured settlement system is adequate capacity in the insurance market to provide the annuity arrangements on which structured settlements are built. The Panel has been told that there may be problems in this area, and we suggest further investigation of this matter.

13.127 However, the Panel thinks that more could and should be done to encourage the use of structured settlements in serious personal injury cases. We recommend that there be included in rules of court in each jurisdiction a provision to the following effect:

Before judgment is entered in any action for damages for negligently-caused personal injury or death where:

- (a) in a case of personal injury, the award includes damages in respect of future economic loss (including loss of superannuation benefits), loss of gratuitous services and future health-care expenses that in aggregate exceed \$2 million; or
- (b) in a case of death, the award includes damages for loss of future support and other future economic loss that in aggregate exceed \$2 million,

the parties should be required to attend mediation proceedings with a view to securing a structured settlement.

### **Recommendation 57**

**Rules of court in every jurisdiction should contain a provision to the following effect:**

**Before judgment is entered in any action for damages for negligently-caused personal injury or death where:**

- (a) In a case of personal injury, the award includes damages in respect of future economic loss (including loss of superannuation benefits, loss**

of gratuitous services and future health-care expenses) that in aggregate exceed \$2 million; or

- (b) In a case of death, the award includes damages for loss of future support and other future economic loss that in aggregate exceed \$2 million,

the parties must attend mediation proceedings with a view to securing a structured settlement.

## Loss of superannuation benefits

13.128 Most employees receive benefits in the form of contributions by their employers to superannuation funds. These contributions may cease if the employee is unable to work as a result of injury (or death). Therefore, compensation may be awarded for loss of future employer contributions in addition to damages for loss of future earning capacity (or for loss of support by a dependant). The compensation to be awarded is the present-day value of the loss attributable to the fact that contributions, that would have been made to the fund if the worker had not been injured or killed, were not made. There is, however, uncertainty as to the method that should be used in calculating the plaintiff's loss in such circumstances.

13.129 According to one method (the *Cremona*<sup>30</sup> method) the relevant loss is not just the amount of the lost contributions, but also the forgone income and capital growth that they would have generated while in the superannuation fund. The appropriate compensation is the present (discounted) value of the aggregate of the contributions, the income and the capital growth.

13.130 According to another method (the *Jongen*<sup>31</sup> method), the relevant loss is the present (discounted) value of the lost contributions alone without reference to forgone income or capital growth.

13.131 The *Cremona* method has been criticised on the ground that the plaintiff is effectively compensated twice over — once by being awarded damages representing not only the value of the lost contributions but also the forgone interest and capital growth that would have been derived from them; and a

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30 *RTA v Cremona* [2001] NSWCA 338.

31 *Jongen v CSR Ltd* (1992) ATR 81-192.

second time by being able to invest those damages and thereby generate income and capital growth.

13.132 The Panel considers that the criticism of *Cremona* is not without substance and prefers the *Jongen* method. The Panel recognises, however, that even the *Jongen* method might be thought undesirably complex because the amount of the relevant contributions will vary from case to case. It was suggested therefore that damages for loss of superannuation contributions should be calculated as a fixed percentage of the damages for loss of earning capacity (subject to the cap on such damages). The Panel considers this to be an appropriate solution to the problem. In the view of the Panel, the fixed percentage should be the minimum level of compulsory employers' contributions stipulated under the relevant Commonwealth legislation.<sup>32</sup>

13.133 The advantage of this approach is that it would bring about certainty, simplify matters and reduce costs. Sophisticated calculations by accountants and actuaries would be rendered unnecessary, opportunities for disagreement between the parties would be reduced, and out-of-court settlements of claims would be facilitated.

#### **Recommendation 58**

**The Proposed Act should embody the following principles:**

- (a) Damages for loss of employer superannuation contributions should be calculated as a percentage of the damages awarded for loss of earning capacity (subject to the cap on such damages).**
- (b) The percentage should be the minimum level of compulsory employers' contributions required under the relevant Commonwealth legislation (the *Superannuation Guarantee (Administration) Act 1992 (Cwth)*).**

#### **Collateral benefits**

13.134 'Collateral benefits' (money or services) are benefits received by a plaintiff, as a result of injury or death, from sources other than the defendant. Examples of collateral benefits are charitable payments, statutory entitlements under social security and health-care schemes, and contractual entitlements

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<sup>32</sup> *Superannuation Guarantee (Administration) Act 1992 (Cwth)*.

under employment contracts, superannuation and pension funds, and payments under insurance policies.

13.135 Certain collateral benefits are set off against the damages recoverable by the plaintiff from the defendant; others are not. From one point of view, when a collateral benefit is not set off against damages, the basic principle of the law of damages, that the plaintiff should receive full compensation but no more, is breached.

13.136 On the other hand, the effect of setting off collateral benefits is that the negligent defendant gets what might be thought an unfair advantage at the expense of the plaintiff.

13.137 The law has found it difficult to resolve the conflict between these two points of view in a consistent and logical way. As a result, the common law rules governing the offsetting of collateral benefits are complex and sometimes difficult to reconcile with each other.

13.138 Additional complexity arises from the patchwork of statutory provisions about the offsetting of various collateral benefits. The way particular benefits are dealt with may vary from one jurisdiction to another.

## Death claims

13.139 In most jurisdictions, the rules governing offsetting of collateral benefits in personal injury actions are different from those applicable to death actions. The basic common law rule is that benefits accruing from the death have to be set off against loss suffered as a result of the death. But this rule has been so heavily modified by statute that it is probably true to say that there is a general statutory principle against offsetting.

13.140 In all Australian jurisdictions, any sum paid or payable on the death of the deceased under any contract of insurance is ignored in assessing damages for loss of support.<sup>33</sup> Sums paid or payable out of any superannuation, provident or like fund, or by way of benefit from a friendly society, benefit society, or trade union are also ignored.<sup>34</sup> However, where the plaintiff's loss is the benefit of the matured fund, the statute will not preclude account being taken of payments made by the fund to the plaintiff.<sup>35</sup>

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<sup>33</sup> Luntz at para 9.5.2.

<sup>34</sup> Luntz at para 9.5.7.

<sup>35</sup> *RTA v Cremona* [2001] NSWCA 338.

13.141 While such liberality is understandable as an expression of compassion for dependants, it is arguably one of the factors that has contributed to current dissatisfaction with negligence law.

13.142 In any event, the Panel considers that the basic principle should be the same in personal injury and death cases, namely that benefits accruing from the injury or death should be set off against losses suffered. This conclusion is consistent with the principles outlined at the beginning of this Chapter, which have guided our thinking in this area.

### Categories of collateral benefits

13.143 Collateral benefits may accrue from one of three sources: statutory provision (for example, social security and health-care benefits); contract (e.g. sick pay and the proceeds of insurance policies); and benevolence, i.e., charity (e.g. donations and gratuitous services).

13.144 The statutory social security and health-care benefits regime is complex. The legislation contains detailed provisions designed to prevent people recovering both damages and state benefits in respect of the same loss. No submissions recommending change in this area have been made to the Panel and, given the time constraints under which the Review has been conducted, the Panel does not make any recommendations in this regard.

13.145 Under current law, collateral benefits in the form of benevolence or charity are not set off against damages. The Panel considers that any change to the law in this regard would not be acceptable to the community and is not desirable.

13.146 It is in the area of contractual benefits that there is scope for altering the present rules and, particularly in the area of insurance and superannuation.

13.147 In considering insurance benefits, it is first necessary to note the distinction between indemnity and non-indemnity policies. If a plaintiff receives payments from an insurer under an indemnity policy, those payments are set off against damages payable by the defendant, and the insurer can recover the payments in question from the defendant by exercising its right of subrogation. On the other hand, payments received under a non-indemnity policy are not set off against damages, and the insurer has no right to recover the payments from the defendant by exercising a right of subrogation. So a plaintiff may receive both benefits under a non-indemnity insurance policy and damages in respect of one and the same loss.



13.148 The usual rationale for the rule that payments under non-indemnity policies are not offset against the plaintiff's damages is that the payments are treated as having been received by the plaintiff under a contract with the insurer whereby the plaintiff provided for the contingency of injury or death, and not as a result of injury suffered by the plaintiff as a result of the defendant's negligence. Another way it is put is that because the insurance payments were bought and paid for by the plaintiff, they are a result of foresight and thrift rather than the injury.

13.149 Personal accident insurance policies are non-indemnity policies. This means that a person who sustains personal injuries can recover payments under a personal accident policy and also damages from the wrongdoer on account of those injuries. The insurer is not subrogated to the rights of the plaintiff against the defendant. This position has been the subject of criticism. It is sufficient in this regard to point to property insurance. Because property damage insurance is classified as indemnity insurance, a property owner cannot recover both tort damages and the proceeds of a property insurance policy as a result of damage to the property. Once the insurer has paid out under the policy, it is subrogated to the owner's tort claim. The owner cannot collect both the insurance money and damages from the wrongdoer. There appears to be no principle that justifies the different ways the law treats property damage insurance on the one hand and personal accident insurance on the other.

13.150 Matters are made more complex by the fact that the distinction between indemnity and non-indemnity insurance is difficult to draw because the basis of distinction is unclear. Policies are often categorised as indemnity or non-indemnity on the basis of authority rather than analysis.

13.151 Subject to what we shall refer to as 'the like-against-like' principle, the Panel is of the view that the proceeds of personal accident and life insurance policies should be set off against damages for personal injury and death. The most important justification for this conclusion is the proposition that plaintiffs should not recover more than they have lost. This is consistent with the principles underlying this Chapter. Offsetting of insurance payments against damages will also further objectives of the Terms of Reference by reducing damages awards in some cases.

13.152 We are also of the view that superannuation payments and pensions received as a result of injury or death should be set off against damages. Generally, such benefits are ignored in the assessment of damages for essentially the same reasons that payments under non-indemnity insurance policies are ignored — namely that the plaintiff paid for the benefits personally

or earned them as part of remuneration for work done for an employer. Our reasons for thinking that they should be set off against damages are essentially the same as our reasons for supporting the setting off of payments received under non-indemnity insurance policies.

### Off-setting and the 'like-against-like' principle

13.153 Once it is accepted that the proceeds of insurance policies should be set off against damages, the next issue that arises concerns how the set-off should operate. One possibility would be to set off collateral benefits against the total amount awarded under all heads of damages. By contrast, under the like-against-like principle, collateral benefits would be set off only against heads of damages of the same nature as the collateral benefit. So, for instance, insurance benefits designed to replace lost income would be set off against damages for loss of earning capacity, but not against damages for non-economic loss. Similarly, disability benefits received under an insurance policy would be set off against damages for non-economic loss, but not against damages for cost of care. Under the like-against-like principle, the nature of the head of damage for which the plaintiff seeks to be compensated must be identified. If it can be shown that the plaintiff has received or will receive, a collateral benefit of the same nature as that head of damages, the benefit may be set off, but not otherwise.

13.154 The important difference between the 'aggregate set-off' principle and the like-against-like principle is that the former may result in greater reduction of the total damages award than the latter. Under the like-against-like principle, collateral benefits are only set off against damages to the extent that they correspond to one or other head of damages. If the relevant collateral benefit is greater in amount than the corresponding head of damages, the benefit will not be set off to the extent that it exceeds the damages awarded under that head. On the other hand, under the aggregate set-off principle, the excess amount would be set off against any other damages to which the plaintiff was entitled regardless of the head under which those damages had been awarded.

13.155 Traditionally in personal injury actions, the lump sum has been considered to be a single indivisible award. Calculating the damages under separate 'heads' was considered to be merely a matter of convenience. Whether an award was correct or not depended on the size of the aggregate lump sum and not the amounts awarded under each head. Now, by contrast, lump sum awards tend to be treated as the sum of the various amounts awarded under each head of damages, and appeals against damages awards

are typically based on the way particular heads of damages were assessed rather than on the size of the total award.

13.156 For that reason, the Panel is of the view that the like-against-like principle should be adopted in preference to aggregate off-setting. We understand that, in terms of the objective of limiting damages, the aggregate set-off principle could achieve more than the like-against-like principle. However, we consider that the latter is more principled than the former and to be preferred for that reason.

### Off-setting and caps

13.157 It is necessary to consider the interaction between the rules about off-setting of collateral benefits and caps on damages, especially damages for loss of earning capacity. We have pointed out in paragraph 13.64 that it would be open to high-earners to insure against loss of income in excess of the cap. Indeed, one of the reasons for imposing a cap is to encourage high-earners to buy such insurance. It follows that if the proceeds of such insurance are to be set off against damages for loss of earning capacity, they must be set off before the cap is applied, and we recommend a statutory provision to this effect.

### Summary

13.158 To summarise, the Panel considers that:

- (a) It is not necessary to make any recommendation about the offsetting of statutory social security or health-care benefits.
- (b) Charitable benefits should not be deducted from damages.
- (c) All other collateral benefits should be deducted (in cases of both personal injury and death), but only in accordance with the like-against-like principle.
- (d) Collateral benefits should be set off before any damages cap is applied.

### **Recommendation 59**

**The Proposed Act should embody the following principles:**

- (a) **In assessing damages in an action under this Act, whether for personal injury or death, all collateral benefits received or to be received by the**

**plaintiff as a result of the injury or death (except charitable benefits and statutory social-security and health-care benefits) should be deducted from those damages on the basis of the like-against-like principle.**

- (b) Collateral benefits should be set off against the relevant head of damages before any relevant damages cap is applied.**

## Exemplary and aggravated damages

13.159 Exemplary damages are damages awarded over and above the amount of damages necessary to compensate the plaintiff. Their purpose is to punish the defendant, to act as a deterrent to the defendant and others who might behave in a similar way, and to demonstrate the court's disapproval of the defendant's conduct.

13.160 Aggravated damages are damages awarded to compensate the plaintiff for increased mental suffering caused by the manner in which the defendant behaved in committing the tort.

13.161 The power to award exemplary damages is to be exercised with restraint.<sup>36</sup> Moreover, exemplary damages cannot be awarded if the defendant has been convicted and sentenced in criminal proceedings arising from the same conduct.<sup>37</sup>

13.162 There are many relevant legislative limitations on the power of courts to award exemplary damages. The following are examples:

- (a) Exemplary or punitive damages are not available in NSW in actions for personal injury or death caused by negligence.<sup>38</sup>
- (b) Exemplary damages are not available under the NSW and Victorian motor vehicle accident regimes.<sup>39</sup>

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<sup>36</sup> *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448.

<sup>37</sup> *Gray v Motor Accident Commission* (1998) 196 CLR 1.

<sup>38</sup> *Civil Liability Act 2002* (NSW), s 21.

<sup>39</sup> *Motor Accidents Compensation Act 1999* (NSW), s 144; *Motor Accidents Act 1988* (NSW), s 81A; *Transport Accident Act 1986* (Vic), s 93; *Accident Compensation Act 1985* (Vic), s 135A (7) (c) and for post 20 Oct 1999 s 134 AA, s 134 AB (2) (c), s 134 A;

- (c) Exemplary damages are not available against motor vehicle insurers in Queensland and SA.<sup>40</sup> However, if the court is of the view that the relevant conduct was sufficiently reprehensible, exemplary damages may be awarded against the insured person.
- (d) Exemplary or punitive damages are not available in personal injury proceedings in Queensland.<sup>41</sup>
- (e) The Northern Territory proposes to abolish awards of exemplary damages in respect of personal injury and death.<sup>42</sup>
- (f) The Crown (in some jurisdictions) is not liable to pay exemplary or punitive damages for the conduct of police officers.<sup>43</sup>
- (g) Exemplary damages cannot be recovered in personal injury proceedings against a deceased estate in the ACT, NT and Tasmania.<sup>44</sup>

13.163 The main arguments in favour of retaining exemplary damages are:

- (a) It is a legitimate function of the civil law to penalise reprehensible conduct; exemplary damages fulfil this function.
- (b) Exemplary damages provide a way of punishing defendants where criminal, regulatory and administrative sanctions are inadequate.

13.164 Various arguments have been used to support abolition of exemplary damages. They are:

- (a) Exemplary damages confuse the punishment function of the criminal law with the compensation function of the civil law.
- (b) Exemplary damages constitute an undeserved windfall for the plaintiff.

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<sup>40</sup> *Motor Accidents Insurance Act 1994* (Qld), s 55 as amended; *WorkCover Queensland Act 1996* (Qld), s 319; *Motor Vehicles Act 1959* (SA), s 113A as amended.

<sup>41</sup> *Personal Injuries Proceedings Amendment Act 2002* (Qld), s 8.

<sup>42</sup> *Personal Injuries (Liabilities and Damages) Bill 2002* (NT), s 19.

<sup>43</sup> *Australian Federal Police Act 1979* (Cth), s 64B (3); *Police Service Administration Act 1990* (Qld), s 10.5 (2); *Police Administration Act 1978* (NT), s 163 (3)

<sup>44</sup> *Law Reform (Miscellaneous Provisions) Act 1955* (ACT), s 5; *Administration and Probate Act 1935* (Tas), s27 (3); *Law Reform (Miscellaneous Provisions) Act* (NT), s 6.

- (c) Awards of exemplary damages are unpredictable especially in jury trials.
- (d) Awards for exemplary damages are often too high.

13.165 The patchwork of legislation now in force limiting or abolishing exemplary damages in various types of case can be taken to reflect a community view that the remedy of exemplary damages is neither necessary nor desirable. In this light, the Panel recommends the enactment of a general provision abolishing exemplary damages in relation to claims for negligently-caused personal injury or death.

13.166 There are also many relevant legislative limitations on the power of courts to award aggravated damages. The following are examples:

- (a) Aggravated damages are not available in NSW for an action for personal injury or death caused by negligence.<sup>45</sup>
- (b) Aggravated damages are excluded by the motor vehicle accident regimes in NSW and Vic.<sup>46</sup>
- (c) Aggravated damages are not available in personal injury proceedings in Queensland.<sup>47</sup>
- (d) Aggravated damages are not available against motor vehicle insurers in SA and insured persons are not entitled to be indemnified against such awards.<sup>48</sup>
- (e) The Northern Territory proposes to abolish awards for aggravated damages in respect of personal injury and death.<sup>49</sup>

13.167 The main argument in favour of retaining aggravated damages is that, where a plaintiff has suffered an outrageous indignity, it is appropriate to make a separate, distinct award of damages. The main argument for abolishing them is that if they are truly compensatory, they are unnecessary because compensation for mental distress can be given under other heads. There is also

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<sup>45</sup> *Civil Liability Act 2002* (NSW), s 21.

<sup>46</sup> *Motor Accidents Compensation Act 1999* (NSW), s 144; *Motor Accidents Act 1988* (NSW), s 81A; *Transport Accident Act 1986* (Vic), s 93; *Accident Compensation Act 1985* (Vic), s 135A (7) (c) and for post 20 Oct 1999 s 134 AB (22) (c).

<sup>47</sup> *Personal Injuries Proceedings Amendment Act 2002* (Qld), s 8.

<sup>48</sup> *Motor Vehicles Act 1959* (SA), s113A.

<sup>49</sup> *Personal Injuries (Liabilities and Damages) Bill 2002* (NT), s 19.

the danger that if they are retained while exemplary damages are abolished, they will be used for punitive purposes. The Panel recommends that aggravated damages be abolished.

**Recommendation 60**

**The Proposed Act should contain a provision abolishing exemplary and aggravated damages.**

**Indexation of fixed monetary amounts**

13.168 Recommendations 45, 48 and 57 refer to fixed monetary amounts. In order to maintain the relative value of these amounts over time the Panel recommends that they be indexed to CPI.

**Recommendation 61**

**The Proposed Act should provide that the fixed monetary amounts referred to Recommendations 45, 48 and 57 should be indexed to the CPI.**