

State-By-State *Legislative*

New South Wales



TOM GOUDKAMP, NSW

In 2002, the citizens of NSW had their rights to compensation severely curtailed by a government which embarked on its own style of 'tort reform' which has pre-empted the negligence review panel report and tort reform elsewhere in Australia.

The tort reform came in two stages after lawyers were prohibited from advertising 'no-win, no-pay' arrangements and all electronic advertising for personal injury work on the dubious basis that such advertising was creating frivolous and unmeritorious claims.

THE CIVIL LIABILITY ACT 2002

This Act was the first stage of the process. It was passed on 18 June 2002

and operated retrospectively from 20 March 2002. The Act restricts damages, imposes onerous obligations on lawyers and restricts legal costs.

Application

The restriction on damages applies to personal injury claims even if damages are recovered in an action for breach of contract or in any other action.¹ It excludes transport, work accidents and dust disease cases.

Non-economic loss

Section 16 prescribes that no damages may be awarded to a claimant for non-economic loss unless the severity of the non-economic loss is at least

15% of a most extreme case, with a maximum of \$350,000 to be indexed and increased on 1 October annually. A deductible applies to restrict recovery of non-economic loss between 15% and 32% of a most extreme case. Currently 15% of a most extreme case has a non-economic loss value of \$3,500, 20% \$12,500, 25% \$23,000 and 30% \$80,500.

Economic loss

Damages for economic loss are capped at three times the gross average weekly earnings at the date of the award. The common law discount rate of 3% on future loss has been increased to 5%. This increase will

There have been a lot of changes this year in relation to public liability, medical negligence and other areas of plaintiff law. In the following pages you will find a summary of the key changes that have occurred in each state and territory as at 15 November 2002, including a handy comparative table at the end of the section. Further updates on legislative change will be available on Plaintiff Online from January 2003 at www.apla.com.au.

Changes 2002



impact harshly on those who have suffered major injuries. This is at odds with the government's supposed policy of providing severely injured people with proportionately greater compensation than those who have been less seriously injured.

A court cannot award damages for future economic loss unless the claimant satisfies the court that assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury. The court is required to make a finding on the percentage possibility that the events might have occurred but for the injury,

and adjust the loss claimed by that percentage.² This provision will erode 'cushion' claims for diminution of earning capacity.

Gratuitous care

No damages may be awarded to a claimant for gratuitous attendant care services unless the court is satisfied that:

- There is or was a reasonable need for the services
- The need arose solely because of the injury to which the damages relate
- The services would not have been provided but for the injury
- The services were provided for more than six hours per week and

for more than six months.

If more than 40 hours per week of gratuitous care has been or will be provided, the maximum amount of damages that may be obtained under this head is the average weekly total earnings of all employees in New South Wales.³

Interest

Interest on damages for past non-economic loss and past gratuitous care is abolished.⁴

Exemplary and aggravated compensatory damages

These damages are abolished in negligence cases.⁵ ►

Contributory negligence

Contributory negligence has become a partial defence to claims brought under the *Compensation to Relatives Act 1897* (NSW).⁶

Restriction of legal costs

The *Legal Profession Act 1987* (NSW) has been amended so that where damages are below \$100,000 the claimant's costs are fixed at 20% of the amount recovered or \$10,000, whichever is the greater, and the defendant's costs are fixed at 20% of the amount *sought to be recovered* by the claimant or \$10,000, whichever is the greater.

Costs are defined as legal services provided by a solicitor or barrister but do not include disbursements.

Both claimants' and defendants' solicitors may contract out of the costs provisions and recover costs on a solicitor/client basis. The costs restrictions do not apply to motor vehicle or workers' compensation claims.

Offers of compromise

The costs restrictions do not prevent the awarding of full indemnity costs where a party beats a reasonable offer of compromise.⁷

Reasonable prospects of success

Solicitors or barristers must not provide legal services on a claim or defence of a claim for damages unless they reasonably believe, on the basis of provable facts, or a reasonably arguable view of the law, that the claim or the defence has reasonable prospects of success. This applies to all civil claims, including motor vehicle and work cases notwithstanding any obligation that the lawyer may have to act in accordance with the instructions of the client.

To act or continue to act in a case without reasonable prospects of success may constitute unsatisfactory professional conduct or professional misconduct. Thus a lawyer who does not

believe that there are reasonable prospects of success must turn away a prospective case notwithstanding that some prospect of success may exist. The prohibition may effectively bring judicial reconsideration of existing precedents pertaining to damages to an end in New South Wales. For instance, how often will claims be commenced in the face of an unfavourable precedent even though there is some chance of a favourable development of the law, perhaps only after an appeal to the High Court? At one time it would have been considered unreasonable for a consumer to bring a claim against a manufacturer in respect of damage caused by the consumption of a beverage which contained the remains of a snail.⁸

The restriction does not apply to preliminary legal services provided for the purpose of a proper and reasonable consideration of whether a claim or defence has reasonable prospects of success.⁹

Furthermore, where legal services have been provided without reasonable prospects of success, the court either by its own motion or on the application of another party, can make the solicitor or barrister personally liable for costs.

The obligation in relation to reasonable prospects is ongoing. If circumstances change and the prospects are no longer reasonable there is an obligation on the lawyer to withdraw the legal services.

CIVIL LIABILITY AMENDMENT (PERSONAL RESPONSIBILITY) BILL 2002

This Bill represents the second stage of tort reform in New South Wales. The main features of the Bill are as follows.

Foreseeability

The Bill redefines 'foreseeability': a possibility does not have to be far fetched or fanciful before it can be considered not reasonably foreseeable.

The fact that a risk could have been avoided by doing something differently does not of itself give rise to liability. Nor does the subsequent taking of action to remove a risk constitute an admission.

Inherent or obvious risk

There is no duty of care in respect of a risk that a reasonable person would consider to be inherent or obvious.

Recreational activities

There is no duty of care in respect of a risk or to warn of a risk if the risk was the subject of a risk warning to the person. It applies to all recreational activities, not just high risk sports or recreational pursuits. The warning can be given in writing or orally, for example, by a loudspeaker.

This provision is particularly harsh in respect of an incapable person. If that person is accompanied by another person who is not an incapable person, the incapable person is bound by the risk warning (even if the incapable person was not warned of the risk). It is not clear whether the risk warning applies to someone who cannot read, write or understand English. An incapable person includes a child.

Waiver of contractual duty

Section 32 provides that a contract for the supply of recreational services may exclude liability and overturns any duties under the *Fair Trading Act 1987* (NSW).

Professional negligence

There is no liability if it is established that the professional acted in a manner that, at the time the service was provided, was widely accepted in Australia by peer professional opinion as competent professional practice and it does not matter that there are differing opinions in the profession. This does not apply in respect of giving a warning, advice or other information,

the consequence of the failure of which to provide would result in a trespass to the person.

Liability of public and other authorities

In determining liability regard has to be made to the availability of resources. In respect of claims based on breach of statutory duty, an authority is only liable if its act or omission was so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions and there is recovery only if the statute makes clear that damages are payable for its breach. This provision will exclude liability for breach of statutory duty regardless of how unreasonable and dangerous the conduct of the authority was, as most statutes do not contain any such provision.

Failure to exercise regulatory functions

Liability is excluded unless there is a statutory right to require an authority to exercise such functions.¹⁰ This excludes any duty of care for negligent acts or omissions by an authority which could not be compelled in law to undertake those activities and which is expressly liable in damages. For practical purposes the departments of states,

the Crown and local government are rendered immune from suit. This goes far beyond reinstating some form of non-feasance defence.

Intoxication

This provision applies also to motor vehicle cases. Damages are reduced where the injured person's intoxication impairs his or her ability to exercise due care and skill.

If a court is satisfied that the death or injury is likely to have occurred even if the person had not been intoxicated, it is presumed that the person was guilty of contributory negligence, unless satisfied that the intoxication did not contribute in any way. A 25% contribution is presumed.

Self defence and recovery by criminals


There is no liability for conduct carried out in self defence against conduct which was unlawful. A person must believe that the conduct is necessary (but not necessarily reasonable). Thus an irrational or grossly unreasonable response to a trivial crime leading to major injury may result in no right to damages by the injured person.

Nervous shock

The Bill sets out a code for recovery for nervous shock. Damages for psychological or psychiatric injury can only be

awarded in favour of the victim or a bystander or a close relative of the victim, who as a consequence of the death or injury has suffered a demonstrable psychological or psychiatric injury and not a normal emotional or cultural grief reaction. Absurdly, damages for nervous shock are to be reduced in the same way as any other damages for the contributory negligence of the victim. Thus, if a bystander sees an horrific accident and suffers nervous shock, without even knowing the perpetrator or the victim, the damages of the bystander can be reduced because of the victim's intoxication or some other contributory negligence.

Commencement

The provisions will apply retrospectively from 3 September 2002 except where proceedings have already been commenced or judgment or settlement entered into. 

Footnotes:

- ¹ s9(3).
- ² s13.
- ³ s15(4).
- ⁴ s18(1).
- ⁵ s21.
- ⁶ s20(1).
- ⁷ s198F.
- ⁸ *Donoghue v Stevenson* [1932] AC 562.
- ⁹ s198K.
- ¹⁰ s31.

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Queensland



IAN BROWN, QLD

The *Personal Injuries Proceedings Act 2002 (QLD) (PIPA)* commenced on 18 June 2002. With limited express exceptions, the Act applies to all applicable personal injuries claims in relation to which proceedings were not commenced, or a written offer to settle was not made, prior to 1 July 2002.

The Act does not apply to claims governed by the:

- Motor Accident Insurance Act 1994
- WorkCover Queensland Act 1995
- Criminal Offence Victims Act 1995
- Anti Discrimination Act 1991
- Civil Aviation (Carriers' Liability) Act 1991
- ex gratia payments to victims of crime under the repealed s663D of the Criminal Code.

The Act also does not apply to:

- personal injury in respect of which a claim was commenced in a court, outside Queensland or Australia, before 18 June 2002;
- dust related conditions.

If the Act giving rise to the claim was:

- an intentional act done with intent to cause personal injury; or
- an unlawful sexual assault or other unlawful sexual misconduct

then the following provisions of the Act do not apply to any claim:

- reduction in damages for a claimant's failure to mitigate;
- restrictions on awards of exemplary, punitive or aggravated damages;
- restrictions on damages for loss of earnings or earning capacity;
- 5% discount rate for future losses;
- restrictions on claims for loss of consortium/servitium;
- restrictions on *Griffiths v Kerkemeyer*

damages;

- restrictions on interest recoverable on damages;
- legal costs restrictions.

Due to its retrospective operation, the Act has a complex series of transitional provisions. These are summarised following.

For Injuries Sustained 18/9/99-18/12/00

- If a proceeding has not been commenced, or a written offer to settle made, prior to 1 July 2002; THEN
- the claimant may commence an action in court after the expiration of the limitation period provided a complying notice of claim is given before 18 June 2003; OR
- the claimant may commence an action in court after 18 June 2003 AND after the expiration of the limitation period *with the leave of the court* provided:
 1. it is not more than six months after the delivery of a complying notice of claim; AND
 2. it is not later than 18 December 2003.

Example 1

- Claimant injured on 1 September 1999.
- Proceedings not commenced prior to 1 July 2002.
- Complying Notice of Claim delivered 1 June 2003.
- Proceedings can be commenced after limitation period expires (i.e. after 1 September 2002) whilst claimant complies with pre court procedures. Please note, s42(1) PIPA – proceedings must be filed within 60 days after conclusion of

the compulsory conference – also note s42(1)(b) PIPA – possible extension of the 60 day period.

- The claimant could commence proceedings immediately after delivering a complying notice (i.e. on 2 June 2003) however the proceeding is stayed pending compliance with the pre court procedures.

Example 2

- Claimant injured on 1 September 1999.
- Proceedings not commenced before 1 July 2002.
- Claimant delivers compliant Notice of Claim on 1 July 2003.
- Claimant must commence proceedings prior to the end of 18 December 2003 *but only with the leave of the court*.
- The proceedings are thereafter stayed pending compliance with the pre court procedures.

For Injuries Sustained On Or After 19/12/00

The provisions of the PIPA apply unless proceedings were commenced, or a written offer to settle was made, prior to 1 July 2002.

Disbursements

This applies to claims where proceedings are not commenced, or a written offer to settle made, prior to 1 July 2002. These claims are not excluded from the operation of the Act. Where:

- a disbursement was paid before 1 July 2002; OR
 - a disbursement was incurred (e.g. deferred etc. fees) before 1 July 2002;
- the disbursement is recoverable despite

the application of the costs restrictions otherwise imposed by the PIPA.

**Actions Commenced
1/7/02-29/8/02 for Incident Prior
to 18/6/02**

Any proceedings commenced in the window period referred to above are stayed pending compliance with the pre court procedures, i.e. notice of claim, disclosure, compulsory conferencing etc.

**Extension of Time for Giving of
Notice for Claims**

For injuries sustained before 18 June 2002 and which claims are subject to the Act, the Act requires the giving of the initial notice within the earlier of:

- Nine months from the date of the incident or first appearance of symptoms;
- One month from the date of the first consultation with a lawyer;
- Where a solicitor is acting for a

claimant injured prior to 18 June 2002 and which claim is subject to the Act, the transitional provisions provide that the notice must be given on or before 29 December 2002 on the basis that the date of the first consultation with the lawyer is deemed to be not earlier than 29 November 2002.

In respect of claims for injuries sustained before 18 June 2002 and in respect of which the client consults the lawyer after 29 November 2002, the date for the giving of the notice is the earlier of:

- One month from the date of consultation; OR
- 1 May 2003.

The Act abolishes the right to trial by jury (already abolished in motor vehicle and workers' compensation claims), such abolition being retrospective regardless of whether the action was commenced or an offer to settle made

before 1 July 2002.

The Act declares that the following provisions are matters of substantive law:

- Claims procedures – i.e. the requirement to provide a notice of claim and the consequent claims procedures;
- Obligations of the parties – i.e. disclosure obligations and medical reports etc;
- Compulsory conferences – i.e. the requirement to conference a matter prior to the commencement of proceedings, mandatory final offers etc.

The Act does not specify the manner in which service of a notice of claim is to be effected and this is already beginning to cause problems in practice with respondents denying service of notices in the mail and insisting upon personal service, in some cases despite the corporations law provisions as to service.

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State-By-State Legislative Changes 2002

One particularly serious anomaly in the Act is the provision dealing with an unresponsive respondent. Section 13 is effectively a deeming provision – deeming a notice of claim compliant in the absence of a response. However, s13 is only triggered by a response to a notice under s12 of the Act. Where a respondent completely ignores or fails to respond to a notice, the deeming provision does not apply.

What then does a claimant do? It seems the claimant's only remedy is to seek an order under s35 of the Act that empowers a court to order a party to take specified action to remedy a default within a specified time and make consequential orders including costs orders. Sections 13 and 35 are shortly to be tested in the District Court and an update on the decision will be circulated.

The advertising restrictions have already resulted in a large number of investigations by the Queensland Law Society and it is understood that the Society intends to be highly pro-active in adopting a rigorous approach to the enforcement of the restrictions. Practitioners are reminded that the penalties for breach of the advertising restrictions include, *inter alia*, charges of unprofessional conduct. **PL**

Victoria



PETER BURT, VIC

Introduction

In the context of an election being held in Victoria on 30 November 2002, the government introduced four Bills into parliament, three of which passed into law before parliament was prorogued on 4 November 2002.

The three bills that passed into law are:

1. *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (VIC)
2. *Transport (Highway Rule) Act 2002* (VIC)

3. *Limitation of Actions (Amendment) Act 2002* (VIC)

Wrongs and Other Acts (Public Liability Insurance Reform) Act

This Act contains a number of significant changes including:

- A cap on general damages of \$371,380;
- A cap on loss of earnings/earning capacity of three times average weekly earnings;
- In considering whether the conduct was negligent, courts must have

regard to the plaintiff's intoxication by alcohol or drugs and any illegal activity that the plaintiff was engaged in;

- An apology does not constitute an admission of liability;
- The discount rate for future economic loss is fixed at 5% and this operates retrospectively;
- Courts now have the power to make orders giving effect to structured settlements;
- Good Samaritans, acting in good faith, now enjoy an immunity from

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civil liability;

- Food donors now enjoy an immunity from civil liability in relation to consumption of donated food;
- Volunteers performing community work enjoy an immunity from civil liability, however, the liability of volunteers passes on to the community organisations they 'work' for;
- The *Goods Act* 1958 (VIC) has been amended to validate exclusion clauses with respect to the sale of recreational services.

The major reforms relate to the capping of general damages and damages for lost income/lost earning capacity. These changes apply to all injuries received whether before, on or after the commencement day. This does not apply to proceedings commenced in court before the commencement day. The alteration to the discount rate from 3% to 5% applies to all injuries and all proceedings, regardless of when the proceedings may have

been commenced.

Transport (Highway Rule) Act

This Act reinstates the highway rule, namely the immunity enjoyed by road-making authorities for losses flowing from non-feasance as opposed to misfeasance.


Limitations of Actions (Amendment) Act

This Act, in respect of all causes of action for personal injury other than common law claims arising under the WorkCover legislation or the Transport Accident Act, now have a limitation period of three years. The position with respect to people under a disability is unaltered, as is the right to apply for an extension under Section 23A of the Limitations of Actions Act.

The *Personal Injuries Procedures Bill* 2002 (VIC), which was second read in October 2002, lapsed as a result of parliament being prorogued on 4 November

2002. This Bill contained provisions restricting party/party costs payable in actions worth less than \$50,000. It is possible that this Bill may be resuscitated during the autumn session of parliament depending upon the outcome of the state election on 30 November 2002.

Conclusion

The ministers introducing each of these Acts outlined in their second reading speeches that these proposals were stop gap measures pending a complete review as recommended by the panel chaired by Justice Ipp. It therefore seems likely that the first half of 2003 will be characterised in Victoria by further legislative changes likely to significantly impinge upon the rights of accident victims in this state. Significantly, it seems probable that the Ipp panel recommendations to codify the law of negligence will be implemented in Victoria, regardless of who wins the election. 

Tasmania



KASSIE JAMES, TAS

So far, Tasmania has had no change to the law as a result of the 'litigation explosion' hysteria sweeping our nation.

Before you all decide to move down here to practice law do not forget the weather at the APLA National Conference, and bear in mind that we already have a 7% discount rate, no damages for gratuitous care, no interest on past damages, very low awards for pain and suffering, limitation periods which run from the date of the tort regardless of the plaintiff's knowledge, and a 30% whole person impairment threshold for work place injuries. One would think that given the current law the government had minimal scope for further eroding plaintiff rights. It is a sad indictment on the law in Tasmania


when the Ipp recommendations appear an attractive proposition.

Minimal scope they may have but, nevertheless, the government has decided to make a further contribution to boosting insurer coffers and so has introduced the *Civil Liability Bill* 2002 (TAS).

The Bill introduces a presumption of contributory negligence when a plaintiff is intoxicated to the extent that their capacity to exercise due care and skill is affected, unless the plaintiff can establish that the intoxication did not contribute in any way to the cause of the death or injury. If the presumption applies, damages are to be reduced by 25% or more. Intoxication includes drugs taken for medicinal purposes unless the plaintiff was unaware of the

effect of the drug. It excludes all non self-induced intoxication.

The Bill prevents a court from awarding damages to a plaintiff (or to the dependants of a plaintiff) for injury or death where the plaintiff was engaged in conduct that constitutes a serious offence at the time of suffering the injury or death, and where the conduct contributed materially to the injury or death. Whether the conduct constitutes a serious offence is assessed on the balance of probabilities. A serious offence is defined as an offence that is punishable by a term of imprisonment of more than six months.

The Bill has been passed in the House of Assembly and had its first reading in the Legislative Council on 1 November 2002. 

State-By-State *Legislative Changes* 2002

Australian

JOHN LITTLE, ACT

Capital Territory



Tort 'reform' is progressing, albeit fairly conservatively to date, via the *Civil Law (Wrongs) Act 2002 (ACT)*. Most of the Act came into force on 1 November 2002.

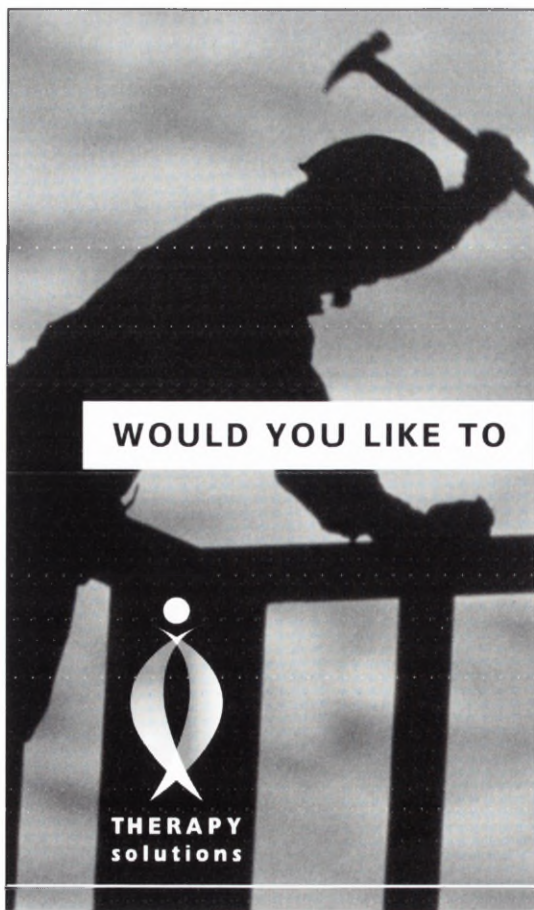
Chapter 4 of the Act limits economic loss to three times average weekly earnings. There is now a facility to enable the court to make a finding of liability without necessarily progressing to quantum.

Chapter 7 (which does not commence until 1 July 2003) purports to mitigate innkeepers' and carriers' liability at common law.

Chapter 8 of the Act concerns occupiers' liability and probably does nothing else than codify the common law after *Zaluzna*¹.

Chapter 10 (commences 1 January 2003) concerns legal costs for personal injuries claims where \$50,000 or less is recovered. In those circumstances, legal

costs (including advice from counsel) are capped at \$10,000. That figure does not include disbursements or counsel's fee on brief. There is no capacity to contract out of the provisions, however, there is wide scope to obtain (from the court or a taxing officer) relief from the cap in appropriate matters. The provision only applies where there is no fees agreement or arrangement in place before 1 January 2003. It is likely that a s155(3A) will be inserted into the Act in



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the next few weeks to provide that the restrictions on legal costs only apply to causes of action that arose before 1 January 2003 – but do not count on it.

The Bill did contain provisions which visited all sorts of odium upon plaintiff lawyers for commencing litigation which had no reasonable prospects of success. That part of the Bill was defeated by the Greens and the Democrats with the support of the Liberal Opposition. In essence, the Greens took the view that 'public interest' litigation would be curtailed by such a provision. It is expected that the government will reintroduce amended legislation touching on this subject before the end of the year.

Chapter 11 of the Act deals with

neutral evaluation. It does not commence until 30 April 2003.

It should be stressed that all of the above may well be subject to variation following the Ministerial Meeting on Public Liability Insurance which took place in Brisbane on 15 November 2002. As is evident from Attachment A to the Joint Communiqué, the Wrongs Act is the first of a three stage process in the ACT.

Legislation is currently in preparation for Stage 2 which contemplates:

- Greater certainty in personal injury outcomes, particularly in the case of medical negligence;
- Further measures fostering efficiency in case processing and management;

- Use of various forms of alternative dispute resolution, both before and after proceedings are commenced;
- Use of pre-trial procedures to assist settlement of cases before they get to court;
- Specific measures dealing with medical negligence, including defences.

Stage 3 will 'address unevenness in the efficiency with which civil claims are managed by further amendments to the Wrongs Act and related laws dealing with civil procedure (whatever that means). ■

Footnote:

- ¹ *Australian Sawway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

South Australia



BRENDAN CONNELL, SA

The South Australian Parliament passed three Acts in September 2002 which will apply from 1 January 2003 generally affecting the way damages claims in CTP, public liability, medical negligence and contractual duty of care cases are to be assessed.

Wrongs (Liability and Damages for Personal Injuries) Amendment Act 2002

This Act amends the *Wrongs Act* 1936(WA). The major change is the amendment of the 0-60 scale of the Wrongs Act. The new scale is calculated by six grades of multiples of \$1,150, the 'seven day' threshold and the prescribed minimum. Points between 0 and 10 are multiplied by \$1,150. Points between 11 and 20 are multiplied by a factor of 2 x \$1,150, that being \$2,300. The assessment is made by adding 10 points at \$1,150 to the number of points between 11 and 20.

For example, 15 points would be 10 x \$1,150 and 5 x \$2,300 for a total of \$23,000. The points between 21 and

30 are valued at 3 x \$1,150, being \$3,450. Between 31 and 40 it is 4 x \$1,150, which is \$4,600, between 41 and 50 it is 5 x \$1,150 being \$5,750 and between 51 and 60 it is 6 x \$1,150 being \$6,900.

Economic loss, both past and future, is now restricted to the prescribed maximum which is \$2.2 million for accidents occurring during 2002 plus or minus CPI fluctuations thereafter. This therefore combines past and future economic loss instead of simply limiting future economic loss alone.

Damages entitlements for injured persons are entirely excluded if the incident giving rise to the claim occurred while the injured person was engaged in conduct constituting an indictable offence and such conduct contributed materially to the risk of injury, although there is an exception if the circumstances are 'exceptional' and if exclusion would be harsh and unjust. A conviction is 'conclusive' evidence of guilt and therefore entirely excludes a damages entitlement but does not apply to joint illegal enterprises.

A 'Good Samaritan clause' has been

included excluding liability against persons providing 'emergency assistance' for an act or omission done or made in good faith and without recklessness in assisting a person in apparent need of emergency assistance. Such clause extends to a medically qualified person including those possessing allied health qualifications. If a person provides assistance in an emergency situation, medically qualified or otherwise, in good faith, and when not significantly impaired, then they will be safe from being sued.

Section 39 specifically excludes expressions of regret as being admissions of liability. In other words, it allows people to apologise without such apology being taken as an admission of fault.

The Act contains a 'sunset clause' requiring the Economic and Finance Committee of Parliament to report on the effect of the amendments on the availability and cost of public liability insurance. If the Deputy Premier who had the conduct of the amendments to the Wrongs Act is serious in his statements, then he expects the changes made to not simply hit the balance ►

sheets of public liability insurers. This clause allows parliament to check the effectiveness of the legislative changes in two years time and there has been no indication from the Deputy Premier of what may occur if, in fact, the legislative changes do simply improve the bottom line of those companies writing public liability insurance.

Statutes Amendment (Structured Settlements) Act 2002

This Act amends the Magistrates Court Act, the District Court Act and the Supreme Court Act to allow consent orders for structured settlements. The MAC Act itself will need to be amended to allow it to purchase the annuity since at present it has no power or capacity to do so.

Recreational Services (Limitation of Liability) Act 2002

This Act provides for the limitation

of liability of providers of recreational services. Recreational services have to be interpreted in the same way as the corresponding definition in the Trade Practices Act which includes activities such as horse riding, bungee jumping and other similar activities.

The major provision of this Act is the capacity to modify a duty of care owed by a provider of recreational services by registration of a code of practice. The code is to set out measures that the provider of recreational services should take (in their opinion) in order to ensure a reasonable level of protection for consumers. The form of the code has to comply with the requirements of the regulations as to its form and content. Naturally, the regulations have not been approved as yet so we have no insight at the moment as to what form an acceptable code will take or, more importantly, what its context may be.

Secondly, under Section 6 of the Act, a registered provider can enter into a contract with a consumer modifying the duty of care owed and governed by the code, however notice must be given to the consumer. Importantly, if a provider of gratuitous recreational services displays the correct notices advising that the code applies then consumers are taken to have agreed to the modification of the duty of care. Liability will only attach to the registered provider if the client establishes that a failure to comply with the code caused or contributed to the injury. The Act does not apply to a liability of a manufacturer of goods, in respect to the sale of goods or criminal liability.

Again there is a 'sunset clause' of two years to allow the Economic and Finance Committee of Parliament to gauge the effect on the availability and cost of insurance for providers of recreational services. **PL**

Western Australia



TIM HAMMOND, WA

As with the national trend, the ability of an injured person to recover compensation when they have been injured through no fault of their own is likely to become increasingly difficult in Western Australia.

As a reaction to recent publicity, which made the quantum leap of asserting a direct causal link between insurance premiums and an award of damages, the government introduced the *Civil Liability Bill 2002 (WA)*. The Bill purports to restrict common law recovery for damages arising out of public liability claims and medical negligence claims. The Bill does not alter the recovery environment with respect to claims involving motor vehicle accidents, or

workers' compensation claims.

Common law damages for public liability and medical negligence claims are currently unfettered by any restrictions to recover at common law.

However, the *Civil Liability Bill* imposes a number of restrictions which erode this right to obtain damages.

The major areas where restrictions will apply are as follows:

- A deductible imposed upon the assessment general damages. This has the effect of taking away \$12,500 from an assessment of general damages up to an amount of \$49,000. This change, implemented at the last minute in the Lower House, was a retreat from the government's previous position in which they indicated the relevant

restriction would simply be a straight threshold of \$12,000. There is no cap or ceiling upon the recovery of general damages;

- A restriction on economic loss of three times the Western Australian average weekly earnings;
- A threshold of \$5,000 in relation to recovering for gratuitous care, and a restriction on recovery thereafter based on the Western Australian average weekly earnings.

The Bill has the effect of bringing restrictions upon common law recovery substantially in line with the way in which claims are assessed under our *Motor Vehicle (Third Party Insurance) Act 1943 (WA)*. The Bill is not retrospective.

The second half of the Bill places an extensive range of restrictions upon the

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ability of lawyers to advertise. The restrictions effectively mirror the provisions as passed in Queensland earlier in the year.

The government has also introduced a number of other reforms designed to give protection to volunteers who perform duties for an organ-

isation. The government has also introduced legislation designed to extend the government insurance arm (the Insurance Commission of Western Australia) to not-for-profit organisations.

Although the Bill has now passed

through both houses of parliament, it is yet to be proclaimed. The government has foreshadowed that these reforms are the first stage of a package of reforms to be adopted once a review of the list of recommendations by the panel chaired by Justice Ipp is complete. **PL**

Northern Territory



MICHAEL GROVE, NT

The Northern Territory Government proposes to introduce three pieces of legislation: the Personal Injuries (Liabilities and Damages) Bill, the Personal Injuries (Civil Claims) Bill and the Legal Practitioners (Costs and Advertising) Bill. None of this is law at the time of print but may well be soon so speak up now.

The Personal Injuries (Liabilities and Damages) Bill follows similar legislation elsewhere by imposing a pain and suffering cap of \$250,000, a threshold of \$15,000 for pain and suffering and a cap of three times AWE for loss of earning capacity damages. This will have a dramatic effect on the claims of children, the disabled, the elderly and other disadvantaged groups who, given that they do not generally suffer any great loss of earning capacity, are unlikely to receive anything for pain and suffering.

The Bill also does away with exemplary and aggravated damages and introduces thresholds for gratuitous care services.

There is also a new regime for volunteers and Good Samaritan situations. There are presumptions concerning contributory negligence.

The Personal Injuries (Civil Claims) Bill is similar to that in Queensland

although, unfortunately, the Northern Territory does not have the history of such a scheme in other areas of the law.

Practitioners will need, if the Bill becomes law, to read carefully the many sections of this Bill, as it is a tangled web.

Very simply, the Bill changes the Limitation Act by requiring plaintiffs to commence any action by way of a notice of claim within a very short time after the incident giving rise to the claim (one month if a client sees a solicitor and nine months if a client does not see a solicitor). This is a dramatic change and will require plaintiff lawyers to rethink their practices. There is then a series of steps to be taken by the plaintiff which are supposed to result in settlement offers, settlement conferences and if both fail, a court proceeding. Most of the detail is already in our Supreme Court Rules, so the only rationale for the change is the severe cutting back of the Limitation Act to rub out meritorious claims. Parts of the Bill are encouraging including the early exchange between the parties of relevant documentation and information and requiring parties to 'actively participate' in the settlement conference 'in an attempt to resolve the claim'. Whilst there may remain pockets of resistance to trying to resolve cases promptly, provisions like these

might encourage insurers to resolve claims expeditiously.

The Bill also has complicated but significant provisions relating to costs (and costs vis-a-vis offers to settle) and therefore practitioners will need to be mindful of the true nature of their client's claim much earlier. This will seriously affect our ability to assist clients with smaller claims.

There are provisions for the bringing of urgent proceedings in the courts if necessary.

Finally, proposed amendments to the Legal Practitioners Act in the Legal Practitioners (Costs and Advertising) Bill are convoluted and appear to go beyond merely regulating the legal profession. For instance, it would appear, on its face, that a legal practitioner cannot advise a client as to their rights to pursue a personal injuries claim. As to costs, there is some regulation of 'no-win, no-fee' arrangements including a cap on the uplift for such cases. I suspect that the changes, if implemented, will be unworkable.

This Bill is the subject of a working group which is expected to report to the Attorney-General by the end of the year. No doubt these issues and the necessity for such legislation in the Northern Territory will be the subject of that report. **PL**

	NSW	QLD	SA
Name of Legislation	<i>Civil Liability Act 2002; Civil Liability Amendment (Personal Responsibility) Bill 2002</i>	<i>The Personal Injuries Proceedings Act 2002; Personal Injuries Proceedings Act Amendment Act 2002</i>	<i>Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002; Statutes Amendment (Structured Settlements) Act 2002; Statutes Amendment (Third Party Bodily Injury Insurance) Act 2002; Recreational Services (Limitation of Liability) Act 2002</i>
Commencement	<i>CLA: 20/3/02;</i> <i>CLA(PR)B:</i> Parts relating to nervous shock and criminal activity to apply from 3/9/02. The limitation period changes apply to injuries or deaths occurring on or after proclamation of the CLA(PR)B. All other amendments apply to proceedings that are commenced after the commencement of the CLA(PR)B.	<i>PIPA</i> commenced on 18/6/02. The Act was made retrospective by the PIPAAA. The <i>PIPA</i> now applies to all injuries both pre and post 18/6/02. It is retrospective unless proceedings were commenced or a written offer to settle was made before 1/7/02.	1/1/03.
Threshold on non-economic loss	15% of a most extreme case (s16 CLA).	No threshold.	Significantly impaired by the injury for at least 7 days or medical expenses of \$2,750. Change to the sliding scale of damages. (s24B W(LDPI)AA).
Cap on non-economic loss recoverable	\$350,000 (indexed) (s16 CLA).	No cap.	\$241,000 (indexed) (s24B W(LDPI)AA).
Cap on loss of income/ earning capacity	3 times average weekly earnings (AWE) (s12 CLA).	3 times AWE (s51 PIPA).	\$2.2 million (indexed). No damages for first week of incapacity (s24D W(LDPI)AA).
Exemplary, punitive and aggravated damages	Abolished in personal injury claims except if it is an act intended to cause personal injury, sexual assault or sexual misconduct (s21 CLA).	Abolished for personal injury claims except if it is an act intended to cause personal injury, sexual assault or sexual misconduct (s50 PIPA).	Have previously been abolished.
Restrictions on plaintiff's legal costs	In cases where damages \$100,000 or less, limited to the greater of 20% of damages or \$10,000. Maximum costs don't affect solicitor-client costs under a costs agreement. Provisions for offers of compromise (CLA inserted Div 5B into <i>Legal Profession Act 1987</i>).	Restrictions on costs for claims under \$30,000, and for claims between \$30,000 and \$50,000 (See s56 of the PIPA).	No restrictions.
Requirements on plaintiff lawyers	Must have reasonable grounds for believing, on the basis of provable facts and a reasonably arguable view of the law, that the claim (or defence) has reasonable prospects of success (CLA inserted Div 5C into <i>Legal Profession Act 1987</i>).	If a respondent completely fails to respond to a notice of claim the deeming provision under s13 does not deem them to be the respondent or deem a compliant Notice.	Nil
Pre-trial procedures	Nil for public liability, some in medical negligence matters. (see <i>Civil Liability Act 2002</i> and <i>Health Care Liability Act 2002</i>)	Pre-trial procedures include early notification of claims by plaintiff, response from defendant, early exchange of information, joint medical reporting and compulsory conferences (See Ch 2 Part 1 PIPA).	Pre-trial procedures in place. Lawyers are required to allow 90 days for a response. A formal settlement conference is required before trial date set.
Discount rate	5% for future economic loss (s14 CLA).	5% for future economic loss (s52 PIPA).	5% for future loss (s.24E W(LDPI)AA).
Interest on past non-economic loss and past gratuitous care	Nil (s18 CLA)	Usually 2%	No interest for non-economic or future loss (s24F W(LDPI)AA).
Gratuitous care	<i>Threshold:</i> no damages if services provided for less than 6 hours per week and for less than 6 months. <i>Cap:</i> based on AWE (s15 CLA).	<i>Threshold:</i> no damages if services provided for less than 6 hours per week and for less than 6 months. No <i>Sullivan v Gordon</i> damages for people outside the plaintiff's house (s54 PIPA).	Damages only paid if the carer is a parent, spouse or child of injured person, or to repay reasonable out-of-pocket expenses incurred voluntarily by a person rendering gratuitous assistance to injured person. <i>Cap:</i> Based on AWE (s24H W(LDPI)AA).
Legal advertising	Severe restrictions. <i>Legal Profession Amendment (Advertising) Regulation 2002</i>	Severe restrictions. Ch 3, Pt 1, <i>Personal Injuries Proceedings Act 2002</i>	No restrictions
Recreational activities	No duty of care in respect of a risk that was the subject of a risk warning. Provisions for waivers to be effective for supply of recreational services. Broad definition of 'recreational activities' (Proposed Div 5 CLA(PR)B).	No restrictions	Providers of recreational services may apply to Minister for registration of code of practice. Registered providers may contract with the consumer modifying duty of care owed, in line with the registered code, but notice must be given to the consumer (RS(LL)A).
Professional negligence	All professionals subject to modified Bolam test. Doesn't apply to warning or other information about a risk (Div 6 CLA(PR)B).	Common law applies.	Common law applies.
Criminal Activity	No damages if engaged in serious offence at time of injury (judged on the balance of probabilities) and this contributed materially to the risk of injury (Proposed Part 6 CLA(PR)B).	Common law applies.	No liability if court satisfied beyond a reasonable doubt that plaintiff was engaged in indictable offence at time of injury and on balance of probabilities that it contributed materially to risk of injury (there is an exception) (s24I W(LDPI)AA).
Intoxication	If due care and skill is impaired, no right to damages unless injury is likely to have occurred even if they were not intoxicated. Presumption of at least 25% contributory negligence (Part 7 CLA(PR)B).	Common law applies	Presumption of contributory negligence if intoxicated at time of injury, unless intoxication did not contribute to accident. Presumption of at least 25% contributory negligence (s24J W(LDPI)AA).

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WA	ACT	VIC	NT	TAS
<i>Civil Liability Bill</i> 2002	<i>Civil Law (Wrongs) Act</i> 2002	<i>Wrongs and Other Acts (Public Liability Insurance Reform) Act</i> 2002; <i>Transport (Highway Rule) Act</i> 2002; <i>Limitation of Actions (Amendment) Act</i> 2002	<i>Personal Injuries (Liabilities and Damages) Bill</i> 2002; <i>Consumer Affairs and Fair Trading Amendment Bill (No.2) 2002</i> ; <i>Legal Practitioners Amendment (Costs and Advertising) Bill</i> 2002 (Discussion Draft); <i>Personal Injuries (Civil Claims) Bill</i> 2002 (Discussion Draft); <i>Personal Injuries (Civil Claims) Regulations</i> 2002 (Discussion Draft)	<i>Civil Liability Bill</i> 2002
On day to be fixed by proclamation.	Formal parts of Act commenced on 1/11/02 (this is subject to confirmation). Costs provisions will not commence until 1/1/03. Neutral evaluation provisions commence on 30/4/03.	<i>WOA(PIR)A</i> was given Royal Assent on 22/10/02. With a couple of exceptions, the Act came into operation on 23/10/02. Sections that commence on day to be proclaimed relate to structured settlements, volunteers and amendments to the Goods Act 1958. The 5% discount rate operates with respect to all claims from commencement date.	On date to be fixed by the administrator by notice in the Gazette.	On a day to be fixed by proclamation.
\$12,000 (s9 <i>CLB</i>).	No threshold.	No threshold.	\$15,000 (s25 <i>PI(LD)B</i>).	No threshold.
No cap.	No cap.	\$371,380 (indexed) (s.28G <i>WOA(PLIR)A</i>).	\$250,000 (indexed) (s24 <i>PI(LD)B</i>).	No cap.
3 times AWE (s11 <i>CLB</i>)	3 times AWE (s38 <i>CL(W)A</i>).	3 times AWE (s28F <i>WOA(PLIR)A</i>).	3 times AWE (s20 <i>PI(LD)B</i>)	No cap
Remain, but rarely awarded.	Remain, but rarely awarded.	Remain, but rarely awarded.	No aggravated or exemplary damages for personal injury claims (s19 <i>PI(LD)B</i>).	Remain, but rarely awarded.
No restrictions.	In cases where damages \$50,000 or less, limited to the greater of 20% of amount recovered or \$10,000. Court discretion to increase costs. Provisions relating to offers of compromise. The costs provisions have not yet commenced (Ch 10 <i>CL(W)A</i>).	No restrictions at present time. The <i>Personal Injuries Procedures Bill</i> 2002 lapsed on announcement of the Victorian election. The earliest any similar legislation could be passed is the Autumn session.	Proposed changes to the <i>Legal Practitioners Act</i> that: 1. Allow a client to have their bill taxed by the Master of the Supreme Court, if it provides for the payment of a premium. 2. Sets cap on premium under a 'no-win, no-fee' agreement of 25% of the costs. 3. Before entering a conditional costs agreement must give client a written estimate of costs.	No restrictions.
Nil	Provisions as to reasonable prospects of success of a claim may be enacted in the future.	Nil	Nil.	Nil.
Nil	Court may refer matters for neutral evaluation of issues and opinion as to likely findings of liability and damages. The neutral evaluation provisions have not yet commenced (Ch 11 <i>CL(W)A</i>).	None at the present time. The <i>Personal Injuries Procedures Bill</i> 2002 lapsed on announcement of the Victorian election. The earliest any similar legislation could be passed is the Autumn session.	Proposed changes seem identical to procedures introduced in Queensland.	Nil.
Currently 6% for future economic loss.	Currently 3% (this is the default rate).	5% for future economic loss (s28I <i>WOA(PLIR)A</i>).	5% for future economic loss (s22 <i>PI(LD)B</i>).	Currently 7% for future economic loss.
Nil.	Rate to be determined by court.	Remains at present time.	Nil.	Nil.
Threshold: \$5,000 deductible. Cap: Based on AWE (s12 <i>CLB</i>).	No threshold or cap.	No threshold or cap.	<i>Threshold</i> : no damages if services provided for less than 6 hours per week and for less than 6 months. Cap: Based on AWE (s23 <i>PI(LD)B</i>).	Nil.
Restricted. Provisions appear identical to QLD provisions (Part 3 <i>CLB</i>).	No restrictions.	No restrictions.	Proposed restrictions appear identical to QLD provisions.	No restrictions.
No restrictions	No restrictions.	The <i>Goods Act</i> 1958 is amended to allow waivers to be effective for recreational services.	Consumer Affairs and Fair Trading Amendment Bill (No.2) 2002 will allow waivers in certain circumstances.	No restrictions.
Common law applies.	Common law applies.	Common law applies.	Common law applies.	Common law applies.
Common law applies.	No liability if court satisfied beyond a reasonable doubt that plaintiff was engaged in an indictable offence at time of injury and on balance probabilities that it contributed materially to the risk of injury (s34 <i>CL(W)A</i>).	In considering the duty of care of defendants consideration must be given as to whether the injured person was engaged in an illegal activity. (<i>WOA(PLIR)A</i> inserted new Part IIB into the <i>Wrongs Act</i> 1958).	Occupier or owner is not liable for injury to person who enters premises intending to commit or does commit an offence and this conduct materially contributed to risk of injury. No liability for injury if injured while engaged in criminal offence and this contributed materially (ss9.10 <i>PI(LD)B</i>).	Court cannot award damages if the injured person was engaged in serious offence and this conduct materially contributed to the risk of injury (Part 3 <i>CLB</i>).
Common law applies.	Presumption of contributory negligence if intoxicated at time of injury. Rebuttable by proof that the intoxication didn't contribute to the injury (s35 <i>CL(W)A</i>).	In considering the duty of care of defendants consideration must be given to whether the person was intoxicated and the level of intoxication (<i>WOA(PLIR)A</i> inserted new Part IIB into the <i>Wrongs Act</i> 1958).	Presumption of contributory negligence if the plaintiff was intoxicated, rebuttable if plaintiff proves intoxication didn't contribute to the incident. Presumption of at least 25% contributory negligence (s14 <i>PI(LD)B</i>).	Presumption of contributory negligence of 25% if the plaintiff was intoxicated to the degree that their capacity to exercise due care and skill was impaired unless the intoxication didn't contribute to the injury in any way (Part 2 <i>CLB</i>).