

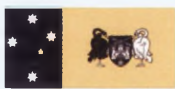


TORT REFORM TWO YEARS ON

This article provides a state-by-state summary of developments in tort reform around Australia, focusing on legislative changes since we last reviewed the situation in December 2002.



ACT



By Steven Hausfeld

Most ACT tort law reform is contained in the *Civil Law (Wrongs) Act 2002* (the Act).¹ The Act includes several sets of amendments, collects relevant statutory provisions from previous disparate Acts,² and engrosses reforms consistent with other jurisdictions.³ A brief summary follows:

Chapter 2 concerns the protection of good samaritans and volunteers, survival of actions upon death, multiple tortfeasors and contribution, and apologies. Provisions about apologies do not apply to a cause of action arising before 9 September 2003.

Chapter 3 deals with liability for death, mental harm and the results of terrorism. The mental harm provisions apply to causes of action arising from 9 September 2003 and limit mental harm to recognised psychiatric illnesses and relevant duties to those applicable to people of normal fortitude.

Chapter 4 defines negligence and enacts the common law in relation to the content of a duty of care, reasonable precautions and causation. It does not apply to a cause of action arising before 9 September 2003.

Chapter 5 specifies detailed 'pre-court' procedures, many of which can run in parallel with court procedures. The procedures do not apply if the claimant first consulted a lawyer about seeking damages prior to 9 March 2004. The procedures include the following requirements:

- Notification of the 'respondent' about the claim within the shorter of nine months post-injury or four months after consulting a lawyer. The notice must contain the prescribed content.⁴ Without court approval, proceedings cannot commence without a complying notice, although late notification is possible with a reasonable excuse.
- The respondent can request more information, accept the notification or deny that it is complying. In the absence of a timely response, a notice is deemed to be complying.
- Parties must make or respond to offers of settlement within specified time limits.
- Prompt disclosure is required of relevant documents and reports, including medical reports and, without court approval, surveillance reports.
- Time generally won't run against a claimant who is under a disability.
- Penalties for non-compliance are generally cost and interest penalties.

Chapter 6 limits medical experts to a single expert in common law personal injury claims for causes of action arising on or after 9 September 2003.⁵

Chapter 7 limits damages. Subject to court discretion, no damages can be awarded if the plaintiff was engaged in an offence. There are rebuttable presumptions of contributory negligence for those intoxicated, relying on intoxicated

people, or not wearing required seatbelts/helmets. Damages for lost wages cannot be based on greater than three times average weekly earnings. There are no statutory limits on *Griffiths v Kerkemeyer* or *Sullivan v Gordon* damages. Contributory negligence is excluded for breaches of statutory duty. Structured settlements are allowed.

When it commences, Chapter 7A will provide for proportionate liability for some commercial claims, excluding personal injury and consumer claims. In applicable cases, a court could find against a concurrent wrongdoer only to the extent of that defendant's contribution to total damages.⁶

Chapter 8 restricts claims against public authorities,⁷ consistent with other jurisdictions.

Other matters include defamation (Chapter 9); trespass (Chapter 10); liability of innkeepers and common carriers (Chapter 11); occupiers' liability and damage from animals or fires (Chapter 12); and misrepresentation (Chapter 13).

Part 14.1 limits legal costs for claims under \$50,000 to the lesser of \$10,000, or 20% of the claim, for personal injury causes of action arising on or after 1 January 2003. This is subject to court or taxing officer discretion to increase the amount. It is also subject to allowing greater indemnity costs to be awarded after rejection of an offer not bettered in judgment, and to orders about unnecessary costs. Part 14.2 requires lawyer certification of reasonable prospects prior to signing pleadings, with the possibility of a costs order against a lawyer certifying contrary to fact. Breach of the provision may be professional misconduct. The Part does not apply to causes of action arising before 9 March 2004. The courts' administrations have recently agreed that simultaneous filing of the certificate and the pleadings will be accepted. It seems accepted that this practice will not be pursued as professional misconduct.

Chapter 15 deals with mediation and early neutral evaluation, abolition of various ancient torts, and some insurance matters.

LIMITATIONS

There have also been changes to limitation periods in the ACT:

For workplace injuries to an employee arising on or after 1 July 2002, there is a new three-year limitation period for common law claims: s16A *Limitation Act 1985* ('LA'). Since 5 April 2004, there is court discretion to extend the limitation period: s35 LA.

For other personal injury claims arising on or after 1 July 2003, there is also a new three-year limitation period: s16B LA. There is a sliding scale transition provision (from the former six-year limitation) for earlier causes of action. There is no court discretion to extend the three-year period: s36(5) LA.

A child or their parent or guardian must give notice of a personal injury claim to potential defendants (or to

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a third-party insurer) within six years of the accident or within six years of knowledge of a disease and knowledge of someone else's fault: s30A LA. Subject to court discretion, default can lead to reductions in damages. This applies to all claims: s30A(9) LA.

There are new limitations for children injured by fault of a 'health service' where the cause of action arose on or after 1 July 2003. 'Health service', defined in the *Community and Health Services Complaints Act 1993*, extends to, for example, ambulance, social work or alternative health services. These new limits follow:

- A child injured not through a disease or disorder confronts a six-year limitation period: s30B(2) LA. This cannot be extended: s36(6) LA.⁸

- For a child injured through a disease or disorder, the limitation period is the shorter of 12 years from the accident, or six years from when the child, parents or guardian first knew or ought to have known of the injury or (sic) of its relating to another's fault: s30B(3) LA. A court can extend this six-year period: s30B(4) LA.
- Running of the new limitation periods is not suspended by a child's disability: s30(3)(b) LA.
- For children injured through medical negligence prior to 1 July 2003, the limitation is the shorter of the pre-existing six-year limit, arguably with the benefit of the previously applicable suspension of the period while a child remains under a disability, or the limit applicable under the above provisions. ■

NSW

By James Goudkamp

Two Acts have amended the *Civil Liability Act 2002* (NSW) (since the enactment of the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW)). Many of the changes made by these two Acts are inconsequential. Only the changes of significance are summarised here.

1. CIVIL LIABILITY AMENDMENT ACT 2003 (NSW)

(i) Exercise of a special statutory power by a statutory public authority

Section 43A was inserted to exclude liability in respect of the exercise of (or failure to exercise) a special statutory power by a public authority unless the exercise (or failure) was so unreasonable that no authority could properly consider the exercise (or failure) to be reasonable. A special statutory power is defined as one that is conferred by statute, and which cannot generally be exercised without specific statutory authority.

(ii) 'Crimes' committed by mentally ill persons

The ability of plaintiffs who incur loss while engaged in conduct that would have constituted a serious criminal offence had they not been suffering from a mental illness at the relevant time has been significantly curtailed in two ways. First, such plaintiffs are not entitled to damages for non-economic loss or damages for a loss of earnings (s54A). Presumably, however, this means that damages may still be recovered in respect of out-of-pocket expenses, medical

expenses, and commercial and gratuitous care. Second, defendants have been conferred immunity in respect of damage caused while acting in self-defence against the plaintiff.

Whether the act would have been a serious criminal offence is assessed on the balance of probabilities.

A serious criminal offence is one that is punishable by imprisonment for six months or more.

These amendments were made in response to the decision of the NSW Supreme Court in *Presland v Hunter Area Health Service*.¹ The plaintiff in that case had killed his brother's fiancée a short time after having been discharged by the defendant hospital, where he had been involuntarily detained for psychiatric treatment. He was acquitted of murder charges on the grounds of insanity. Subsequently, he brought an action against the hospital for negligently releasing him, and recovered \$300,000.

(iii) Damages for the birth of a child

Section 71 was inserted to reverse the effect of the High Court decision in *Cattanach v Melchior*.¹ It provides that, in respect of an action for an unwanted child, damages cannot be awarded for the costs associated with rearing or maintaining the child, or any loss of earnings of the claimant while rearing or maintaining the child.

(iv) Proportionate liability

There are two new rules concerning proportionate liability. Section 34A provides that a concurrent wrongdoer is not

entitled to the protection afforded by proportionate liability if they intentionally or fraudulently caused the economic loss or property damage that is the subject of the claim. Section 35A provides that a defendant who becomes aware of the existence of a concurrent wrongdoer, but fails to notify the plaintiff of that wrongdoer as soon as practicable, may be ordered to pay any unnecessary costs incurred by the plaintiff as a result of the failure to notify.

(v) Vicarious liability

Section 3C provides that any provision of the Act that limits or excludes liability also applies to vicarious liability.

2. CIVIL LIABILITY AMENDMENT (OFFENDER DAMAGES) ACT 2004

This Act inserts Part 2A into the *Civil Liability Act 2004* (NSW), imposing restrictions on damages for claims by criminals who are held in custody (which includes periodic and home detention) brought against protected defendants. Protected defendants include the Crown, government departments, and public health organisations. Part 2A does not apply to a claim under the *Compensation to Relatives Act 1897* (NSW).

- The following restrictions are imposed:
- No damages whatsoever may be awarded unless a 15% permanent impairment threshold is passed (s26C).
 - For the purposes of calculating economic loss, the court must disregard any earning capacity of the claimant after age 65 (s26F).
 - Damages for non-economic loss cannot exceed the amount to which a worker would be entitled under the *Workers Compensation Act 1987* (NSW), had the worker received an injury that caused the same degree of permanent impairment as that sustained by the claimant (s26I).
 - Any amount that the offender is liable to pay to a victim of his or her crime is to be deducted from the award and paid directly to the victim (s26J).

The impetus for this Act was a \$100,000 settlement between a prisoner held in the Grafton Correctional Centre and the state in respect of injuries that the prisoner sustained after the bunk in which he was sleeping collapsed because it had been negligently constructed. ■

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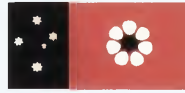
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Jane Campbell is a financial adviser at ipac who specialises in personal injury compensation. Jane previously worked as a compensation lawyer and lobbied for many years to improve tax and financial outcomes for plaintiffs.



NORTHERN TERRITORY



By Michael Grove

The *Personal Injuries (Liabilities and Damages) Act* 2003 came into force on 1 May 2003.

Compared to other states and territories, it is modest in its reach, although enacting some significant changes to personal injuries actions in the Northern Territory. It applies only to personal injury claims, including fatal injuries and prenatal injuries. Certain claims are excluded, including motor accidents and workers' compensation claims.

The Act changes the personal liability of volunteers and good samaritans, and introduces certain presumptions in relation to intoxication and claims for contributory negligence.

By far and away the most significant change is to damages. There can be no award for aggravated or explanatory damages in respect of a personal injury claim. Pecuniary loss has been capped to three times the average weekly earnings. The discounted rate for future pecuniary loss is now 5% instead of 3%, and claims for gratuitous services have now been significantly curtailed. In effect, those claims are now limited to claims for gratuitous services that are provided, or are to be provided, for six hours or more per week, and for six months or more. They are capped in terms of the amount per year that the plaintiff is entitled to claim.

The common law principles relating to the assessment and awarding of damages for pain and suffering, loss of amenities

of life, and loss of expectation of life or disfigurement have also been abolished and replaced with a permanent impairment assessment; this is itself capped at (currently) \$350,000.

There is no interest on damages awarded for non-pecuniary loss or gratuitous services, and the court may now make orders for structured settlements.

The Territory Parliament has also passed the *Personal Injuries (Civil Claims) Act* 2003. In large part, this Act has yet to come into force. It is the subject of a working party, which is unlikely to be able to report to the Attorney General until well into 2005. The Act requires pre-writ notification to be made by potential plaintiffs and prescribes certain consequential orders to follow the making of a claim. The claimant is not entitled to commence proceedings in a court unless such a claim has been made.

Parliament has also introduced amendments to its *Consumer Affairs & Fair Trading Act*, which largely mirror the changes effected by the *Trade Practices Amendment (Liability for Recreational Services) Act* 2002 at the Commonwealth level.

There have also been (and will soon be more) significant changes to workers' compensation legislation in the Territory (bearing in mind that there is no common law for industrial accidents in the Northern Territory). ■

QUEENSLAND



By Gerard Mullins

The *Civil Liability Act* 2003 was passed by the Queensland Government on 3 April 2003 and received assent on 9 April 2003.

The Act applies to any civil claim for damages for 'harm', which includes claims for personal injury, economic loss and damage to property. 'Claim' means a claim for damages for personal injury, damage to property or economic loss – whether that liability is based on tort, contract or another form of action, including breach of statutory duty.

The majority of the provisions apply to injuries or incidents that took place after 2 December 2002. However, practitioners should not be misled: some of the provisions are

operative from 2 December 2002, some commence on assent, some commence on the date of proclamation, and some amendments to the *Personal Injuries Proceedings Act* 2002 (PIPA) are retrospective. When one includes the fact that the scale of general damages commenced on 1 December 2002, there are potentially five separate dates from which various provisions of the Act may apply.

The Act also applies to motor vehicle claims. The general damages scale applies to injuries from 1 December 2002. The Act does not apply to civil liability relating to an injury under the *WorkCover Queensland Act* 1996.

The *Civil Liability Act* contains significant amendments to

PIPA. The PIPA Notice of Claim has been split into two Notices. Part 1 of the Notice claim now includes the essential information about the plaintiff and circumstances surrounding the injury. The new Part 2 of the Notice includes details of economic loss. Section 13 was amended, as the original provision did not deal with the situation where the respondent completely ignored or failed to respond to a Notice.

Significant changes were also made to the procedural regime dealing with medical negligence. PIPA was amended so that in a claim arising from a 'medical incident', an 'additional Notice' was to be given within nine months of the incident, or one month of seeing a lawyer. After the initial Notice was given, the respondent need only respond advising whether any documents were held in relation to the medical services. Thereafter, the claimant was obliged to give a Part 1 Notice of Claim within 12 months of the initial response.

Time limits in respect of children's claims have also been altered.

The *Civil Liability Act* also introduced substantial alteration to the assessment of damages. These include:

- Damages for loss of earning capacity capped at three times the average wage;
- Superannuation calculated at the minimum percentage required by an employer to pay at law;
- The 5% discount rate applied across the board for all future loss;
- No damages for domestic care unless the care is provided for at least six hours per week for at least six months;
- General damages are now to be assessed by way of an injury scale. An injury is to be assigned a numerical value between 0-100 according to its severity, with 100 being the 'greatest conceivable kind'. The allocation of value does not necessarily follow the AMA percentage scale. Once the injury is assigned a number, a calculation in accordance with the Act can be made of the award of general damages.

In December 2003, the Queensland Parliament passed an amendment to the *Civil Liability Act*. This effectively emasculated the effect of the High Court's decision in *Cattanach v Melchior*, prohibiting a court from awarding damages for 'economic loss arising out of the costs ordinarily associated with rearing or maintaining a child'.¹¹

Since the introduction of the *Civil Liability Act* and PIPA, there have been minor amendments to both Acts. Three are particularly worthy of comment.

The first is the amendment to s61 of the *Civil Liability Act*. The original Act provided that in assessing an injury scale value, the court was 'to consider' the range of injury scale values prescribed under the Regulation and the injury scale values attributed to similar injuries in prior proceedings.

That section was amended by the *Professional Standards Act 2004* to provide that in assessing the injury scale value, the court must assess the injury scale value under the Regulation and have regard to the injury scale values given to similar injuries in previous proceedings. This amendment was made after a suggestion that the scale was a guide for a judge rather than a mandatory direction.

Secondly, the Court of Appeal in *Patterson v The Baptist*

*Union of Queensland & Anor*¹² held that leave could only be granted to commence proceedings pursuant to the provisions of s77D if a complying Notice of Claim had been served before 18 June 2003. This interpretation was quite different from that adopted and relied upon by many practitioners. This decision could potentially have had a catastrophic effect on hundreds of claims. The government moved quickly (and sensibly) to correct the position in the *Justice and Other Legislation Amendment Act 2004*, inserting a new section 77DA into PIPA to confirm that a proceeding was validly started if commenced in accordance with the alternative approach.

Finally, and most importantly, the proportionate liability provisions are due to commence in early 2005. They were passed in the *Professional Standards Act 2004* and can be found in Part 8 of that Act. These provisions are extremely important in the conduct of litigation (excluding personal injury). The Queensland legislation has an important limitation that does not exist in other states: proportionate liability does not apply where the goods or services are purchased by a consumer. This includes whether they are being acquired for personal, domestic or household consumption or relating to advice given by a professional to an individual for the individual's use.

The *Civil Liability Regulation* and the *Scale of General Damages* is due to be reviewed in 2005. ■



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SOUTH AUSTRALIA



By Brendan Connell

The *Wrongs Act 1936* has been renamed the *Civil Liability Act 1936*; section numbering has been redesignated and the Act amended to:

- codify the standard of care;
- provide for a reduction in the duty of care relating to mental harm by imposing a standard of 'normal fortitude';
- include a somewhat clumsy attempt to codify causation;
- most controversially, amend the assumption of risk, and particularly the presumption of the awareness of this risk and the effect of the abolition of the duty to warn of this risk;
- codify a modified Bolam principle;
- revert the liability of road/highway authorities to misfeasance/nonfeasance;
- introduce a presumption of contributory negligence when the injured person is intoxicated, with the injured person

- having the responsibility to rebut the presumption by establishing the contrary or lack of volition;
 - attempt to tighten the provisions relating to damages for mental harm;
 - introduce a serious limitation on *Melchior v Cattenach*-type cases; and
 - confirm codification of expressions of regret as not being admissions of liability, and a good samaritan clause allowing medical practitioners to provide emergency medical assistance without fear of litigious retribution.
- The *Limitation of Actions Act 1936* has been amended to restrict the power to extend periods of limitation and insert a special provision regarding children (s45A). Section 45A(1)(b) requires a child to provide notification of an intended action within six years of the incident causing the



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injury. Section 45A(7) states that non-compliance with notification does not preclude entitlement to bring a claim, but the court may not allow medical or gratuitous services provided before the date the action was commenced, and may disallow legal or other costs. This section was specifically included to appease the medical profession in relation to 'long-stop' claims, where proceedings may be brought against them up to 21 years after the provision of the medical service which gave rise to the claim.

There is also a new restriction to extend periods of limitation generally under the *Limitations of Actions Act* 1936, where the extension is sought on the grounds of the discovery of a material fact. An additional requirement is that the material fact needs to form an 'essential element' of the cause of action or have 'major significance' on an assessment of the claimant's loss. The legislation then provides three clumsy examples of such 'major significance', namely:

1. a substantial reduction of the plaintiff's capacity to work;
2. the requirement for substantially more medical care than previously expected; or
3. a significant loss of expectation of life.

It is noted that, despite the legislation referring to 'major

significance', the cited examples refer to 'substantial reduction' and 'substantially more' medical care. The terms 'major significance', 'substantial reduction' and 'substantially more' offer significant scope for different interpretations. It is arguable that the word 'substantial' represents a watering down of 'major significance'.

The legislation then provides four criteria for a court to consider in determining whether it is appropriate to provide an extension of time. These are:

1. the period of time and the potential of prejudice for a fair trial;
2. the desirability of bringing litigation to an end within a reasonable period and thus promoting a more certain basis for the calculation of insurance premiums;
3. the loss and the conduct of the parties; and
4. any other relevant factor.

Ironically, while the CEO of the Insurance Council of Australia has publicly stated that tort reform was unnecessary, the South Australian legislature thinks that the basis for calculating insurance premiums is so important that a judge should take it into account when considering whether to grant an extension of time. (Certainly, no extensions of time would make it easier for insurers to calculate their insurance premiums.) ■

TASMANIA



By Sandra Taglieri

Tasmania has fortunately been spared a continuous flood of tort reform. Essentially, the Tasmanian Government has passed three Acts, which between them implement all of the recent tort reforms.

The *Civil Liability Act* 2002 took effect on 1 January 2003. This Act contained limited reforms, the major reforms being:

1. the introduction of a presumption of contributory negligence where the plaintiff is intoxicated; and
2. provision of a complete defence to a claim if the plaintiff was engaged in conduct constituting a serious offence, being an offence punishable by a term of imprisonment greater than six months.

In 2003, more widespread tort reforms were introduced with the passing of the *Civil Liability Amendment Act* 2003. This Act significantly amended the *Civil Liability Act* 2002 (which became the principal Act). The amendments commenced from 4 July 2003 and adopted many of the recommendations made by the Ipp Report.

Reforms relating to liability included:

1. attempts to codify the law in relation to breach of duty and causation;
2. provision of a defence where the plaintiff is injured as a

3. result of obvious risks of dangerous recreational activities;
3. provision for the nature of the duty to warn owed by a medical practitioner and the standard of care required of medical practitioners; and
4. an ability to enter into structured settlements.

The legislative reforms in relation to damages included the imposition of limits in relation to claims for damages for economic loss and non-economic loss. With respect to economic loss, damages for loss of earning capacity are capped at 4.25 times the adult average weekly earnings. In respect of non-economic loss, the restrictive provision is that only a percentage of the award assessed by the court is permitted if it is between \$4,000 and \$20,000. Damages assessed in excess of \$20,000 are paid without a reduction or discount, but damages assessed at less than \$4,000 are not awarded at all.

The *Civil Liability Amendment Act* 2003 introduced limitations on recovery of damages in pure mental harm cases and confined or limited actions for damages against public and other authorities on the basis of a breach of duty by the public or other authority (s38).

Statutory protection of volunteers and community organisations in certain circumstances is also provided for in >>

what is now s47.

The scope or operation of the significant reforms enacted by the passing of the *Civil Liability Amendment Act 2003* is established by s3B. It provides that the Act does not apply to acts done to intend injury or death, sexual assault, the awarding of damages for injury or death arising from smoking or tobacco product use, or to injuries where the provisions of the *Workers Rehabilitation and Compensation Act 1988* applies. The Act has partial application to injuries sustained in motor vehicle accidents. In particular, the restrictions on awarding damages apply, as do the provisions relating to structured

settlements, breach of duty and mental harm.

The third enactment was the *Civil Liability Amendment Act 2004*. This did not implement any major changes, but rather clarified the application and scope of the *Civil Liability Act* (as amended). In short, it provides that the majority of the reforms introduced by the *Civil Liability Act 2002* and *Civil Liability Amendment Act 2003* apply only to causes of action accrued after 4 July 2003.

There have been no decisions in respect of the *Civil Liability Act* in Tasmania to date. ■

VICTORIA

By **Barrie Woollacott**

Victoria was inundated with a spate of legislative change in the 2002/2003 period.

The most significant amendments are contained in the *Wrongs Act 1958*. These changes were introduced via numerous legislative initiatives, namely: *Wrongs and Other*

Acts (Public Liability Insurance Reform) Act 2002, Wrongs and Limitation of Actions Act (Insurance Reform) Act 2003 and Wrongs and Other Acts (Law of Negligence) Act 2003.

The full impact of the changes came into force as from 1 October 2003. From that date, all unissued claims arising from injuries occurring post-21 May 2003 would need to satisfy an impairment threshold to be entitled to general damages compensation. Further, they would be subject to the new statute of limitations period of three years (previously six years) from the date of injury. (Note that changes to limitations periods include a 12-year long-stop provision and six years from date of injury for persons under a disability.)

The most substantive changes set out below.

THRESHOLD RELATING TO RECOVERY OF DAMAGES FOR NON-ECONOMIC LOSS

As a pre-requisite to recover damages for pain and suffering, loss of enjoyment of life and scarring, a claimant must have suffered a 'significant injury'. Such damages are now limited to a cap of \$371,380 (to be indexed annually). This restriction will not apply in circumstances where the injury arises from an intentional tort, motor vehicle claims or workers compensation claims.

A person suffers 'significant injury' (s28LF) if an approved medical practitioner has assessed the injured person as satisfying the 'threshold level' by having a degree of permanent whole person impairment of more than 5% in the case of a physical injury, or more than 10% in the case of psychiatric impairment. (The latter excludes impairment arising as a consequence of, or secondary to, a physical injury.) The assessment must be accepted by or on behalf of the respondent to trigger entitlement.

If the respondent does not accept the assessment, they must refer the matter to an independent medical panel, which will then determine whether the degree of impairment satisfies the threshold level. The decision of the panel is



SCHOOLS

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binding upon a court and there is no appeal on the merits.

Assessment of impairment level must be made by reference to the *American Medical Association Guides* (4th edition) but excludes Chapter 15 and, in the case of psychiatric injury, substitutes the 'Clinical Guidelines to the Rating of Psychiatric Impairment' prepared by the Medical Panel (Psychiatry) Melbourne for Chapter 14 of the *Guides*.

Notably, 'significant injury' is also defined to include the loss of a foetus, psychiatric injury arising from loss of a child due to an injury to the mother or foetus or child, during or immediately after birth; and loss of a breast.

A 'significant injury' is deemed if the respondent/insurer waives the requirement for a certificate or, where the injury is significant but not stabilised in certain circumstances, or the court makes a determination under s28LZN. Deeming may occur if the insurer fails to respond to various prescribed time limits.

The most substantive procedural change is the requirement for an assessment of the degree of impairment if the claimant wishes to pursue a claim for non-economic loss. A claimant is not required to establish 'significant injury' prior to commencing court proceedings. However, this must be established prior to ultimate determination.

A range of time limits apply that must be adhered to where claimants seek waiver of the requirements for an impairment assessment and where the respondent is required to respond to service upon it of a Certificate of Assessment. (These time periods are contained within ss28LO & 28LW respectively).

The costs associated with a medical panel determination are borne by the respondent/insurer.

Practitioners will be relieved to learn that no costs penalties apply within the Victorian jurisdiction.

RECOVERY FOR ECONOMIC LOSS CLAIMS

Claims for economic loss and other special damages encompassing medical and related expenses are not subject to the 'significant injury' threshold test. Claims for these losses may be pursued in the normal manner. However, there have been some changes that are designed to limit the rights of all claimants, namely:

- restricting past and future loss of earnings to three times the average weekly earnings (s28F);
- limitations on gratuitous attendant care (ss28IA & 28IB); and
- provision for proportionate liability in claims for pure economic loss.

CODIFICATION OF THE LAW OF NEGLIGENCE

An attempt to codify the laws of negligence is contained within Part X of the Act and applies to claims commenced on or after 3 December 2003.

The general view is that the codification amounts to little change to the existing common law principles.

There are specific provisions relating to medical and legal negligence (Division 5). These provisions mark a legislative return, in part, to the *Bolam* principle. Certain exclusions in the tests apply in cases involving warnings and the giving of advice in respect of the risks when providing professional services.

Part XI deals with mental harm and appears to follow and adopt the principles set out in *Tame v NSW*.¹³ It restricts the right of recovery of damages to those directly witnessing the traumatic death or injury or being put in danger or those in close relationships to the victim.

As in most other jurisdictions, Victoria has yet to see the full impact of these legislative changes. ■

WESTERN AUSTRALIA



By Greg Burgess >>

Tort reform in WA has occurred through a number of Acts, namely the *Civil Liability Act* 2002 (CLA), the *Civil Liability Amendment Act* 2003, and the *Workers' Compensation Reform Act* 2004.

The *Civil Liability Act* 2002 ('the Act') was proclaimed on 1 January 2003. From 1 January 2003 until 29 October 2003, the main effect of the Act was to place restrictions on the recovery of damages for common law negligence claims, primarily in the area of public liability and medical negligence (which brought these types of claims into line with the way that damages are assessed under the *Motor*

Vehicle (Third Party Insurance) Act 1943).

The primary restriction introduced by the Act was to place a \$12,500 (indexed) deductible upon the recovery of non-pecuniary loss. Other restrictions related to economic loss and gratuitous care. The Act was not retrospective, and the restrictions on recovery of damages apply only to causes of action arising on or after 1 January 2003. The Act also placed significant restrictions in relation to advertising and providing information in relation to rights, remedies and the provision of legal services.

The Limitations Bill 2004 is presently under review in the Upper House. It proposes significant changes to time limits >>

in which children's claims in particular can be brought. Adults' time limits will be reduced from six years to three. With a Western Australian election scheduled for February 2005, the future of the Bill is uncertain.

Following the Ipp Report, the Western Australian Government introduced the Civil Liability Amendment Bill 2003, which took effect from 30 October 2003 ('the Amended Act').

The amendments incorporate an extensive codification of common law principles in relation to duty of care, causation, contributory negligence and voluntary assumption of risk.

The amendments also create special rules in relation to liabilities arising from recreational activities, intoxication, injuries causing mental harm, and liabilities in relation to public functions. It also provides protection from liability for good samaritans, and allows for apologies to be given without any consequential liability attaching itself to the apology.

Notes: **1** Authorised versions of ACT legislation, including subordinate legislation, disallowable instruments, commencement notices, etc, are available on the internet at www.legislation.act.gov.au. **2** For example, provisions previously in the *Common Carriers Act 1902*, *Compensation (Fatal Injuries) Act 1968*, *Civil Liability (Animals) Act 1984*, *Defamation Act 2001*, *Innkeepers Liability Act 1902*, *Law Reform (Miscellaneous Provisions) Act 1955*, *Law Reform (Misrepresentation) Act 1977*, *Married Persons (Torts) Act 1968*. **3** Legislation in other jurisdictions includes: *Civil Liability Act 2002* (NSW), *Wrongs Act 1958* (VIC), *Civil Liability Act 2003* (QLD), *Civil Liability Act 1936* (SA), *Civil Liability Act 2002* (TAS), and *Civil Liability Act 2002* (WA). **4** A form established with input from the Law Society of the ACT, government and insurers is available at www.lawsocact.asn.au. **5** To the author's knowledge, these procedures have not yet been used. Doubts have been expressed about their practicality. **6** The relevant uncommenced provisions are in notes at the end of the authorised version of the Act. **7** While there is scope for including other prescribed authorities, none has yet been prescribed. **8** See also *DJ v RHS & JF* [2004] ACTSC 12 (2 April 2004). **9** Unreported, [2003] NSWSC 754, 19 August 2003, Adams J. **10** [2003] HCA 38. **11** (2003) 199 ALR 131. **12** [2004] QCA 146. **13** *Tame v NSW*, 191 ALR 449.

The *Amended Act* primarily applies to claims involving medical negligence and public liability. Certain parts apply to claims pursuant to the *Motor Vehicle (Third Party Insurance) Act 1943*. The *Amended Act* does not apply to claims for assessments of damages under the workers' compensation regime. The amendments are not retrospective, and any claim for an injury that occurred between 1 January 2003 and 29 October 2003 will arguably be subject only to the restrictions on recovery and not to the attempted codification of the common law.

The *Workers' Compensation Reform Act 2004* was assented to on 9 November 2004. The Act adopts the AMA 5 *Guides*, imposing thresholds based on impairment – 15% for capped damages, 25% for uncapped. An election to pursue common law must be made within 12 months and step-down provisions apply in certain circumstances. Only approved medical specialists under the control of Workcover are able to determine assessments of impairment. ■

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