

# COMPULSORY THIRD PARTY COMPENSATION SCHEMES:

## A STATE-BY-STATE ROUND-UP

### NEW SOUTH WALES

By Tom Goudkamp

#### RELEVANT LEGISLATION

CTP claims in NSW are governed by the *Motor Accidents Compensation Act 1999* (MACA).

#### MAIN FEATURES OF THE SCHEME

The scheme requires a notice of claim, in the prescribed form, to be completed and sent to the CTP insurer within six months of the date of the accident or death.

It provides a procedure for early notification and early payment of treatment expenses, up to \$500.

It restricts access to damages for non-economic loss (NEL) to those cases where the degree of whole person permanent impairment (WPI) is either conceded by the insurer, or is assessed, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA) and MAA medical guidelines, to be greater than 10%. Where the injuries are assessed at greater than 10% WPI, common law principles in relation to the assessment of the damages will apply, subject to a maximum (currently \$359,000).

The scheme restricts claims for economic loss (currently \$3,300 net per week). No damages are payable for the first five days off work, and there is a set maximum weekly rate for past and future economic loss.

It provides a system of medical assessments by the statutory Medical Assessment Service (MAS). These assessors, appointed by the MAA, may hear and determine disputes over:

- the degree of permanent impairment;
- the degree of impairment of earning capacity;
- whether an injury has stabilised; and
- whether medical treatment is reasonable or necessary and related to the accident.

The scheme requires early decisions on liability. An insurer must give written notice to the claimant as expeditiously as possible where liability is admitted or denied but, in any event, within three months of the claimant giving notice of the claim.

The scheme extends the insurer's obligation to make interim payments for attendant care service expenses to a claimant who is seriously injured and in need of constant care over a long term, where the care is provided on a commercial basis and where liability has been admitted. It requires insurers to pay for reasonable medical, hospital and rehabilitation expenses, where liability is admitted, even if they allege contributory negligence.

The scheme has created the Claims Assessment and Resolution Service (CARS).

Most CTP claims are assessed by CARS rather than by the courts. The decisions of CARS assessors are binding on insurers.

There are approximately 40 CARS assessors in NSW, appointed from the senior ranks of personal injury lawyers. CARS assessors may assess claims at a face-to-face assessment conference or on the papers.

Claimants may reject an assessor's award and take the matter to court, but face severe costs penalties if the verdict is not at least 20% higher than the assessor's award.

A CARS assessment conference is relatively informal, with CARS assessors often asking most of the questions. Witnesses are not sworn

in and there is no opportunity for 'trial by ambush' – for example, surveillance film, if it is to be relied on, must be disclosed to the claimant well before the assessment conference.

The scheme restricts access to court. Court proceedings cannot be commenced unless the matter has been exempted from CARS. There are four mandatory grounds for exemption, namely:

- the insurer has denied liability;
- the insurer has admitted liability but alleged contributory negligence of more than 25%;
- the claimant lacks legal capacity; and
- the person against whom the claim is made is not a licensed or other CTP insurer.

Claims can also be exempted on discretionary grounds, for example, where the issues in relation to liability and/or quantum are complex. If a matter is exempted, court proceedings are generally commenced in the District Court, which has unlimited jurisdiction.

It regulates costs payable by insurers in matters that are not exempted from CARS.

Court proceedings must be commenced within three years of the date of accident or death if the matter is exempted from CARS. No time period applies, however, to an application for a matter to be determined by CARS. Furthermore, once an application for CARS assessment has been lodged, the time within which court proceedings must commence is suspended.

Damages available for gratuitous care are restricted. There are no such damages unless the care is provided for at least six hours per week and for more than six months. No such threshold applies to care provided on a commercial basis.

Generally, there is no entitlement to interest.

#### CHANGES IN THE WIND

A number of significant changes are on the way.

The defence of 'inevitable' accidents will be abolished from 1 October 2006. Thus, a hapless pedestrian or a passenger injured as a result of the driver of a motor vehicle suffering a heart attack, being stung by a bee, having a coughing fit, etc, will recover full damages without having to establish actual fault by the driver.

A no-fault scheme will pay medical expenses and rehabilitation costs for children under the age of 16 years from 1 October 2006. Infants who can prove negligence/fault will still be entitled to receive common law damages.

A no-fault lifetime care regime for accident victims with catastrophic injuries will start, probably for accidents from 1 October 2007.

Accident victims who can prove fault, in addition to care (including equipment and medical treatment) will retain the right to receive lump-sum damages for NEL, past and future economic loss and, possibly, any item of care or equipment that is not covered by the care/equipment schedule (yet to be finalised).

*Sullivan v Gordon* damages for the cost of childcare have been reinstated.

#### PRAISE AND CRITICISM

##### The good

CARS operates reasonably smoothly and fairly due largely to the experience of the CARS assessors, the informality of the process and the fact that the assessments are binding on insurers.

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**The bad**

The costs regime for CARS matters is low and does not reward practitioners for thorough preparation and proper presentation. No such restrictions apply to insurers' lawyers.

**The ugly**

WPI and MAS: these are matters of grave concern.

It is universally accepted that the WPI assessment process is flawed because many of the MAS doctors are perceived to lack objectivity, while the guidelines themselves are thought to be so rigid and unfair that many accident victims who have suffered significant injuries fail to receive entitlement to NEL damages. The guidelines specifically exclude pain, disability and future complications and are particularly severe in the area of lower extremity injuries – for example, a fractured leg – which are probably the most common injuries suffered in motor vehicle accidents.

Furthermore, the MAS process is causing gross delays in the resolution of claims because cases cannot be finalised until the issue of WPI has been resolved. Insurers and claimants are often reluctant to concede, even in the most obvious cases, that injuries either exceed or fall below the prescribed WPI threshold. Thus accident victims are subjected to unnecessary further medical assessments and therefore further delay.

## QUEENSLAND

By Luke Randell

**RELEVANT LEGISLATION**

The *Motor Accident Insurance Act 1994* (MAIA) regulates all personal injury claims in Queensland that are motor vehicle-related. As of 2 December 2002, the *Civil Liability Act 2003* (CLA) also applies to motor vehicle claims.

**TIME LIMITS: SECTION 37 NOTICE OF CLAIM**

Generally, the *Limitation of Actions Act 1974* places a three-year limit on actions for injuries, dating from the cause of the action. However, the MAIA has imposed additional time limits and procedures that must be complied with.

The regulations require that the police be informed of the accident and complete a traffic incident report.

Generally, a notice of claim under s37 must be lodged within nine months of the accident, or one month after consulting a solicitor. If lodged outside these periods, the claimant must give reasons for the delay.

Regulations also require that the s37 notice be accompanied by a medical certificate.

Should the defendant's vehicle be uninsured, or unidentified, notice must be given to the nominal defendant within three months. Time limits for nominal defendant claims are strictly enforced and can be complex.

Following compliance with s37, the insurer has up to six months to conduct its own investigations and to provide a notice as to liability. During this period, the plaintiff's solicitors and their insurer will usually require the client to attend a medical assessment.

Medical examinations and reports are usually completed in accordance with the AMA5.<sup>1</sup>

**COMPULSORY SETTLEMENT CONFERENCE**

Under the MAIA, it is necessary for at least one settlement conference to be held before proceedings can be commenced or continued in court.

If the matter does not settle at the compulsory settlement conference, court proceedings must be issued and served within 60 days of the date of the conference. Mandatory final offers (MFOs) must be exchanged and certain cost consequences flow from these.

MFOs are tactically important and are examined in more detail elsewhere in this edition.

**COURT PROCEEDINGS**

As all the necessary information regarding the claim is known to both parties – due to the pre-litigation process – court proceedings are usually streamlined and can be concluded within six months.

While court proceedings may start, very few matters actually proceed to trial and most are settled through negotiation.

The procedures under the MAIA have been in operation for many years and have been very successful in settling matters quickly and cheaply. As such, the system has generally been operating very successfully in Queensland to the benefit of all involved, insurers and injured alike.

However, in response to the so-called public liability and insurance 'crisis', recent far-reaching changes and restrictions to injury compensation laws have been made by the CLA.

**EFFECT OF THE CIVIL LIABILITY ACT 2003**

In addition to the hefty cuts to compensation (through thresholds on gratuitous assistance and restrictions on costs), the Queensland Government has made further inroads by introducing a scale for general damages.<sup>2</sup> The scale is unfair and unjust.

The scale applies to all motor vehicle and general claims for personal injuries suffered after 1 December 2002.

**Notes:** 1 The CLA stipulates that courts must give preference to reports completed according to AMA5. 2 The scale of general damages is mandated by the CLA and limits awards of compensation in general damages, especially in minor to moderate claims. The court allocates an injury scale value (ISV) between nil and 100 to the claimant's injury depending on its seriousness. The ISV corresponds to a dollar value up to \$250,000 and is weighted against ISVs at the low end. For example, 5 points corresponds to \$5,000, while 40 points corresponds to \$68,000. The scale largely replaces judicial discretion in this area.

## SOUTH AUSTRALIA

By Victoria Webster

**RELEVANT LEGISLATION**

Compensation for third-party personal injury claims is governed by the following Acts and Regulations:

- *Motor Vehicle Act 1959* (MVA);
- *Road Traffic Act 1961* (RTA);
- *Motor Vehicle Rules and Regulations* (MVRR); and
- *Civil Liability Act 1936* (CLA).

The MVA, the RTA and the MVRR establish the criteria for imposing liability on drivers of motor vehicles.

The CLA governs what damages can be claimed; how damages are calculated; who can claim damages; and contributory negligence.

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

Accidents should be reported to the police within 48 hours.

A claim should be lodged with the claims manager for the Motor Accidents Commission (in South Australia, Allianz) as soon as practical, but it can be done any time up to three years after the accident. In the case of a child, the insurer must be notified within six years.

Court proceedings must be initiated within the three-year time limit. This is the same for a claimant under a disability. For children, the time limit expires on their 21st birthday.

**INITIATING A CLAIM**

A claim can be made either by the injured person or, in the case of death, by a surviving lawful or putative spouse of a person wrongfully

killed, or by children who are financially dependent on the person wrongfully killed.

Proceedings can be initiated in the Magistrates, District or Supreme Court of South Australia. The Magistrates Court has a jurisdictional limit up to \$80,000, while the District and Supreme Courts can award unlimited damages.

**PARAMETERS FOR COMPENSATION: THRESHOLDS, CAPS AND DEDUCTIBLES**

**Non-economic loss**

Section 52 of the CLA sets out the scale of damages for NEL.

Paragraph 1 states that damages may be awarded for NEL only if:

1. the injured person's ability to lead a normal life was significantly impaired by the injury for a period of at least seven days; or
2. medical expenses of at least the prescribed minimum (as defined in s3) have been reasonably incurred in connection with the injury.

Damages awarded for NEL are assessed on a scale of 0 – 60, and the calculations of those damages are set out in paragraph 2C of s52 of the Act.

**Loss of earning capacity**

There is no award for the first week of incapacity.<sup>1</sup>

Total damages for loss of earning capacity are not to exceed the prescribed maximum.<sup>2</sup>

Similarly, for a dependency claim, the total amount awarded to compensate economic loss resulting from a death cannot exceed the prescribed maximum.

**Loss of future earning capacity**

A lump sum can be awarded for future earnings or other future losses.<sup>3</sup> An actuarial multiplier is used to calculate the present value of future losses.<sup>4</sup>

**Gratuitous services**

Damages in respect of gratuitous services both past and future can be awarded as s58 CLA, but are limited to care received from parents, the spouse or the child of the injured person.

A further cap limits damages awarded for the gratuitous services of a parent, spouse or child to an amount equivalent to four times average weekly earnings in the state. The award in excess of that prescribed by paragraph 2 of s58 is at the discretion of the court.

**Loss or impairment of consortium**

Section 65 CLA allows damages to be awarded for this loss.

**Mental harm**

Damages may be awarded for mental harm<sup>5</sup> only if the injured person:

- was physically injured in the accident or was present at the scene of the accident; or
- is a parent, spouse or child of a person killed, injured and/or endangered in the accident.

Only recognised psychiatric illnesses are compensable.

A defendant is liable for mental harm damages only if a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, have suffered a psychiatric illness.<sup>6</sup>

**CONTRIBUTORY NEGLIGENCE<sup>7</sup>**

**Where injured person intoxicated**

Section 46 imposes a presumption of contributory negligence where the injured person is intoxicated. The presumption can be rebutted if the injured person can establish on the balance of probabilities that the intoxication:

- did not contribute to the accident; or
- was not self-induced.

If self-induced, the injured person must establish that the intoxication:

- is wholly attributable to the use of drugs in accordance with prescription or the instructions of a medical practitioner; and
- that the injured person was complying with those instructions.

If the presumption is not rebutted, damages are reduced by 25% if the blood alcohol level is under 0.15 gms.

If it can be established that the concentration of alcohol in the injured person's blood was 0.15 gms or more, or that the driver was so much under the influence of intoxicating liquor or a drug as to be incapable of exercising effective control of the vehicle, the fixed statutory reduction prescribed by the Act is 50%.

**Where injured person relies on an intoxicated person**

Section 47 presumptively reduces damages where the injured person relies on the care and skill of an intoxicated person.

The section applies if the accident was caused by an intoxicated person, where the injured person:

- is over the age of 16;
- relied on the care and skill of a person who was intoxicated; and
- was aware or ought to have been aware that the other person was intoxicated.

The presumption can be rebutted if:

- the intoxication did not contribute to the accident; or
- the injured person could not reasonably have been expected to avoid the risk.

The reductions of damages mirror s46 of the Act.

**Where injured person over 16**

Section 49 sets out the presumption of contribution where an injured person over the age of 16:

- was not wearing a seatbelt;
- was not wearing a safety helmet; or
- was not in the passenger compartment at the time of the accident.

The presumption can be rebutted if, on the balance of probabilities, s/he could not reasonably have been expected to avoid the risk.

The fixed statutory reduction for contributory negligence in these circumstances is 25%.

**CONCLUSION**

The system works very smoothly in South Australia. There is a good relationship between plaintiffs' solicitors and the sole claims agent, Allianz.

Allianz will generally pay for medical reports obtained through the process and, in major claims, will often cover care, equipment and living expenses on an interim basis.

**Notes:** 1 Section 54 CLA. 2 As defined in s3 CLA. 3 Section 55 CLA. 4 The actuarial figures can be found in Luntz, Harold, *Assessment of Damages for Personal Injury and Death*, 4th ed, 2002. 5 Section 53 CLA sets out damages for mental harm. 6 Section 33 CLA. 7 See ss46, 47, 49 CLA.

**TASMANIA**

By Leigh Mackey

**RELEVANT LEGISLATION**

The CTP scheme in Tasmania is governed by the:

- *Motor Accidents (Liabilities & Compensation) Act 1973 (MALCA)*;
- *Motor Accidents (Liabilities & Compensation) Regulations 2000 (MALCR)*;
- *Motor Accidents Compensation Tribunal Regulations 1999 (Trib Regs)*;
- *Wrongs Act 1954*;

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- *Civil Liability Act 2002 (CLA)* – parts 2, 3, 5, 7 and 8, and part 6 re divisions 1, 2, 3, 4 and 7; and the
- *Limitation Act 1974 (LAct)*.

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

### Schedule benefits (no-fault benefits)

Motor vehicle accidents must be reported to the police as soon as practicable (failure can be excused): s23(2A) of the MALCA.

A disability allowance is available only if a claimant has been wholly disabled from engaging in their usual employment or housework within 20 days: part 5, schedule 1 of the MALCR.

The registered owner of the motor vehicle must notify the Motor Accidents Insurance Board (MAIB) of the accident (including a statement of particulars specified) as soon as practicable after the accident occurs or after it comes to the owner's knowledge: s21 of MALCA (a penal provision).

Referral of a matter to the Motor Accidents Compensation Tribunal must be made within 14 days from the date of notification of the challenge decision: Trib Regs, r4.

### Common law proceedings

Again, for common law claims, the accident must be reported to police as soon as practicable (failure can be excused): MALCA s14(2A).

If the driver at fault is dead or unknown, notice of a nominal defendant claim, with a short statement of grounds, must be provided to the MAIB within three months: MALCA s 16(2).

This period can be extended by applying within nine months of the accident, and for any further period if it is just and reasonable: see MALCA s16.

The registered owner has a duty to notify the MAIB of the accident (including a statement of particulars specified) as soon as practicable after the accident or after it comes to their knowledge: MALCA s21 (a penal provision).

For injuries occurring before 1 January 2005, the action must be commenced within three years. An application to extend time can be made within a further three years: LAct s5.

For injuries occurring on or after 1 January 2005, the action must be commenced within three years from the date of discoverability, or 12 years from the act or omission that caused the injury, whichever is the earlier: LAct s5A.

Extension of time can be given in certain circumstances: LAct ss5, 5A and 38A.

For injuries occurring after 1 January 2005, the action must be commenced within three years from the date of discoverability or 12 years from the date of the act or omission occurring, with an extension period of a further three years from the date of discoverability: LAct s5A.

## PARAMETERS FOR COMPENSATION: THRESHOLDS, CAPS AND DEDUCTIBLES

### Schedule benefits (no-fault benefits)

For medical benefits, a current limit of \$400,000 applies. Funeral expenses are limited to \$4,000 plus a discretion to provide a further \$2,000.

For death benefits, the maximum is a \$50,000 lump sum, together with \$12,000 for each dependent child under the age of nine, \$6,000 for each dependent child between the ages of 9 – 18 years, and \$2,400 for each dependent child between the ages of 18 – 25 years.

Disability allowance is limited to 260 weeks in total. The first 104 weeks are awarded if the injured person is wholly disabled from engaging in usual employment; the remainder period is awarded if the person is wholly disabled from engaging in any employment for which

they are suited by reason of education, training, experience or ability. Payments are made at 80% of average weekly earnings.

Housekeeping expenses are paid at the lesser rate of commercial cost or \$200 per week, but are limited to 26 weeks or 39 weeks if the claimant has been hospitalised for four days consecutively.

### Common law

Where the claimant was intoxicated, there is a presumption of 25% contributory negligence: CLA s5.

When the claimant failed to wear a seat-belt and is aged 16 or above, the deduction for contributory negligence is 15% or higher: CLA s22(3), (4).

Where the claimant is a criminal engaged in a serious offence (punishable by imprisonment exceeding six months), they cannot recover for their injuries: CLA s6.

Any superannuation entitlements are limited to a percentage of the rate claimed for lost income: CLA s25. Claims for earning capacity cannot exceed three times the adult average weekly earnings as published by the Australian Bureau of Statistics: CLA s26 and MALCA s22(5).

General damages are restricted, depending upon the quantum awarded: CLA s27.

Future losses are calculated on the basis of the 5% discount table: CLA s28A.

Recovery is excluded for gratuitous services: CLA s28C; as are claims for lost consortium: s28D.

Any claims for nervous shock are limited to witnesses of the event or its aftermath, or close relatives: CLA s32.

## MEDICAL EVIDENCE

Medical evidence is not binding on the MAIB or any court. In the ordinary course of events, the MAIB will obtain independent medical evidence and be supplied with medical evidence from the claimant's practitioners. Any dispute may be decided by a court or tribunal upon hearing and testing the evidence in the usual course of a trial or other proceeding.

## LEGAL COSTS AND DISBURSEMENTS RECOVERY

In all jurisdictions, costs follow the event and are payable on a party-party basis as per the applicable scales.

Out-of-pocket expenses incurred by the claimant in the pursuit of proceedings for personal injuries against the MAIB's insured may be refunded in the course of a matter by the Board, if they are provided to it within six months of receipt and if proceedings have been instituted by the claimant.

## CONCLUSION

There are currently no changes to the scheme imminent.

The current system, which provides access to both schedule (no-fault) benefits and/or common law damages for persons injured by motor vehicles, remains one of the last bastions of relatively unfettered access to common law damages in this state. At least in this area, individuals are not denied access to a system designed to compensate them by measure of their actual loss. Indeed, it is instructive to recognise that the system overseen by the MAIB continues to provide access to common law benefits as well as no-fault benefits without unduly raising the costs associated with the scheme (premiums on motor vehicles).

The trade-off to ongoing access to common law damages, however, is the relatively scant schedule benefits on a no-fault basis.

# ACT

By Andrew Freer

## RELEVANT LEGISLATION

Territory motor vehicle accident personal injury claims are now primarily regulated by the *Civil Law (Wrongs) Act 2002* (CLW Act), *Civil Law (Wrongs) Regulation 2003* and *Road Transport (General) Act 1999* (RTG Act).

Chapter 4 of CLW Act defines negligence and enacts the common law in relation to the content of a duty of care, reasonable precautions and causation. Chapter 5 creates a regime of pre-court procedures, including personal injury claim notification to a respondent. These procedures do not apply if the injured person had consulted a lawyer prior to 9 March 2004.

Part 10 of RTG Act deals with compulsory vehicle insurance and the nominal defendant scheme for uninsured and unregistered vehicles.

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

There is no specific requirement that an accident be reported to the police; however, a report should be made as soon as possible.

Section 51 of the CLW Act provides that a personal injury claim notification, containing information specified by the regulations, must be given to a respondent within nine months of the day of the accident (or the day that symptoms of the injury first appeared) or within four months of the claimant seeking advice from a lawyer about damages for personal injury.

The *Limitation Act 1985* (L Act) provides a three-year limitation period for causes of action that arise after 9 September 2003. For these claims, no court discretion to extend exists. For matters before this date, a six-year limitation period applies. Claims captured by the provisions of the *Workers Compensation Act 1951* are subject to a three-year time-limitation period, where the cause of action arose after 1 July 2002. Children's claims must be notified within six years.

Compensation to relatives claims have a six-year limitation period.<sup>1</sup> There appears to be no extension available.<sup>2</sup>

For claims involving an uninsured or unidentified motor vehicle, the nominal defendant must be notified within three months of the accident.<sup>3</sup> An extension of this notice period can be sought.

Liability for treatment costs is dependent on notification within one month of the accident, subject to an agreed or court-ordered extension.<sup>4</sup> Drivers must notify the owner and insurer of specified information as soon as practicable.<sup>5</sup> Enforcement action requires three months' notice to an insurer, subject to an agreed or court-ordered extension.<sup>6</sup> Court proceedings must also be served on the insurer.

## PARAMETERS FOR COMPENSATION: THRESHOLDS, CAPS AND DEDUCTIBLES

Restrictions on available damages are set out in chapter 7 of the CLW Act. Restrictions exist if the claimant's conduct constituted an indictable offence or contributed materially to the risk of injury. Similarly, contribution issues arise if the claimant was intoxicated or not wearing a seatbelt.

Economic loss is limited to three times the average weekly earnings. There is no cap on general damages. No deductibles apply.

## COURTS INVOLVED IN THE PROCESS

Claims are routinely litigated in either the ACT Magistrates Court, which has a jurisdiction to \$50,000, or the Supreme Court, which has an unlimited jurisdiction. Costs penalties apply to a matter litigated in the Supreme Court where less than \$40,000 is recovered.

## MEDICAL EVIDENCE

On lodgement of a claim, the respondent and their insurer must get

authority to allow the release of clinical notes and records made by the treatment provider. For litigated matters, expert medical evidence is regulated by chapter 6 of the CLW Act. Evidence given in the proceedings is limited to an agreed or appointed expert. These provisions are currently the subject of judicial consideration in relation to whether the expert evidence limitations imposed by the CLW Act are in conflict with the provisions of the *Evidence Act 1995* (Cth) as it also applies in the ACT.

The Supreme Court Practice Direction #2/2004 (pre-1 July 2006) and new *Court Procedures Act 2006* (post-1 July 2006) specify the expert witness code of conduct.

## LEGAL COSTS AND DISBURSEMENTS RECOVERY

The recovery of legal costs is limited by chapter 14 of the CLW Act. For a claim of \$50,000 or less, costs must not exceed 20% of the amount recovered, or \$10,000, whichever is the greater. The Act defines what is a cost, what is a disbursement and what is covered by the restriction. Cost recovery in the Supreme Court is regulated by the *Supreme Court Rules 1937* (pre-1 July 2006) and the new *Court Procedures Act 2006* (post-1 July 2006).

## IMMINENT CHANGES

The expert evidence regime is currently the subject of judicial consideration and ongoing dialogue with the ACT Government.

## CONCLUSION

The ACT scheme maintains a relatively unfettered common law scheme. The scheme provides for the realistic recovery of damages, particularly for reasonably serious injuries which may not, however, satisfy thresholds of whole person impairment that exist in other jurisdictions.

The implementation of tort reform in relation to the territory motor vehicle accident compensation scheme has, by comparison with some other jurisdictions, taken place in a relatively measured manner.

**Notes:** 1 See s16 L Act. 2 See s36(5)(b) L Act. 3 Section 181 RTG Act. 4 See s186 RTG Act. 5 Section 189 RTG Act. 6 See s190 RTG Act; see also *Botterill v Lane* [2005] ACTCA 39 (11 November 2005), and *Lane v Botterill* [2005] ACTSC 40 (20 May 2005).

# NORTHERN TERRITORY

By Allison Robertson and Omar Khan

## RELEVANT LEGISLATION

The NT scheme is governed by the *Motor Accidents (Compensation) Act 1979* (MACA), and *Motor Accidents (Compensation) Appeal Tribunal Rules* (MACATR). The sole insurer is the Territory Insurance Office (TIO). Compulsory third-party insurance is paid with vehicle registration.

The scheme is a hybrid of no-fault statutory benefits for residents of the Territory and modified common law damages for non-residents.

## THE STATUTORY SCHEME FOR RESIDENTS

### Entitlement

NT residents are entitled to benefits for injuries suffered in accidents in or out of the Territory.

A 'resident' is someone who, at the time of the accident, has resided continuously in the NT for more than three months. Note that 'resided continuously for three months' has been widely interpreted, and does not necessarily require continuous presence in the NT for those three months. Alternative tests of residency also apply.

Injured drivers affected by alcohol or drugs, taking part in a race, not licensed to drive, or who are found guilty of certain criminal >>

offences in relation to the accident, are precluded from receiving weekly benefits or permanent impairment compensation, but are still entitled to medical expenses.

Injuries in motor accidents on journeys to or from work fall under MACA, not the *Work Health Act 1986*. Motor accident injuries in the course of employment are compensated under the *Work Health Act*.

## Claim process

No police report is required by MACA (the general law requiring reporting of accidents to police applies, however).

Claims must be lodged 'as soon as practicable' after an accident, or other event triggering a claim for variation benefits.

Claims lodged outside six months may be refused. The TIO board *must* refuse a claim made more than three years after the relevant event, or three years after a minor claimant turns 18.

Claims must be made in the approved written form.

The TIO 'designated person' must either make a decision within 30 days of application, or refer the matter to the board for determination. Once a decision has been made by the designated person, or if there has been a refusal/failure to make a decision within 30 days, the claimant has 28 days from notification, or from expiration of the 30-day period, to request that the matter be referred to the board. The board has 60 days from the date of referral to make a decision.

Neither the designated person or the board is required to give reasons for their decisions. Decisions may be made without any hearing, but written submissions are to be taken into account.

A claimant aggrieved by a decision or failure of the board to make a decision can appeal to the Motor Accidents (Compensation) Appeal Tribunal. The claimant must refer the matter within 28 days of the board's decision, or, if the board fails to make a determination, within 28 days from the end of the 60-day period. The board may also refer matters to the tribunal at any time.

The tribunal is constituted by a single judge of the NT Supreme Court. The decision of the tribunal is final and not subject to appeal.

## Statutory benefits

For weekly compensation for loss of earning capacity to age 65 (s13), maximum benefits are 85% of 'all employees' average earnings', net of tax (currently \$562.15 net per week, indexed six-monthly). Benefits are payable where a person's earning capacity is reduced. The claimant does not have to have actually lost wages to receive the benefit.

As regards lump sums for permanent impairment (s17), nil is payable below 5% WPI. WPI between 5 and 14% is subject to a deduction. WPI of 15% or more is not subject to a deduction. The maximum amount for WPI is \$216,112 (208 x NT full-time adult average weekly earnings, indexed annually on 1 January).

Unlimited, but reasonable, medical, surgical, nursing, travel and rehabilitation expenses are available (s18), as are attendant care payments for a maximum of 28 hours per week, at a prescribed rate (currently \$20.80 per hour).

Unlimited, but reasonable, home/vehicle modification expenses, appliances, facilities and equipment are available (s19).

Prescribed funeral expenses are \$5,402.50 and lump-sum compensation of \$162,084 is available to the spouse and/or dependant children or parents, of deceased persons (ss22 and 24), and weekly payments of \$103.90 to dependant children of the deceased (s23).

## Medical evidence

The board may take such medical and other advice from such sources as it considers necessary.

The claimant may request that the board approve treatment. However, the board must not approve unless it is satisfied on medical evidence that the requested treatment or care is medically necessary (s18(4)).

The board can require a person to undergo a medical examination by a practitioner that it nominates, for the purpose of determining any entitlement (s12(2)).

'Permanent impairment' means assessment in accordance with the AMA Guides 'as published from time to time' – somewhat more flexible than most other compensation schemes, as it does not restrict the medical practitioner to a particular edition of the Guides.

Decisions of the board in relation to medical issues are subject to appeal (see above).

## Legal costs recovery

Costs incurred before the tribunal stage are not recoverable. Tribunal costs follow the event unless otherwise ordered.

The tribunal can specify the scale of costs and how they are calculated. Generally, it uses the Supreme Court's scale.

With common law actions, costs follow the event, party:party on relevant court scales.

Costs provisions in the NT currently allow solicitors to enter into conditional fee agreements, and to charge clients at rates above Supreme Court scale, subject to disclosure of the rates of charge.

## MODIFIED COMMON LAW FOR NON-RESIDENTS

Non-residents can pursue damages where fault can be demonstrated.

Actions for damages cannot start unless notice in approved written form has been given to the TIO within three months of the date of injury/death or such further period that the court allows.

Proceedings must be commenced within three years of the date of accident (in accordance with the *Limitation Act*).

Proceedings can be commenced in the Supreme Court (by generally endorsed writ) or Local Court (by statement of claim).

Damages entitlements for non-residents include:

- NEL up to the s17 maximum (currently \$216,112), not subject to any threshold;
- past economic loss as incurred;
- future economic loss, but not in excess of the weekly rate prescribed for the purposes of s13 (ie, currently \$562.15 net per week); and
- special damages (medical, hospital, rehabilitation, care, equipment, etc).

Note that a 6% discount rate applies to all future losses. There are no prescribed rates or limits for voluntary care.

## THE SCHEME TO DATE, AND THE FUTURE

In its nearly 27 years of operation, the current scheme has proved to be stable and durable. It provides basic but universal coverage for victims of motor accidents in the NT, regardless of whether the injured person is at fault or not. The emphasis is on coverage of medical and rehabilitation costs, and while the coverage of economic loss is inadequate for any person on an above-average wage, for very low-income earners or people who are not actually employed at the time of the accident, the weekly benefit payments are something of a windfall.

Claims-processing for statutory benefits is straightforward and disputation levels are extremely low, with only those cases that are marginal requiring tribunal involvement.

Premiums are currently in the vicinity of \$430 per annum for a regular passenger vehicle and no imminent changes in the scheme have been proposed.

## VICTORIA

By Voula Lambropoulos and Emily Anderson

### RELEVANT LEGISLATION

In Victoria, the *Transport Accident Act 1986* (TAA) governs compensation for transport accidents. The Transport Accident

Commission (TAC) administers the scheme, which is a no-fault system with restricted common law damages for seriously injured people.

## NO-FAULT BENEFITS

In order to be eligible for benefits, an injured person must report the accident to police and lodge a claim for compensation within 12 months of the accident.<sup>1</sup> Once the claim has been accepted, there are three main categories of no-fault benefits: medical and like expenses; loss of earnings/loss of earning capacity; and impairment.

An initial medical excess of \$564 must be met prior to the TAC accepting liability for medical and like expenses.<sup>2</sup> Under s60 of the TAA, the TAC is liable to pay for the reasonable cost of medical, hospital, nursing, disability, rehabilitation, transportation, ambulance and childcare services arising out of the accident.

Claimants who meet the statutory definition of an 'earner', and are incapacitated for work, are entitled to loss-of-earnings benefits for a maximum of 18 months following the accident. Their benefits are payable after the first five days off work, at the rate of 80% of the gross pre-accident earnings.

If the earner remains unfit for work after the 18 months, they are entitled to loss-of-earning-capacity benefits, which are calculated by reference to pre-accident earning capacity in view of their training, skills and experience. This entitlement ceases three years after the accident, unless the claimant is assessed as sustaining a level of permanent impairment above 50% WPI.

A lump sum is payable for permanent impairment exceeding 10% WPI. Eligibility for impairment benefits is assessed by accredited specialists in accordance with the AMA4. The TAC must determine a claimant's level of impairment when his or her condition has stabilised, and no later than three years after the accident.

Legislative changes introduced in December 2004 saw a significant increase in the amount payable for impairment. Previously, 11% WPI resulted in a payment of \$902.55, and the maximum amount payable for impairment benefits was \$81,230. Eleven per cent WPI now results in a payment of \$5,500, and the maximum is \$257,670.<sup>3</sup>

TAC decisions on no-fault entitlements can be appealed to the Victorian Civil and Administrative Tribunal (VCAT). A notice of application for review must be lodged within 12 months of the claimant becoming aware of the decision.

However, in March 2005, dispute resolution protocols were negotiated between the TAC, the Australian Lawyers Alliance and the Law Institute of Victoria (LIV). In accordance with these protocols, claimants who are represented by Alliance or LIV members may engage in an informal dispute-resolution process (including a pre-issue conference) prior to issuing VCAT proceedings. In addition, impairment protocols have been established that recognise the role of the claimant's lawyers in the impairment process, and which aim to speed up the delivery of impairment benefits.

## COMMON LAW

Claimants who can prove that the accident was caused by another's negligence can make a common law claim for damages if they have sustained a 'serious injury'. Claimants who are assessed as having sustained 30% WPI or more are automatically deemed to have suffered a serious injury. Alternatively, there is a narrative test where there has been a serious long-term impairment or loss of body function; permanent serious disfigurement; serious long-term mental or behavioural disturbance or disorder; or loss of foetus.<sup>4</sup>

In most cases, the County Court of Victoria hears applications to issue proceedings on the basis that a serious injury has been sustained (originating motions). Common law damages claims are usually dealt with in the County or Supreme Court of Victoria. However, common law protocols have also been introduced to encourage discussion and settlement prior to the issuing of proceedings.

The statute of limitations for common law claims is six years.

## LEGAL COSTS AND DISBURSEMENTS RECOVERY

In relation to VCAT and County Court proceedings, party:party legal costs and disbursements are taxed in accordance with the County Court Scale. However, for matters that are negotiated in accordance with the protocols, fixed price-points have been set for legal costs.<sup>5</sup> Recent negotiations between the TAC and the Alliance have led to amendments to the common law protocols raising the amount of costs payable.

In addition, practitioners may claim reimbursement for the reasonable cost of medical reports obtained for the purpose of advising their clients under s60 of the TAA.<sup>6</sup>

## RECENT CHANGES TO THE SCHEME

The Victorian scheme has recently undergone a number of significant changes, primarily the legislative amendments and the introduction of no-fault dispute resolution, impairment and common law protocols.

Although the protocols have been in operation for only a little over 12 months, they appear to be working to the benefit of claimants. Negotiation in accordance with the protocols avoids costs risks to the client; recognises the role of claimants' lawyers; and appears to be expediting the delivery of disputed benefits by facilitating the earlier resolution of disputes. The protocols appear to be most successful at this stage, with reports of high levels of engagement, co-operation and successful resolution.

Since the introduction of the protocols, protocol development forums (attended by representatives of the TAC, the Alliance and the LIV) have been held at six-monthly intervals to assess the implementation of the protocols. These regular forums provide an opportunity for the Alliance to ensure that any further changes are in the interests of claimants.

**Notes:** 1 However, the TAC may exercise its discretion to accept a claim within three years of the date of injury if there are reasonable grounds for the delay in lodgement. 2 Although the excess is waived where the claimant was a hospital in-patient overnight, and only applies once to a family group. 3 See s11(3) of the *Transport Accident (Amendment) Act 2004*. 4 See s93 of the TAA. 5 The protocols are available on the TAC website: [www.tac.vic.gov.au](http://www.tac.vic.gov.au). 6 However, the 'reasonable cost' of a medical report has been an issue of some dispute between the TAC and Alliance members.

## WESTERN AUSTRALIA

By Laura Angel

### RELEVANT LEGISLATION

The Insurance Commission of Western Australia (ICWA) is the state's CTP insurer for vehicles registered in Western Australia. The motor vehicle third party personal injury insurance policy is combined with the registration premium for every licensed vehicle.

The legislation that governs the CTP scheme is the *Motor Vehicle (Third Party Insurance) Act 1943* (MVTPI). The Act is administered by the Motor Vehicle Personal Injury Division (MVPI) of ICWA. The Act is to be read in conjunction with and as supplementary to the *Road Traffic Act 1974* (RTA). The applicable regulations, the Motor Vehicle (Third Party Insurance) Regulations 1962, deal with the costs and payment of emergency treatment following a motor vehicle accident, and also prescribe the forms necessary to give notice of a claim, and for the recovery of costs of emergency treatment by hospitals and doctors.

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

Section 56 of the RTA requires the driver or the person in charge of the vehicle involved in the collision to report the accident to the officer in charge of the nearest police station 'forthwith'. Section 29 of the Act requires a person claiming for bodily injury or death caused by >>

another person driving a motor vehicle to give notice in writing of their intention to make a claim 'as soon as practicable' after the accident. Failure to do so may prejudice the making of a claim at some stage in the future.

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

For injuries occurring on or after 15 November 2005, under the *Limitations Act 2005*, an action cannot be commenced if three years have elapsed since the cause of action accrued.

For injuries occurring prior to 15 November 2005, a six-year limitation period applies. More restrictive time limits apply for such injuries when the proposed defendant is a public authority.

### PARAMETERS FOR COMPENSATION: THRESHOLDS, CAPS AND DEDUCTIBLES

The MVTPI imposes restrictions on the recovery of damages for non-pecuniary loss. No damages may be awarded where damages are assessed at less than the deductible statutory minimum of \$13,500. The statutory maximum, set at \$268,000, may be awarded only in a 'most extreme case'.

The Act also imposes restrictions on damages for provision of home-care services.

If the services are provided for 40 hours or more per week, then the amount of damages is not to exceed the amount calculated as the average weekly total earnings of all employees in Western Australia for the relevant quarter as published by the Australian Bureau of Statistics (s3D(3)). If services are provided for less than 40 hours per week, damages are calculated on a pro rata basis, based on the rate for the average 40-hour working week (s3D(5)).

Section 3D(6) imposes a \$5,000 threshold for an award of damages for home-care services.

### COURTS AND OTHER ENTITIES INVOLVED IN THE PROCESS

When liability is admitted on behalf of an insured, most motor vehicle claims will be dealt with informally through direct negotiation with ICWA and/or its panel of lawyers. If the matter is not resolved through informal negotiations, or when liability remains in issue, then proceedings may be issued in the District Court, which has unlimited jurisdiction.

### MEDICAL EVIDENCE

Currently, no guides are used to assess the level of disability or impairment arising out of injuries caused in a motor vehicle accident. The ICWA may require that an injured person submit to medical examinations by a legally qualified medical practitioner. Failure to do so may result in a bar to commencing an action for damages (s30 MVTPI). Both parties are entitled to obtain and rely on medical evidence regarding the plaintiff's injuries and disabilities and neither opinion is binding on the parties.

### LEGAL COSTS AND DISBURSEMENTS RECOVERY

The MVTPI restricts the recovery of costs as between solicitor and client. In an action for damages to which the MVTPI applies, solicitors cannot enter an agreement to represent a person for any greater reward than is allowed in the Supreme Court's scale of costs.

The scales impose maximum hourly and daily rates for lawyers and counsel as well as a scale for each item necessary to progress the claim.

### IMMINENT CHANGES

The Motor Vehicle (Third Party Insurance) Amendment Bill 2005 seeks to make two changes to the legislation.

The first is a restriction on damages for loss of earning capacity which would bring the legislation into line with the *Civil Liability Act 2002* (WA). The proposed s3F provides that, in assessing the amount of both past and future economic loss, the loss is to be disregarded to the extent that it would exceed three times the average weekly earnings at the date of the award. This amount is calculated in the same way as set out in s3D.

The second is to amend the legislation so that ICWA is not liable to indemnify an employer where an employee is injured while driving the employer's vehicle in the course of their employment, but where no other vehicle is involved. Currently, the legislation allows employers in such circumstances to be indemnified despite there being no negligence in the driving of a motor vehicle, but rather when the negligence relates to negligence in the workplace.

### CONCLUSION

As a fault-based common law system, the Western Australian scheme works well for represented and unrepresented claimants. However, as for other common law personal injury jurisdictions, the thresholds imposed by the legislation (both current and proposed) effectively reduce the number of claims for damages for personal injuries that are minor or moderate in nature.

Claimants are afforded access to medical and ancillary treatment without having to meet specific criteria or reach specific impairment or disability thresholds, provided that the treatment is necessary and related to the index accident. When disputes arise concerning a claimant's injuries or treatment, the scheme allows the issues to be considered informally between the parties. Accordingly, issues are usually resolved between the parties without the need for formal court proceedings.

**Notes:** 1 Either in relation to obtaining evidence regarding the circumstances of the accident or quantum of damages. 2 *Hall v Motor Vehicle Insurance Trust* [1984] WAR 111 at 113-114 and *Stevens v Motor Vehicle Insurance Trust* [1978] WAR 232.

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