

Quantum Assessment in New South Wales

Damages awarded in personal injury claims in New South Wales are regulated by the *Civil Liability Act 2002* (NSW).

Claims against an employer are governed by the *Worker's Compensation Act 1987* (NSW) and *Workers Compensation Regulation 2016* (NSW).

1. General damages / non-economic loss

- Cover damages for pain and suffering and loss of enjoyment of life.
- A plaintiff will not be entitled to claim general damages from his or her employer. Plaintiffs that have sustained more than 10% Whole Person Impairment (**WPI**) (physical injury) or 15% WPI (psychological injury) will be entitled to a lump sum payment under the *Worker's Compensation Regulation 2016*.
- A plaintiff will not be entitled to claim general damages against non-employer parties unless the severity of the loss is equal to or greater than 15% of a 'most extreme case' (s16 CLA). This is not equivalent to a 15% WPI.
- A 'most extreme case' has been held to include serious cases of paraplegia, brain damage and extremely serious scarring and disfigurement. The percentage of a 'most extreme case' assigned to an injury is a discretionary exercise by the court.
- Often, an injury that is not significant can still meet the 15% threshold.
- The damages amount is calculated as a percentage of the maximum amount allowed, which is currently capped at \$687,000 (correct as at 1 October 2020). The maximum amount is indexed each year on 1 October.
- Interest cannot be claimed on general damages.

2. Past economic loss

- Calculated from the date of the injury to the anticipated date of settlement or judgment.
- If the plaintiff was employed at the time of the incident, past economic loss is calculated by adding up the net weekly earnings the plaintiff lost as a result of the injury or, alternatively, loss of earning capacity or a mixture of both.
- If the plaintiff was not employed at the time of the incident, the court will consider whether the injury impacted on the plaintiff's ability to return to work, whether the claimant was likely to return to work, and may award a global sum for loss of earning capacity accordingly.
- Past economic loss is capped at three times the average weekly earnings at the date of the award.
- Interest on past economic loss is recoverable.

3. *Fox v Wood* damages

- Where workers' compensation benefits have been paid to a plaintiff in respect of an injury, the plaintiff will be entitled to recover the income tax paid in respect of refundable workers' compensation payments when claiming damages under the common law.

4. Future economic loss

- For a plaintiff to be entitled to future economic loss, they must not only establish a diminution in earning capacity but also that the diminution will or may result in actual financial loss.
- A court will generally award a global sum where the precise impact of an injury on a plaintiff's earning capacity is difficult to determine.
- A prescribed discount rate of 5% is applicable to determine the present day value of the future loss.
- After applying the 5% discount, a generally accepted discount of 15% is applied for vicissitudes and contingencies. This can be varied to account for the particular circumstances of the plaintiff (such as if the economic loss period is short) or increased (such as if the economic loss period is exceptionally long or other more evident factors will likely impact on the plaintiff's future earning potential such as unemployment and industrial disputes).

5. Past special damages

- Consists of out of pocket expenses paid by the plaintiff, including medical and travel expenses and paid domestic assistance, and medical benefits received by the plaintiff (e.g. hospital, Medicare).
- The former is calculated by asking the plaintiff to provide documentary evidence of their outlays, and the latter by requesting medical providers or statutory bodies for their refunds.
- Interest is recoverable.

6. Future special damages

- Consists of anticipated medical and out of pocket expenses the plaintiff will incur in the future as a result of the injury.

7. Gratuitous and paid care damages

(a) Gratuitous assistance / *Griffith v Kerkemeyer* damages

- A plaintiff will only be entitled to claim gratuitous care damages from a non-employer if they have received, or will receive, gratuitous care for at least 6 hours per week for a period of at least 6 consecutive months (s15 CLA).
- Unlike in some other states (for example, Queensland), the plaintiff is not entitled to continue to claim for care once the care drops below 6 hours per week.
- No allowance is to be made for gratuitous care unless:
 - there is (or was) a reasonable need for the services to be provided;
 - the need has arisen (or arose) solely because of the injury to which the damages relate; and
 - the services would not be (or would not have been) provided to the plaintiff but for the injury.

- Interest is not recoverable on damages for gratuitous care.
- Gratuitous care damages can only be claimed from an employer where the person who provided the care has lost income or forgone employment as a result of providing the service (s 60AA(3) WCA).

(b) Loss of capacity to provide care

- The plaintiff can claim damages for their inability to provide domestic assistance to a dependant (such as a parent being unable to care for a child).
- The services the plaintiff can no longer provide must exceed 6 hours per week for a period of at least 6 consecutive months.
- Damages will only be awarded where:
 - the plaintiff provided domestic services to those dependants before the incident occurred; and
 - the plaintiff's dependants were not (or will not be) capable of performing the services themselves by reason of their age or physical or mental incapacity.
- If the dependant has previously recovered damages in respect of the same loss of capacity, the plaintiff will not be entitled to claim damages for that loss.

(c) Paid care

- A plaintiff will be reimbursed for all paid care received, and will receive in the future, as a result of the injuries.

8. Plaintiff's costs

- An employer will not be liable to pay for the plaintiff's costs.
- If the plaintiff's claim is successful, they will be entitled to recover their legal costs from the defendant non-employer on a standard or agreed basis.
- Similarly, if the non-employer defendant is successful, they will be able to recover their standard costs from the plaintiff.
- Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (NSW) sets the maximum costs recoverable where damages recovered in a personal injury claim do not exceed \$100,000:

Damages threshold	Costs
Below \$100,000	<p>In the case of legal services provided to a plaintiff: costs are capped at 20% of the damages recovered by the plaintiff, or \$10,000, whichever is greater.</p> <p>In the case of legal services provided to a defendant: maximum costs are fixed at 20% of the amount sought to be recovered by the plaintiff, of \$10,000, whichever is greater.</p>

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- Where a matter is heard in the District Court and proceeds to trial after an unsuccessful arbitration, the costs cap is increased such that an additional 15% of the damages may be recoverable or \$7,500, whichever is greater.
- Where a court considers certain costs were incurred because of the unreasonable or unnecessary conduct of an opposing party, it may order certain legal costs to be excluded from the maximum costs limitation.
- Notably courts have held that in cases where the plaintiff was unsuccessful in establishing liability on behalf of the defendant, the above costs cap will not apply if there is a verdict for the defendant.

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