

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) (**CLA**).

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

1. General damages / non-economic loss

- Cover damages for pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement (s 3 of the CLA).
- A plaintiff will not be entitled to claim non-economic loss damages against non-employer parties unless the severity of the plaintiff's injuries and disabilities suffered, as a result of the defendant(s) negligence, are equal to or greater than 15% of a 'most extreme case' (s 16 of the CLA).
- A 'most extreme case' has been held by the court 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. Recent court decisions can be useful as a guide to assigning a percentage of a 'most extreme case' to an injury. Often, an injury that is seemingly not significant can still meet the 15% threshold. A 'most extreme case' is not equivalent to a 15% Whole Person Impairment (**WPI**) (which is discussed further below).
- Damages for non economic loss are calculated as a percentage of the maximum amount allowed, which is currently capped at \$693,500 (correct as at 1 October 2021). The maximum amount is set out in s17 of the CLA and indexed each year on 1 October and s 16 provides the scaled amounts for each percentage of non-economic loss.
- Interest cannot be claimed on general damages.
- A plaintiff will not be able to claim non-economic loss damages from his or her employer. Under the New South Wales workers compensation scheme, a plaintiff that has sustained more than a 10% WPI (physical injury) or 15% WPI (psychological injury) will be entitled to a lump sum payment under s 66 of the WCA.

2. Past economic loss

- Past economic loss results from loss of earnings or the deprivation and/or impairment of earning capacity may be awarded under s 12 of the CLA.
- 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 plaintiff's injuries and disabilities suffered as a result of the defendant(s) negligence from the date of that injury and disability to the anticipated date of settlement or judgment, the plaintiff's loss of earning capacity for that period or a mixture of both.
- If the plaintiff was not employed at the time of the incident, the court will consider the plaintiff's employment history, whether the injury impacted 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

- Future economic loss is determined on what the plaintiff's most likely future circumstances would have been but for the injury.
- 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.
- Future economic loss is generally calculated to retirement age. Depending on the age and vocation of the plaintiff, 67 is commonly treated as the acceptable age for retirement in assessing future economic loss.
- 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 to account for vicissitudes and contingencies of life.

5. Lost superannuation

- The plaintiff is also entitled to loss of employer superannuation contributions based on economic loss assessed pursuant to s 12 and 13 of the CLA.
- The relevant approach for the calculation of superannuation on earnings was determined by the court in *Nadjovski v Crnojlovic* [2008] NSWCA 175.

6. Past special damages

- Consists of out of past pocket expenses which are expenses which have been incurred in connection with treatment of the plaintiff's injuries and disabilities suffered as a result of the defendant(s) negligence. Past out of pocket expenses are generally comprised of medical benefits received by the plaintiff (e.g. Medicare, any expenses paid by the plaintiff's private health insurance and workers compensation benefits) and those paid by the plaintiff, including medical and travel expenses.
- These damages are generally easy to quantify by reference to government notices from statutory bodies, refund/payment/payback statements from insurers and/or medical providers and tax invoices and/or receipts.
- Interest is recoverable.

7. Future special damages

- Consists of anticipated medical and out of pocket expenses the plaintiff will incur in the future as a result of the plaintiff's injuries and disabilities suffered as a result of the defendant(s) negligence.
- Typically, future out of pocket expenses are the subject of expert medical evidence as to the nature and extent of further or ongoing treatment and medication as well as aids/equipment.

8. Gratuitous and paid care damages

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

- A plaintiff will only be entitled to claim past or future gratuitous care damages (ie, unpaid care received from another person, usually a spouse/partner, family and/or friends) with respect to his/her injuries and disabilities suffered as a result of the defendant(s) negligence 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 continuous months (s 15 of the CLA).
- 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 (s 15 of the CLA).
- If gratuitous domestic care is required for less than 40 hours per week, the damages that may be awarded are calculated at the rates applicable to the period during which the care was required. The current rate gratuitous domestic care is \$32.53 per hour.
- If gratuitous domestic care is required for 40 hours or more per week, the amount of damages which may be awarded for gratuitous domestic care is capped at the average weekly earnings for the for employees in New South Wales for the period between when the injuries and disabilities suffered as a result of the defendant(s) negligence occurred and the date of the award.
- 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) of the 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 continuous months (s 15B of the CLA).
- Damages will only be awarded where:
 - the plaintiff provided domestic services to those dependants before the incident in which the Plaintiff's injuries and disabilities suffered as a result of the defendant(s) negligence 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 (s 15B of the CLA).
- Damages for loss of capacity to provide care which has been provided gratuitously is calculated by the same method used to calculate gratuitous domestic care.
- 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 (s 15B of the CLA).

(c) Commercial care

- A plaintiff will be reimbursed for all paid care received, and will receive in the future, for the plaintiff's injuries and disabilities suffered as a result of the defendant(s) negligence.
- The plaintiff will not be entitled to damages for future commercial care where they have been receiving gratuitous care and in the absence of evidence that the gratuitous care would/should cease in future.

9. 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 can seek to recover their legal 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 at 20% of the damages recovered by the plaintiff or \$10,000 plus reasonable disbursements, whichever is greater. This allowance does not include disbursements.
- 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.
- Where a court considers certain costs were incurred because of the unreasonable or unnecessary conduct of a party, it may order certain legal costs to be excluded from the maximum costs limitation.

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