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## TOPIC 1: Damages

**NOTE:** Where P suffers from a pre-existing condition that might have forced D to give up work, or might have resulted in him/her becoming ill anyway, must discount all relevant damages by the relevant %

### 1 Categories of damages

- Compensatory
- Aggravated
  - Awarded to compensate P for humiliating, malicious or insulting circumstances: **Canterbury Bankstown**
  - Compensate for circumstances of the injury rather than the loss
- Exemplary / punitive
  - **Lamb v Cotogno**
    - Awarded to punish D and act as deterrent
    - Where D has acted in conscious and contumelious disregard for P's rights
    - Can still claim from a compulsory insurer
  - **Gray v Motor Accident Commission**
    - Available in negligence where conduct was deliberate and flagrant disregard for P's personal safety
    - Not available if substantial punishment already inflicted as a criminal proceeding
  - Not available where P has died

### 2 Compensatory damages for living Ps

- S 28B – Personal injury damages: damages that relate to the death of or injury to a person caused by the fault of another person
  - 'Injury': harmful consequence: **Dean v Phung**

### **4 Fundamental principles: Todorovic v Waller**

1. Compensation objective
  - P put in monetary position as if injury had not been sustained
2. Damages awarded once and for all
  - Lump sum award that cannot be varied even if P gets worse, better or dies: **Fetter v Beal**

- Courts must make predictions about P's future health, employment etc.: *Wynn v NSW IMC* (vicissitudes of life normally 5-20% discount)
  - ***Malec v JC Hutton***
    - Whether past event has occurred assessed on balance of probabilities (if >50%, treated as a certainty)
    - All damages for future and hypothetical events must be discounted for:
      - Probability they will occur; and
      - Probability P would suffer same loss independent of the tort due to pre-existing medical condition
    - Future event to be ignored where speculative (less than 1%)
- Court can now approve agreement between parties to settle by a structured settlement: ***Wrongs Act s 28N***
  - Not taxable

### 3. Court doesn't care how P spends the money

- Money recovered for gratuitous attendant care services need not be paid to carers
- If D's negligence has rendered P unable to manage the money, P entitled to recover for reasonable cost of managing fund: ***Gray v Richards***
  - Not entitled to damages for the cost of managing the income from the fund itself

### 4. P bears burden of proof

- P doesn't bear burden of proof for defences

→ ***Wrongs Act*** caps and thresholds do NOT apply to intentional harm or sexual misconduct: ss 28C and 28LC. However, they apply to person injury damages.

### **Special vs general damages:**

- Special damages – Can be quantified with precision (e.g. past economic loss)
- General damages – Cannot be quantified with degree of precision (e.g. future economic loss)

### **Heads of damage:**

- Economic loss (pecuniary damages)
  - 1. Medical, hospital, rehabilitation (includes gratuitous attendant care services)
  - 2. Loss of earning capacity
- Non-economic loss (non-pecuniary damages)