

## Remedies Notes

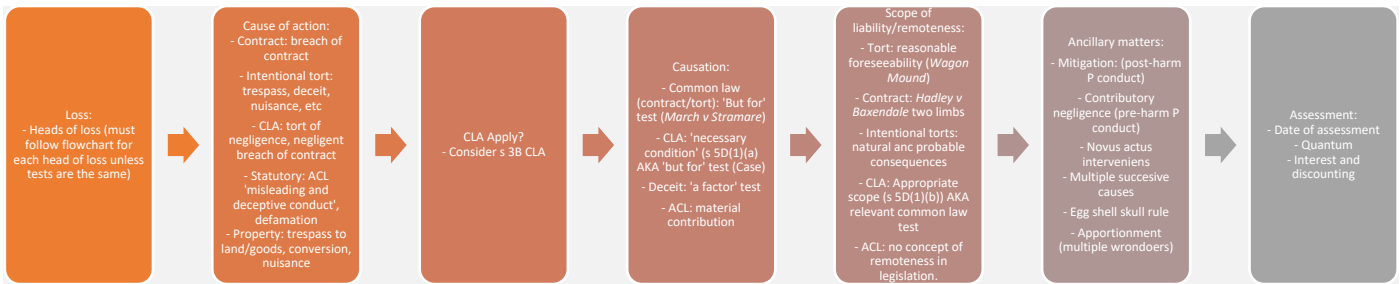
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## Compensation



### Key Distinctions Summary

| Element                 | Contract            | Tort                      | CLA                      | ACL                     |
|-------------------------|---------------------|---------------------------|--------------------------|-------------------------|
| Primary Measure         | Expectation damages | Restoration to position   | Modified tort principles | Reliance/tort measure   |
| Alternative Measures    | Reliance damages    | Special damages           | Capped damages           | Expectation (rare)      |
| Non-Pecuniary           | Exceptional only    | Generally available       | Capped (s 16)            | Available               |
| Aggravated              | Very limited        | Available                 | Excluded (s 21)          | Within compensatory     |
| Exemplary               | Not available       | Some torts                | Excluded (s 21)          | Not available           |
| Causation               | But for             | But for                   | Necessary condition      | Material contribution   |
| Remoteness              | Hadley v Baxendale  | Reasonable foreseeability | Appropriate scope        | Broad (like deceit)     |
| Assessment Date         | Breach              | Judgment                  | Judgment                 | When loss suffered      |
| Mitigation              | Required            | Required                  | Required                 | Required                |
| Contributory Negligence | N/A                 | Complete/proportionate    | Proportionate            | Bar to relief           |
| Apportionment           | N/A                 | Solidary or proportionate | Proportionate (Pt 4)     | Proportionate (federal) |

### General Principles

- Compensatory principle: compensation awarded to P for losses suffered but must not place P in a better position than if the wrong had not occurred (*Butler v Egg*).

#### Contract damages:

- Forward-looking – put P in the position they would have been had the contract not been breached (*Robinson v Harman*).
- Expectation loss is the primary measure.

#### Tort/ACL damages:

- Backward-looking exercise – put P in the position they would have been had tort/statutory wrong not been committed (*Livingstone v Rawyards Coal Co*).
- Restoration to original position.

#### Equitable compensation:

- **Put P in the same position they would have been had the wrong not occurred** (same as tort) (*Target Holdings Ltd v Redfern* quoting *Livingstone v Rawyards Coal Co*).
- Focuses on breach itself rather than just loss.

### Loss

- Economic loss

- Expectation losses (incl. loss of chance, loss of future profits)
- Reliance losses
- Non-pecuniary losses
- Personal injury losses

### **Cause of Action**

- Contract: breach of contract.
- Intentional torts: trespass, deceit, nuisance, etc.
- CLA: tort of negligence, unintentional torts, negligent breach of contract.
- **ACL s 18** 'misleading and deceptive conduct' (see ACL).
- Defamation (see Defamation).
- Property: trespass to land/goods, conversion, nuisance (see Property Damage compensation).
- Tort resulting in personal injury: **Common law** –physical injury or recognised psychiatric illness (not mere anxiety, disappointment, distress or inconvenience) (*NSW v Ibbett*); **CLA (wider)** – s 5 'personal injury' includes (a) pre-natal injury, and (b) impairment of a person's physical or mental condition, and (c) disease.

### **CLA Apply?**

- **S 5A(1)**: This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.
- **S 3B**: Excluded from CLA: (a) intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person; (b) injury from dust diseases; (c) injury from smoking; (d) injury from motor vehicle accident; (e) injury involving worker's comp.
- Personal injury: CLA if negligent aspect to cause of action, otherwise common law.
- Motor vehicle accidents: use CLA and its caps.
- Workers compensation: CLA is excluded (except for child abuse), apply common law.
- Dust diseases: CLA is excluded, use common law; common law test for breach, causation, damages. No caps from CLA or other legislation for damages. **Ss 15A, 15B, and 18(1)** (concerning interest) allow for claims for certain heads of loss that are otherwise not available at common law.

### **Causation**

Common law – 'but for' test (*March v Stramare*):

- Contract and tort, anything at common law unless stated otherwise.
- Primary test of negative exclusion.
- Not definitive – requires common sense and policy considerations.
- Common sense should be used when the 'but for' test yields absurdity (*Young v Chief Executive Officer (Housing)*)
- Other examples (in tort and contract): *Barnett v Chelsea*; *Reg Class Ltd v Rivers Locking System Pty Ltd*; *Alexander v Cambridge Credit Corporation Ltd*.

Intentional torts (including deceit, false inducement) – 'a factor' test:

- It is sufficient if fraud was an inducing fact, does not need to be the sole or most important factor.
- "The real question is, what was the state of P's mind, and if his mind was disturbed by D's misstatement, and such disturbance was in part cause of what he did, the mere fact of his also making a mistake himself could make no difference" (*Edgington v Fitzmaurice*).
- "In an action of deceit P is entitled to recover as damages a sum representing the prejudice or disadvantage he has suffered **in consequence** of his altering his position under the inducement of D's fraudulent misrepresentations." (*Toteff v Antonas*).
- Tort of deceit: 1) false misrepresentation (*Edgington v Fitzmaurice*); 2) D made statement fraudulently (*Derry v Peak*); 3) D intended P to rely on it (*Commercial Banking Co of Sydney Ltd v RH Brown & Co*); 4) P was induced to rely on the representation; 5) P suffered damage.

CLA – the negligence must be a 'necessary condition of the occurrence of the harm' (s 5D(1)(a)):

- Interpreted as equivalent to the 'but for' test (*Adeels Palace v Moubarak*).
- Multiple causes addressed through material contribution to the harm (*Amaca v Ellis, Amaca v Booth*).

Causation issues:

- **Multiple possible/necessary causes:** test – the necessary cause must have a **material contribution to harm** (*March v Stramare; Strong v Woolworths; Amaca v Ellis; Amaca v Booth; Elayoubi*).
- **Successive causes of harm:** test – when P suffers a loss or injury later aggravated, diminished or overwhelmed by another completely unrelated event, do we compensate the damages flowing from the latter event? (*Baker v Willoughby; Jobling v Associated Dairies Ltd; DNM Mining Pty Ltd v Barwick*).
- **Subsequent events:** see *Chand v Cth* (contracts).

### Scope of Liability/Remoteness

Tort – reasonable foreseeability (*Wagon Mound (No 1 & 2)*).

- P can recover compensation for **losses of a kind that were reasonably foreseeable** (*Wagon Mound (No 1 & 2)*).

Contract – *Hadley v Baxendale* two limbs:

- 1) Losses in the usual course of things (imputed to D).
- 2) Special losses must be brought to D's attention at the time of contracting.
- See e.g., *Victoria Laundry v Newman Industries*.

Intentional torts – '**natural and probable consequences**' test (*Totef v Antonas*):

- Broader than reasonable foreseeability.

CLA – must be 'appropriate for the scope of the negligent person's liability to extend to the harm so caused' (s 5D(1)(b)):

- Normative 'ought' question about policy limits on liability.
- Determining appropriateness: requires application of principles established under common law for relevant breach (whether tort, intentional tort, or contract) – apply applicable remoteness test accordingly.

### Ancillary Matters

Mitigation

- Principle: Victim expected to act reasonably to minimise and avoid further consequential loss after the harm.
- Does not break causation chain (as not actionable per se) but reduces damages (*Burns v MAN Automotive (Aust) Pty Ltd*).
- Applies equally in tort and contract under common law.
- Sometimes unreasonable conduct by P can increase loss to regard it as a supervening event and break causation chain or make additional losses too remote to be recoverable.
- Two aspects:
  - 1) Avoidable loss rule: no compensation for losses that could have been reasonably avoided (duty to mitigate).
  - 2) Avoided loss rule: if P takes steps to reduce their losses, D gets credit for reduced losses (but must be balanced with not penalising P for being proactive).
- Benefits from mitigation must be considered if action arises from breach and is not independent of breach (*British Westinghouse Electric v Underground Electric Railways*).
- If D's breach results in a benefit not otherwise available, the P's gain reduces S's liability breach (*British Westinghouse Electric v Underground Electric Railways*).
- P can recover the cost of reasonable mitigation even if it increases the loss.
- Anticipatory breach: where D makes clear before performance date they will not fulfil their contractual obligations, P has choice to keep contract alive or accept breach and sue for damages (*White & Carter Ltd v McGregor*).
- Other key cases: *Glavonjic v Foster* (personal injury mitigation); *Hoad v Scone Motors*.

Contributory negligence (partial defences):

- Pre-harm carelessness by P that can decrease D's liability and reduce damages (proportionate liability).
- Common law (before statute): complete defence barring compensation (*March v Stramare*)
- Statutory Modification (of the common law):
  - *Law Reform (Miscellaneous Provisions) Act 1965 s 9*: Allows apportionment between P and D. (1)(a) claim not defeated by contributory negligence, and (b) damages recoverable are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.
  - *CLA s 5S*: can reduce damages by 100% if court thinks it is just and equitable to do so (complete defence).

- *CLA s 5R*: (2)(a) standard of care required of P is that of a reasonable person in the position of that person (reasonable person test) and (b) determined on the basis of what P knew or ought to have known at the time.
- *CLA s 5O*: A person practicing a profession does not incur a liability in negligence arising from the provision of a service if it is established that the professional acted in a manner widely accepted in Australia by peer professional opinion as competent professional practice.
- *CLA s 5P*: But does not apply to duty to warn of the risk of death of or injury to a person associated with the provision by a professional of a professional service.

#### Egg Shell Skull Rule:

- Principle: D takes P as they find them (*Havenaar v Havenaar*)
- Includes weaknesses, beliefs, reactions, physical, mental, social and economic capacities and attributes (*Nader v Urban Transit Authority*)
- Not an exception to foreseeability – it is foreseeable that people have vulnerabilities.

#### Novus Actus Interveniens:

- Breaking the chain of causation – an event after the initial injury that either exacerbates the original harm or results in an entirely new form of harm.
- Can exonerate D of any liability.
- Considerations: lack of foreseeability; unreasonable conduct by P (*McKew v Holland*); voluntary conduct by P; unreasonable conduct by third party; criminal acts (*State Rail v Chu*).
- Basic loss: event after initial event that would have caused similar injury. Q is whether it breaks the chain of causation (*Alexander v Cambridge Credit*).
- Additional loss: event(s) after initial event that exacerbates original harm or results in entirely new form of harm. Can be deliberate or negligent act by P or third party or unrelated natural event. Q is whether original harm can be attributed to original D or whether causation chain is broken (*Haber v Walker* - suicide not voluntary; *Mahony v Kruschich* - medical treatment foreseeable).
- Key cases: *Haber v Walker*; *Mahoney v Kruschich Demolitions*; *State Rail Authority v Chu*; *McKew v Holland & Hannen & Cubitts (Scotland) Ltd*; *Alexander v Cambridge Credit Corporation* (contract).

#### Successive Causes:

- Different to novus actus – no connection between subsequent and initial event.
- Tortious/criminal acts: first D may remain liable as they should not benefit from the fact that a second D came along later (*Baker v Willoughby*).
- Natural events: may limit liability from initial event to time of supervening event (*Jobling v Associated Dairies and DNM Mining Pty Ltd v Barwick*).

#### Apportionment (multiple wrongdoers – can include P):

- Types of liability: 1) Solidary/joint and several liability – each wrongdoer liable for entire damage, protects P so they can recover from any D, applies to personal injury and intentional/fraudulent acts; 2) Proportionate liability – each wrongdoer only liable for their contribution, benefits D, risk of insolvent D falls on P.
- Statutory modification of common law:
  - *Law Reform (Miscellaneous Provisions) Act 1946 (NSW) s 5*: (1)(a)-(c) allows contribution between joint and several tortfeasors; (2) court determines "just and equitable" contribution recoverable from Ds based on responsibility and includes power to exempt any person from liability (e.g., *Chapman v Hearse* - apportionment between wrongdoers).
  - Law Reform (Miscellaneous Provisions) Act s 9: between P and D (see contributory negligence).
  - CLA Proportionate Liability (Pt 4):
    - Scope (*s 34*): Includes (a) economic loss/property damage in an action for damages (contract, tort, or otherwise) arising from failure to take reasonable care and (b) ACL s 18 claims but excludes personal injury (means P can make one D responsible for whole wrong), intentional acts, dust diseases, smoking, MVA, workers comp (*s 34A*: torts excluded under *s 3B*).
    - Operation (*s 35*): Liability of D who is a concurrent wrongdoer limited to an amount reflecting the proportion of responsibility.

- Concurrent wrongdoer definition (*s 34(2)*): Two or more persons whose acts/omissions independently or jointly caused damage or loss that is the subject of the claim.
- Excluded wrongdoers (*s 34A*): Intentional/fraudulent conduct - solidary liability applies.
- Key case: Hunt & Hunt Lawyers v Mitchell Morgan Nominees.

# Assessment of Compensation

## Date of Assessment

| Type of claim      | Date of assessment                           |
|--------------------|--|
| Breach of contract | Date of breach                               |
| Tort/negligence    | Date of judgment ( <i>O'Brien v McKean</i> ) |
| Personal injury    | Date of judgment                             |
| Defamation         | Date of judgment                             |
| Property damage    | Varies by circumstances                      |

## Adjustments for Time

### Past Economic Loss (Pre-Judgment Interest)

- Common law and CLA: *s 100 CPA* (generally 4% above RBA cash rate)
- CLA: No interest on non-economic loss or gratuitous services (*s 18*)

### Future Economic Loss (Post-Judgment Discount Rate)

- Common law: 3% (*Todorovic v Walker*)
- CLA: 5% (*s 14*)

## General Principles

- Lump sum rule: single payment for all losses to represent entire loss (*Robinson v Harman*).
- Once and for all rule: no return to court for reassessment.
- Taxation: personal injury compensation generally non-assessable; lost income requires "grossing up"; if tax is applicable to certain payment it must be considered; generally for compensation tax must be considered.

## Contract Heads of Loss

### Expectation Damages (primary measure)

- "Loss of bargain" - what plaintiff expected to gain had contract been performed.
- Put plaintiff in position if contract performed (*Robinson v Harman*).
- *Clark v Macourt*: Difference between promised and delivered goods.
- Calculation: difference between the performance expected and the actual performance provided (subject to mitigation) ('difference in value').

### Loss of Opportunity/Chance (Subtype of expectation damages)

- Two approaches depending on context:
  - All or nothing (medical negligence): >50% probability = full compensation; <50% = nothing (*Tabet v Gett*).
  - Sliding scale (commercial contexts): Damages = entire loss × probability of occurrence (*Malec v JC Hutton*; *Sellars v Adelaide Petroleum NL*; *Hungry Jacks v Burger King*)
- Requirements (*Sellars*): 1) Fact of lost opportunity proved on balance of probabilities; 2) Once established, quantum assessed by probability of success.

### Reliance Damages (Alternative measure)

- Wasted expenditure incurred in reliance on contract (*Cth v Amann Aviation*).
- Used when expectation damages difficult to prove
- Key cases: *McRae v Cth Disposals*, *Cth v Amann Aviation*, *Cessnock City Council v 123 259 932*.

### Non-Pecuniary Losses (Exceptional)


- Generally, not available for breach of contract.
- Exception: Contracts for pleasure/relaxation (*Baltic Shipping v Dillon*).
- Now includes psychiatric injury in some employment cases (*Elisha v Vision Aus*).

### Cost of Cure (mainly for construction contracts)


- *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*.

## Tort Heads of Loss

### Special Damages



**Furzer Crestani Forensic**  
Chartered Accountants



MACQUARIE  
University

| TABLE OF MULTIPLIERS - \$1 PER WEEK   |       |       |       |         |       |       |         |         |
|---|-------|-------|-------|---------|-------|-------|---------|---------|
| Present Lump Sum Equivalent in Value to a Sum of \$1 Per Week for Discount Rates of 3% and 5% |       |       |       |         |       |       |         |         |
| Years   | 3%    | 5%    | Years | 3%      | 5%    | Years | 3%      | 5%      |
| 1   | 51.4  | 50.9  | 31    | 1,059.2 | 833.8 | 61    | 1,474.4 | 1,014.9 |
| 2   | 101.3 | 99.4  | 32    | 1,079.8 | 845.0 | 62    | 1,482.9 | 1,017.5 |
| 3   | 149.8 | 145.6 | 33    | 1,099.8 | 855.7 | 63    | 1,491.1 | 1,020.0 |
| 4   | 196.9 | 189.6 | 34    | 1,119.2 | 865.9 | 64    | 1,499.1 | 1,022.3 |
| 5   | 242.6 | 231.5 | 35    | 1,138.0 | 875.6 | 65    | 1,506.8 | 1,024.6 |
| 6   | 286.9 | 271.4 | 36    | 1,156.2 | 884.8 | 66    | 1,514.4 | 1,026.7 |
| 7   | 330.0 | 309.4 | 37    | 1,174.0 | 893.6 | 67    | 1,521.7 | 1,028.8 |
| 8   | 371.8 | 345.6 | 38    | 1,191.2 | 902.0 | 68    | 1,528.8 | 1,030.7 |
| 9   | 412.4 | 380.1 | 39    | 1,207.9 | 909.9 | 69    | 1,535.6 | 1,032.5 |
| 10  | 451.8 | 412.9 | 40    | 1,224.2 | 917.5 | 70    | 1,542.3 | 1,034.3 |
| 11  | 490.0 | 444.1 | 41    | 1,239.9 | 924.8 | 71    | 1,548.8 | 1,036.0 |
| 12  | 527.2 | 473.9 | 42    | 1,255.2 | 931.6 | 72    | 1,555.1 | 1,037.6 |
| 13  | 563.3 | 502.3 | 43    | 1,270.1 | 938.2 | 73    | 1,561.2 | 1,039.1 |

**Future Loss:**

- \$200 per week for 40 years
- \$1pw for 40 years (3%): \$1,224.20
- \$1,224.20 \* \$200pw: \$244,840

[http://www.furzercrestani.com.au/files/docs/forensicbooks/assessment\\_handbook.pdf](http://www.furzercrestani.com.au/files/docs/forensicbooks/assessment_handbook.pdf)

[http://www.furzercrestani.com.au/files/docs/forensicbooks/assessment\\_handbook.pdf](http://www.furzercrestani.com.au/files/docs/forensicbooks/assessment_handbook.pdf)

- Losses that have occurred up to date of trial.
- Specific, quantifiable losses calculated based on actual expenditure.
- Must be specifically pleaded and proven.
- Examples: medical expenses, lost wages.

General Damages

- Losses not specifically quantifiable but still come from injury from the tort. Compensate for intangible things— so highly subjective.
- Incapable of precise quantification and require judicial assessment based on various factors.
- Presumed to flow from wrongful act itself, but the factual basis of such claims should be outlined.
- Non-Pecuniary Damages (type of general damages): Pain and suffering; loss of available than in contract.

**Personal Injury (Teubner v Humble)**

| Teubner Group                       | Head of Loss                           | Common Law  | CLA  |
|-------------------------------------|--|---|--|
| Compensation for loss of capacities | Loss of earning capacity (past/future) | <ul style="list-style-type: none"> <li>• Task = value the capital asset of P – their capacity to earn money (<i>Arthur Robinson (Grafton) Pty Ltd v Carter</i>).</li> </ul> <p>Past loss:</p> <ul style="list-style-type: none"> <li>• Date of the accident-date of judgment.</li> <li>• Calculation = net wages/salary P would have received (+ interest).</li> <li>• Considerations (increases): holiday pay loadings, incentive or bonus payments on balance of probabilities would receive.</li> <li>• Considerations (deductions): time lost due to sickness or accident, contract conditions for sick pay, unavoidable outgoings directly related to realisation of earning capacity.</li> <li>• Superannuation included: 11% of net earnings (<i>Najdovski v Crnojlovic</i>), 11.5% (<i>Roberson v Icon Distribution Investments Ltd</i>), 14.23% using actuarial tables (<i>Alelaimat v Synergy Scaffolding Services (No 3)</i>).</li> </ul> <p>Future loss:</p> <ul style="list-style-type: none"> <li>• Calculation = use of actuarial tables to reflect present value. Discount rates = 3 % (<i>Todorovic v Walker</i>). No superannuation.</li> <li>• If the injury cuts short P's life, the pre-injury expectation of life = basis of calculation ('lost years') (<i>Skelton v Collins</i>).</li> <li>• Pre-existing medical conditions that may have independently</li> </ul> | <ul style="list-style-type: none"> <li>• Applies caps.</li> <li>• <b>S 15C</b>: superannuation: the relevant % is the minimum % required by law to be paid as employer superannuation contributions.</li> <li>• <b>S 12</b>: earning capacity: capped to 3x average weekly earnings (\$4,513.80 as of 17 May 24).</li> <li>• <b>S 13</b>: future loss: what one's prospects were, how well educated they were, where one thinks they may have ended up in life, and breaks in employment, etc, all need to be considered. Follows common law principles and imposes burden of proof on P to show (a) P's most likely future circumstances for the injury, and (b) the assumption about future earning capacity (and other events) to form the basis of the calculation (<i>Amoud v Al Batai</i>).</li> <li>• <b>S 14</b>: Discount rate = 5 %</li> </ul> |

|                                |   |  |  |
|--------------------------------|---|--|--|
|                                |   | <p>rendered one unable to work and reduced earning capacity must be considered (<i>Sharman v Evans</i>).</p> <ul style="list-style-type: none"> <li>No deduction for childcare costs, but deduction for needed expenditure for the realisation of earning capacity e.g., attire or transport (<i>Wynn v NSW Insurance Ministerial Corporation</i>).</li> <li>Retirement (<i>Medlin v State Gov Insurance Commission</i>).</li> <li>Vicissitudes of life: 15% (<i>FIA Insurance</i>) but may adjust to case circumstances (<i>Wynn v NSW</i>). 4 main vicissitudes are sickness, accident, unemployment and industrial disputes (<i>Wynn v NSW</i>). Not all are adverse (<i>Bresatz v Przibilla</i>). Positive which might have increased earnings also considered (<i>Wynn v NSW</i>).</li> </ul> |  |
|                                | Loss of domestic capacity (past/future) | <ul style="list-style-type: none"> <li>Not a separate head, part of the loss of amenities (<i>CSR v Eddy</i>).</li> </ul>  | <ul style="list-style-type: none"> <li><b>S 15B</b>: separate head of loss that can be compensated for. Requires dependants not capable of doing the services.</li> <li>At least 6/hrs per week for at least 6 consecutive months threshold.</li> <li>Calculation: average weekly total earnings of MSW employees pro-rata (40 hours or part thereof).</li> </ul>  |
|                                | Medical needs (past/future)             | <ul style="list-style-type: none"> <li>Medical needs where need has been created by the injury, can be fully compensated provided they are reasonably needed.</li> <li>Medicare: deducted from damages.</li> </ul>   | <ul style="list-style-type: none"> <li>No modification.</li> </ul>   |
| Compensation for needs created | The need of care (past/future)          | <p>Paid:</p> <ul style="list-style-type: none"> <li>Can be compensated where people are reasonably employed to provide care services that are reasonably needed.</li> </ul> <p>Gratuitous (<i>Griffiths v Kerkemeyer</i> damages):</p> <ul style="list-style-type: none"> <li>Can be compensated but conditional.</li> <li>"...the market cost, as a general rule, is the amount which the defendant must pay as damages..." (<i>Van Gervan v Fenton</i>).</li> <li>Payable to P only (not necessarily person completing the services (<i>Griffiths v Kerkemeyer</i>)).</li> </ul>   | <p>Paid: No modification.</p> <p>Gratuitous:</p> <ul style="list-style-type: none"> <li><b>S 15</b>: can be compensated to injured – there must be a reasonable need for the services that arose solely because of the injury and would not have been provided but for the injury.</li> <li>At least 6hrs/wk for at least 6 consecutive months threshold.</li> <li>Capped at 1 x average weekly earnings of NSW employees on pro-rata basis (40 hours or part).</li> <li>If salary is lower, go by their salary per hour of gratuitous work they do. If salary is higher, go average weekly earnings from CLA divided by 40 for hourly rate then x by hours of gratuitous work they do.</li> </ul> |

|   | Cost of obtaining financial advice to manage the damages award   | <ul style="list-style-type: none"> <li>Not recoverable unless there is some special need for funds management caused by D's wrong or a pre-existing disability (<i>Grey v Richards</i>).</li> <li>Not to do with the way P used the sum awarded (<i>Todorovic</i>).</li> </ul> | <ul style="list-style-type: none"> <li>Not modified.</li> </ul>   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
|---|--|--|---|--|---|-----|----|-----|------|-----|----|-----|------|-----|----|-----|------|-----|----|-----|------|-----|----|-----|------|-----|------|-----|----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|----------|-----------------------|
| Compensation for non-pecuniary losses (non-monetary loss) | Pain and suffering   | <ul style="list-style-type: none"> <li>Subjective: greater suffering, the larger the amount received.</li> <li>Unconscious patient: greater awareness = greater compensation (<i>Skelton v Collins</i>).</li> </ul>  | <ul style="list-style-type: none"> <li><b>S 16:</b> non-pecuniary damages.</li> <li>Damages available but must be min of 15% of the worst case. Max amount of damages awarded is \$350,000 (indexed (s17) – \$ 761,500 at 1 October 24).</li> </ul> <table border="1" data-bbox="975 539 1465 1010"> <thead> <tr> <th>Severity of the non-economic loss (as a proportion of a most extreme case)</th> <th>Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss)</th> </tr> </thead> <tbody> <tr><td>15%</td><td>1%</td></tr> <tr><td>16%</td><td>1.5%</td></tr> <tr><td>17%</td><td>2%</td></tr> <tr><td>18%</td><td>2.5%</td></tr> <tr><td>19%</td><td>3%</td></tr> <tr><td>20%</td><td>3.5%</td></tr> <tr><td>21%</td><td>4%</td></tr> <tr><td>22%</td><td>4.5%</td></tr> <tr><td>23%</td><td>5%</td></tr> <tr><td>24%</td><td>5.5%</td></tr> <tr><td>25%</td><td>6.5%</td></tr> <tr><td>26%</td><td>8%</td></tr> <tr><td>27%</td><td>10%</td></tr> <tr><td>28%</td><td>14%</td></tr> <tr><td>29%</td><td>18%</td></tr> <tr><td>30%</td><td>23%</td></tr> <tr><td>31%</td><td>26%</td></tr> <tr><td>32%</td><td>30%</td></tr> <tr><td>33%</td><td>33%</td></tr> <tr><td>34%-100%</td><td>34%-100% respectively</td></tr> </tbody> </table> <ul style="list-style-type: none"> <li>See e.g., <i>Dean v Phung</i>.</li> <li>Disappointment/distress not 'personal injury' (<i>Moore v Scenic Tours</i>).</li> </ul> | Severity of the non-economic loss (as a proportion of a most extreme case) | Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss) | 15% | 1% | 16% | 1.5% | 17% | 2% | 18% | 2.5% | 19% | 3% | 20% | 3.5% | 21% | 4% | 22% | 4.5% | 23% | 5% | 24% | 5.5% | 25% | 6.5% | 26% | 8% | 27% | 10% | 28% | 14% | 29% | 18% | 30% | 23% | 31% | 26% | 32% | 30% | 33% | 33% | 34%-100% | 34%-100% respectively |
|   | Severity of the non-economic loss (as a proportion of a most extreme case)   | Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss)  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
|   | 15%  | 1%   |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
|   | 16%  | 1.5%   |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 17%   | 2%   |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 18%   | 2.5%   |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 19%   | 3%   |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 20%   | 3.5%   |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 21%   | 4%   |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 22%   | 4.5%   |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 23%   | 5%   |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 24%   | 5.5%   |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 25%   | 6.5%   |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 26%   | 8%   |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 27%   | 10%  |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 28%   | 14%  |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 29%   | 18%  |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 30%   | 23%  |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 31%   | 26%  |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 32%   | 30%  |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 33%   | 33%  |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| 34%-100%  | 34%-100% respectively  |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| Loss of amenities of life                                 | <ul style="list-style-type: none"> <li>The permanent or temporary loss of enjoyment of life resulting from the inability to do things they could do without the injury.</li> <li>Based on objective and subjective considerations; the minimum loss irrespective of the particular injured person's situation, and even a permanently unconscious victim can recover something under this head.</li> <li>Difficult to quantify and will be limited if full compensation has been determined for all other heads of loss (<i>Sharman v Evans</i>).</li> </ul> |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| Loss of expectation of life                               | <ul style="list-style-type: none"> <li>P's awareness that their life expectancy has been shortened.</li> <li>Assessed objectively and very moderate (<i>Sharman v Evans</i>).</li> <li>Note death claims: Estate claims under Law Reform (Miscellaneous Provisions) Act 1944 and dependants' claims under Compensation to Relatives Act 1897</li> </ul>  |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |
| Disfigurement   | <ul style="list-style-type: none"> <li>Damages awarded to compensate for embarrassment and agony felt by P and economic consequences.</li> </ul>   |  |   |  |   |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |    |     |      |     |      |     |    |     |     |     |     |     |     |     |     |     |     |     |     |     |     |          |                       |

### Special Heads of Loss (Other)

#### Aggravated Damages (Compensatory)

- Compensate for increased mental suffering, humiliation, and outrage; compensatory in nature (*Carson v John Fairfax & Sons Ltd*).
- Caused by defendant's reprehensible conduct in committing the wrong, can be awarded even if defendant's conduct was not intentional or intentionally reckless (*Carson v John Fairfax & Sons Ltd*).
- Available for: Many torts (defamation, trespass to person/land); limited availability in contract; available in equity in limited circumstances (*Giller v Procopets* - breach of confidence); ACL not specifically provided for but may be available (*NSW Lotteries v Kuzmanovski* - as part of compensatory damages).
- Requirements: Improper, insulting, or high-handed conduct.
- Note: **CLA s 21** excludes for negligence causing personal injury.

### Exemplary/Punitive Damages (Non-compensatory)

- Purpose: Punish defendant and deter others.
- Rare in Australia (Gray v Motor Accident Commission).
- Available for: intentional torts (S 3B CLA: where CLA doesn't apply).
- NOT available: Negligence (CLA s 21), defamation (s 37 Defamation Act), contract, equity (*Harris v Digital Pulse*); CLA claims; ACL (s 236; *Musca v Astle Corp Pty Ltd*).
- Requirements: Egregious conduct; no substantial criminal punishment for same conduct; ability to fulfil punishment/deterrence purpose.
- Assessment: Difficult to calculate; considers defendant's conduct severity