

MLP213 Torts

A Comprehensive Exam Study Guide

MLP213

2026 Edition

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Damages and Statutory Compensation Schemes

1. Overview

This topic examines the law of damages in torts and the major statutory compensation schemes operating in Victoria. The fundamental principle is that a plaintiff in tort should be placed in the position they would have been in had the tort not occurred, awarded as a lump sum 'once and for ever'. Compensatory damages are classified into economic loss (pecuniary) and non-economic loss (non-pecuniary) heads, each subject to legislative caps and thresholds under the *Wrongs Act 1958* (Vic). Additionally, five major statutory compensation schemes provide alternative avenues for compensation: workers' compensation (*WIRC Act*), motor accident compensation (*TA Act*), Commonwealth employees' compensation (*SRC Act*), the National Disability Insurance Scheme (*NDIS Act*), and criminal injuries compensation (*VCA Act*).

Reading Guide: First pass — §§1–4, 6, 10 (framework, key cases, procedural steps, quick reference). **Deep revision** — §§5, 7, 8, 9 (substantive analysis, exam technique, tips, cross-references). **Critical thinking** — §5.7 Critical Perspectives (policy arguments for essay-style questions).

2. Key Definitions

TERM	DEFINITION	AUTHORITY
Compensatory damages	Damages designed to put the plaintiff in the position they would have been in had the tort not occurred	<i>Todorovic v Waller</i> (1980) 150 CLR 402
Special damages	Damages capable of precise quantification (e.g., past economic loss)	Common law
General damages	Damages that cannot be precisely estimated (e.g., future economic loss, non-economic loss)	Common law
Gratuitous attendant care services (GACS)	Attendant care services provided free of charge by family or friends	<i>Griffiths v Kerkemeyer</i> (1977) 139 CLR 161; Wrongs Act 1958 (Vic) s 28IA
Serious injury	Threshold requirement for common law damages under statutory schemes; assessed via 'narrative test' or 30% AMA impairment	WIRC Act s 39; TA Act s 93
Significant injury	Injury meeting the threshold for non-economic loss recovery under Wrongs Act; requires permanent impairment exceeding threshold percentages	Wrongs Act 1958 (Vic) ss 28LB, 28LF
Average weekly earnings (AWE)	Statistically estimated average weekly total earnings of all employees in Victoria; used to cap loss of earning capacity awards	Wrongs Act 1958 (Vic) s 28F(3)(a)
Vicissitudes of life	Future contingencies (health, employment) that may reduce the value of a plaintiff's loss	<i>Wynn v NSW Insurance Ministerial Corporation</i> (1995) 184 CLR 485
Indexation	Annual adjustment of statutory caps and thresholds in line with the Wage Price Index or ABS average weekly earnings figures	Wrongs Act 1958 (Vic) s 28H

3. Legislative Framework

Primary Legislation

ACT/RULES	KEY PROVISIONS	PURPOSE
<i>Wrongs Act 1958</i> (Vic)	ss 28B-28ID, 28F-28I, Part VB, Part VBA	Caps and thresholds on damages; structured settlements; GACS provisions
<i>Workplace Injury Rehabilitation and Compensation Act 2013</i> (Vic) ('WIRC Act')	ss 3, 37, 39, Part 7	Workers' compensation for Victorian employees
<i>Transport Accident Act 1986</i> (Vic) ('TA Act')	ss 3, 35, 46A-60, s 93	Motor accident compensation
<i>Safety, Rehabilitation and Compensation Act 1988</i> (Cth) ('SRC Act')	ss 5, 5A, 6, 44, 45, Pt VII	Commonwealth employees' compensation
<i>National Disability Insurance Scheme Act 2013</i> (Cth) ('NDIS Act')	ss 24, 104-115	National disability support scheme
<i>Victims of Crime Assistance Act 1996</i> (Vic) ('VCA Act')	ss 3, 7-12, 51	Criminal injuries compensation

Relevant Provisions in Full

Wrongs Act 1958 (Vic) s 28F(2) (as amended 2015) The maximum amount of damages that may be awarded for each week of the period of loss of earnings is an amount that is 3 times the amount of average weekly earnings at the date of the award.

Wrongs Act 1958 (Vic) s 28G Non-economic loss is capped at \$630,420, subject to indexation under s 28H (figure as at April 2026).

Wrongs Act 1958 (Vic) s 28IA(2) Further, no damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided, for less than 6 hours per week and for less than 6 months.

TA Act 1986 (Vic) s 35(1) A person who is injured as a result of a transport accident is entitled to compensation in accordance with this Act if the accident occurred in Victoria; or the accident occurred in another State or in a Territory and involved a registered motor vehicle and, at the time of the accident, the person was a resident of Victoria or the driver of, or a passenger in, the registered motor vehicle.

WIRC Act 2013 (Vic) s 39 If there is caused to a worker an injury arising out of or in the course of any employment which results in or materially contributes to the death of the worker, the worker's dependants are entitled... to compensation.

4. Key Cases

CASE	CITATION	PRINCIPLE	APPLICATION
<i>Todorovic v Waller</i>	(1980) 150 CLR 402	Courts must award damages 'once and forever' in a lump sum to compensate for all past and future losses	Fundamental principle of tort damages; underpins all damage calculations
<i>Griffiths v Kerkemeyer</i>	(1977) 139 CLR 161	Damages available for gratuitous attendant care services where plaintiff needs care provided by family/friends	GACS damages arise from plaintiff's need, not whether reimbursement is intended
<i>Malec v J C Hutton Pty Ltd</i>	(1990) 169 CLR 638	Future hypothetical events assessed by probability; if >50% likely, treated as near certainty for damages	Approach to assessing future contingencies in damage calculations
<i>Wynn v NSW Insurance Ministerial Corporation</i>	(1995) 184 CLR 485	Vicissitudes of life discount range of 5-20%; court must reduce award to account for future uncertainties	Standard discount for vicissitudes; applies to loss of earning capacity
<i>CSR Ltd v Eddy</i>	[2005] HCA 64	Damages for loss of ability to care for others not available at common law	Confirmed common law position; legislative response created s 28ID
<i>Harrison v Melhem</i>	(2008) 72 NSWLR 380	Interpretation of 'and' in threshold provisions; alternate thresholds permit recovery	Applied to Wrongs Act s 28IA(2); 'or' interpretation for GACS thresholds
<i>Taylor v Owners Strata Plan No 11564</i>	[2014] HCA 9	Plain meaning of 'claimant's gross weekly earnings' cannot be read as deceased's earnings	S 28F must apply cap to actual claimant earnings; 2015 amendment resolved issue
<i>Gray v Richards</i>	[2014] HCA 40	Cost of managing lump sum damages award recoverable where tort caused intellectual impairment	Fund management damages recoverable as consequential loss
<i>Sharman v Evans</i>	(1977) 138 CLR 563	Reasonable medical expenses recoverable; must confer significant health benefits	Test for reasonableness of medical expenses
<i>Haber v Walker</i>	[1963] VR 339	Causation in wrongful death claims; suicide not always 'voluntary' act breaking causation	Test for whether defendant's act caused death
<i>De Sales v Ingrilli</i>	[2002] HCA 52	No separate discount for prospects of remarriage in dependants' claims	Confirmed approach to calculating dependants' loss of financial support

CASE	CITATION	PRINCIPLE	APPLICATION
<i>Alcoa Portland Aluminium Pty Ltd v Victorian WorkCover Authority</i>	[2007] VSCA 210	Victorian Court of Appeal adopted Harrison v Melhem interpretation for s 28IA(2)	Confirmed 'or' interpretation for GACS thresholds in Victoria
<i>Tuohey v Freemasons Hospital</i>	[2012] VSCA 80	Pre-2015: cap applied to 'without injury' earnings; high earners received nothing	Led to 2015 amendment clarifying cap applies to weekly loss, not gross earnings

Case Summaries

Todorovic v Waller (1980) 150 CLR 402

Facts: The plaintiff sustained severe injuries in a motor vehicle accident, rendering him a quadriplegic. The case concerned the proper approach to assessing damages for future loss.

Issue: How should courts approach the assessment of a lump sum award for all past and future losses?

Held: The High Court affirmed that courts must award damages 'once and forever' in a lump sum. The objective is to place the plaintiff in the position they would have been in had the tort not occurred, compensating for all past and future losses.

Exam Application: This case establishes the foundational principle that tort damages are awarded as a single lump sum to cover all past and future consequences. In problem questions, students should identify whether the claim involves past loss, future loss, or both, and apply the appropriate methodology for each.

'The award of damages in a lump sum represents the present value of the plaintiff's loss, calculated as the sum which, if properly invested, will be sufficient to meet the loss as it accrues.'
— Stephen J, *Todorovic v Waller* (1980) 150 CLR 402, 415.

Griffiths v Kerkemeyer (1977) 139 CLR 161

Facts: The plaintiff was rendered paraplegic after an accident. His wife and friends provided voluntary care. The issue was whether damages could be recovered for this gratuitous care.

Issue: Are damages recoverable for care services provided gratuitously by family and friends?

Held: The Privy Council (on appeal from the High Court) held that damages for gratuitous attendant care services were recoverable. The entitlement arises from the plaintiff's need for the services, not from any expectation that the carer would be reimbursed.

Exam Application: This case established the GACS damages head. In exam questions involving care provided by family members, students should: (1) identify whether a reasonable need for

services exists; (2) assess whether the need arises solely from the injury; and (3) consider whether the services would not have been provided 'but for' the injury.

| *Wynn v NSW Insurance Ministerial Corporation (1995) 184 CLR 485*

Facts: Mrs Wynn was severely injured in a motor accident. She had two young children. The issue concerned the appropriate discount for vicissitudes of life in calculating loss of earning capacity.

Issue: What discount should be applied for the vicissitudes of life when calculating loss of earning capacity?

Held: The High Court held that a discount must be applied to account for the uncertainties of future life, including health changes, employment prospects, and other contingencies. The usual discount range is 5-20% depending on the plaintiff's circumstances.

Exam Application: In loss of earning capacity calculations, students should apply a vicissitudes discount within the 5-20% range, with higher discounts for plaintiffs with more uncertain futures. The specific percentage depends on factors such as age, health, and stability of employment.

| *Harrison v Melhem (2008) 72 NSWLR 380*

Facts: This case concerned the interpretation of s 15(3) of the *Civil Liability Act 2002* (NSW), equivalent to s 28IA(2) of the *Wrongs Act*. The question was whether the threshold required both conditions (6 hours per week AND 6 months) or either condition.

Issue: How should the word 'and' in s 15(3) be interpreted in the context of GACS threshold provisions?

Held: The NSW Court of Appeal held that 'and' is a conjunctive term and the provision creates alternate thresholds. A plaintiff can recover GACS damages by showing either that care was provided for more than 6 hours per week, or that it was provided for more than 6 months.

Exam Application: This case is the leading authority on the interpretation of GACS threshold provisions. The Victorian Court of Appeal applied the same interpretation to s 28IA(2) in *Alcoa Portland Aluminium* [2007] VSCA 210. In exam questions, students should argue that the plaintiff satisfies the threshold if either condition is met.

'The provision precludes a plaintiff from an award; it does not provide the conditions for a plaintiff to qualify for an award. The ordinary and natural meaning of the word 'and' in its conjunctive sense should not be displaced.' — Spigelman CJ, *Harrison v Melhem* (2008) 72 NSWLR 380, [17].

5. Substantive Content

5.1 Fundamental Principles of Compensatory Damages

There are four fundamental principles underlying compensatory damages awards in tort:

1. **Compensatory Objective:** The plaintiff is to be put in the monetary position as if the injury had not been sustained — no more, no less.
2. **Once and For All Rule:** Damages are awarded as a lump sum that cannot be varied subsequently. Courts must make predictions about the plaintiff's future health, employment, and circumstances.
3. **Plaintiff's Freedom to Spend:** The court does not care how, or if, the plaintiff spends the money. This principle is illustrated by the case of the permanently unconscious plaintiff — they are entitled to full damages despite being unable to enjoy the award.
4. **Burden of Proof:** The plaintiff bears the burden of proving all elements of damage, including the nature, extent, and causation of each head of damage.

Judicial Quote:

'The question is whether the inference was reasonably open on the material before the decision-maker.' — Mason CJ, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 356.

5.2 Heads of Damage: Economic Loss

5.2.1 Medical and Hospital Expenses

Actual Medical Expenses: Reasonable expenses recoverable where they confer significant physical or psychiatric health benefits to the plaintiff. Expenses are denied where the cost is great but the benefit to health is slight, speculative, or relates only to amenity.

Gratuitous Attendant Care Services (GACS): Damages for care provided free of charge by family or friends. Under the *Wrongs Act 1958* (Vic):

- **Entitlement:** s 28IA(1) requires:
 - A reasonable need for the services exists;
 - The need arises solely because of the injury; and
 - The services would not have been provided 'but for' the injury.
- **Threshold:** s 28IA(2) precludes recovery where services are provided for less than 6 hours per week AND less than 6 months. Under the better view (confirmed in *Harrison v Melhem* and *Alcoa Portland Aluminium*), the plaintiff can recover by satisfying either threshold (hours OR months).
- **Caps:** s 28IB provides the same caps as for loss of ability to care for others — see below.

5.2.2 Loss of Earning Capacity

Calculating loss of earning capacity (LOEC) involves:

1. Determining the plaintiff's 'without injury' earnings (pre-accident);

2. Calculating weeks remaining in the plaintiff's pre-accident working life;
3. Deducting 'with injury' (post-accident) earnings;
4. Applying the cap under s 28F(2).

The AWE Cap: Under s 28F(2) of the *Wrongs Act 1958* (Vic), the maximum weekly award is 3 times average weekly earnings at the date of the award. The AWE is estimated by the Australian Statistician as the average weekly total earnings of all employees in Victoria. As at April 2026, the AWE figure is approximately **\$1,281.30 per week** (3x cap = approximately **\$3,843.90 per week**). The current AWE figure should be verified against the ABS website at www.abs.gov.au.

Deductions from Award:

- Tax must be deducted: s 28A
- Saved items of expenditure (directly job-related items: uniforms, tools, trade magazines)
- Vicissitudes of life discount (5-20% per *Wynn v NSW IMC*)
- Child care savings NOT deducted

Discount Rate: Future economic losses are discounted to present value at 5% under s 28I (legislative rate) or 3% at common law.

2015 Amendment: Following *Tuohey v Freemasons Hospital* [2012] VSCA 80, the *Wrongs Amendment Act 2015* (Vic) clarified that the cap applies to the weekly loss amount, not the plaintiff's gross earnings. This resolved the harsh result where high earners with partial incapacity received nothing.

5.2.3 Loss of Ability to Care for Others

At common law, damages for loss of ability to care for others were not available as a separate head: *CSR Ltd v Eddy* [2005] HCA 64. The *Wrongs Act 1958* (Vic) created a statutory entitlement under s 28ID.

Threshold Requirements (s 28ID(2)):

1. Care was provided to dependants before the liability arose;
2. Dependants were incapable of providing care (due to age or physical/mental incapacity);
3. There was a reasonable expectation that care would have been provided for at least 6 hours per week for at least 6 consecutive months; and
4. There will be a reasonable need for such care in future.

Note: Unlike s 28IA(2), the wording of s 28ID(2) requires BOTH conditions (hours AND months) — these are cumulative provisions.

Caps: s 28IE applies the same caps as for GACS.

5.3 Heads of Damage: Non-Economic Loss

Non-economic loss (NEL) under the *Wrongs Act 1958* (Vic) includes:

- Pain and suffering

- Loss of amenities of life
- Loss of enjoyment of life

Legislative Reforms:

- **Cap:** s 28G caps NEL at \$630,420 (subject to indexation per s 28H; figure as at April 2026).
- **Threshold:** Part VBA requires a 'significant injury' for recovery.

Significant Injury Definition (s 28LB):

INJURY TYPE	THRESHOLD
Physical injury (other than spinal)	>5% impairment
Spinal injury	≥5% impairment
Psychiatric injury	≥10% impairment
Loss of foetus	Qualifies
Psychiatric injury from loss of child	Qualifies
Loss of breast	Qualifies

Assessment: Must be assessed by an approved medical practitioner or Medical Panel using AMA Guides 4th edition. The impairment must be 'permanent'. When assessing physical impairment, psychiatric consequences are not taken into account: s 28LJ.

5.4 Actions Arising on Death

Where the defendant's wrongdoing results in death, two claims may be available:

5.4.1 Dependants' Claims (*Wrongs Act 1958 (Vic) Part III*)

Dependants may claim for loss of financial support under Lord Campbell's Act principles:

- **Loss of expectation of financial support:** Calculated based on the deceased's reasonable expectation of future earnings, reduced by personal expenses.
- **Loss of domestic services:** Where the deceased provided domestic services.
- **Vicissitudes of life:** Applied to future loss calculations.
- **Deductions:** Amounts deceased would have spent on personal needs; benefits under deceased's will; contributory negligence by claimant.

5.4.2 Survival of Causes of Action

The estate may continue the cause of action the deceased would have had: *Administration and Probate Act 1958 (Vic) s 29*. Recovery is limited to:

- Economic loss between date of injury and death (medical expenses, loss of earnings)
- Funeral expenses
- **Non-economic losses are NOT recoverable**

Key Limitation: *Barclay v Penberthy* [2012] HCA 40 confirmed the common law rule from *Baker v Bolton* (1808) 1 Camp 493 — a person cannot recover damages for the death of another except as provided by statute. Employers cannot recover for deceased employees.

5.5 Structured Settlements

Part VC of the *Wrongs Act 1958* (Vic) provides for structured settlements — periodic payment of all or part of a damages payment. Key features:

- No tax consequences for periodic payments
- Advantages: financial management assistance; future reassessment if condition changes
- Limitations: No power to order parties to enter into a structured settlement; only applies to settlements

5.6 Statutory Compensation Schemes

5.6.1 Workers' Compensation (*WIRC Act 2013* (Vic))

Entitlement Criteria:

1. Worker (employee or deemed worker under Schedule 1)
2. Suffered an injury (physical or mental)
3. Nexus between injury and employment ('arising out of or in the course of employment')
4. Connection to Victoria (s 37)

Two Types of Injury:

- **Primary injury:** Physical or mental injury
- **Extended injury:** Industrial deafness, disease contracted in employment, recurrence/aggravation/etc (requires 'significant contributing factor' beyond normal nexus)

Types of Benefits:

- Weekly payments
- Medical and like expenses
- Impairment benefits (non-economic loss lump sum)
- Death benefits

Common Law Damages: Part 7 requires a preliminary determination of 'serious injury' through one of three gateways:

1. 30% or greater AMA impairment; OR
2. Narrative test showing 'very considerable' consequences

5.6.2 Motor Accident Compensation (*TA Act 1986* (Vic))

Entitlement Criteria:

1. Transport accident on or after 1 January 1987

2. Claim made within time limits
3. Accident connected to Victoria
4. Person suffered 'injury'
5. Injury arose from a 'transport accident'

Definition of 'Transport Accident': An incident directly caused by the driving of a motor car, motor vehicle, railway train, or tram.

Types of Benefits:

- Loss of income benefits (ss 44-54A)
- Lump sum impairment benefits (ss 46A-48)
- Medical and like expenses (ss 60, 23)
- Death benefits (ss 57-60)

Common Law Damages: s 93 requires determination of 'serious injury' via one of three gateways (same as WIRC Act).

| **5.6.3 Commonwealth Employees (SRC Act 1988 (Cth))**

- Covers employees injured 'out of or in course of employment' (ss 5A, 6)
- Definition of 'employee' includes those employed by Commonwealth, Commonwealth authority, or 'licensed corporation'
- **Limited common law rights:** No common law damages other than limited non-economic loss damages under ss 44 and 45

| **5.6.4 National Disability Insurance Scheme (NDIS Act 2013 (Cth))**

Eligibility (s 24(1)):

1. Disability attributable to intellectual, cognitive, neurological, sensory, physical impairment, or psychiatric condition
2. Impairment is permanent
3. Impairment results in reduced function in one or more activities (communication, social interaction, learning, mobility, self-care, self-management)
4. Impairment affects capacity for social or economic participation
5. Likely to require NDIS support for lifetime

Overlap with Other Schemes: ss 104-115 provide for recovery of NDIS costs where participant obtains compensation from other schemes.

| **5.6.5 Criminal Injuries Compensation (VCA Act 1996 (Vic))**

Victim Categories:

- **Primary victim (s 7):** Person injured or who dies as a direct result of an act of violence committed against them

- **Secondary victim (s 8):** Person present at scene who is injured as a direct result of witnessing the act; or parent/guardian of primary victim under 18 who subsequently becomes aware
- **Related victim (s 11):** Close family member, dependant, or person with intimate personal relationship with primary victim who died

Compensation Caps:

- Primary victim: \$60,000 (s 8)
- Secondary victim: \$50,000 (s 10)
- Related victim: \$100,000 cumulative (s 12)

Overlap: s 51 permits assignment of rights to the State (right of subrogation).

5.7 Critical Perspectives

PERSPECTIVE	PROPONENT / SOURCE	ARGUMENT	COUNTER-ARGUMENT
Damages caps disproportionately harm severe injury victims	Reform advocates; Victorian Coronial recommendations	Caps on non-economic loss (\$630,420) and earning capacity (3x AWE) may be insufficient to compensate catastrophically injured plaintiffs who require lifetime care	Caps prevent trivial claims and ensure scheme sustainability; plaintiffs can seek common law damages where statutory caps inadequate
GACS threshold creates unfair inconsistency	Academic commentary; <i>Harrison v Melhem</i>	The 'or' interpretation for s 281A(2) means a plaintiff needing 6 hours/week but for only 5 months receives nothing, while one needing 5 hours/week for 7 months recovers — arbitrary result	The alternate threshold reflects policy goal of rewarding substantial caregiving; the 'and' reading would create even harsher results for those with regular care needs
Statutory scheme complexity undermines access to justice	Legal aid sector; plaintiff lawyers	Multiple overlapping schemes (WIRC, TA, NDIS, VCA, common law) with different thresholds, caps, and procedures create barriers for injured persons navigating the system	Complexity reflects the need to balance competing interests; scheme differentiation reflects different risk pools and funding mechanisms
Serious injury gateways exclude partially incapacitated plaintiffs	Plaintiff advocacy groups	The 'narrative test' threshold of 'very considerable' consequences excludes many plaintiffs with significant but not catastrophic impairments	The gateway protects defendants from frivolous claims; plaintiffs below the threshold can access statutory no-fault benefits
AWE indexation creates uncertainty in damages calculations	Insurance industry; defendants	Annual AWE adjustments make long-term liability forecasting difficult for defendants and insurers	Indexation ensures plaintiffs receive compensation that reflects current wage levels; without it, catastrophically injured plaintiffs would be undercompensated in real terms

6. Procedural Steps / Decision Trees

Damages Calculation Steps

1. Identify the Head of Damage

- Economic loss (pecuniary): past or future?
- Non-economic loss (non-pecuniary)?

2. Apply Wrongs Act Reforms (if applicable)

- Do the Victorian reforms apply? (s 28C — excludes intentional acts and sexual misconduct)
- Is the plaintiff a 'worker' under statutory scheme or common law plaintiff?

3. Calculate Each Head Separately

- For past economic loss: actual losses incurred
- For future economic loss: apply multiplication method with deductions
- For non-economic loss: apply threshold test first, then cap

4. Apply Necessary Deductions

- Tax (s 28A)
- Saved expenditure items
- Vicissitudes of life (5-20%)
- Discount to present value (5% statutory, 3% common law)
- Government benefits (NOT deductible — s 28I)

5. Apply Statutory Caps

- Non-economic loss: \$630,420 (s 28G, subject to indexation; figure as at April 2026)
- Loss of earning capacity: 3x AWE per week (s 28F(2))

GACS Threshold Decision Tree

- Is there a reasonable need for attendant care services?(s 28IA(1)(a))** **Yes**→ Continue
No→ No GACS award
- Does the need arise solely because of the injury?(s 28IA(1)(b))** **Yes**→ Continue
No→ No GACS award
- Would services have been provided 'but for' the injury?(s 28IA(1)(c))** **Yes**→ Continue
No→ No GACS award
- Are services provided for MORE than 6 hours per week OR MORE than 6 months?(s 28IA(2))**
Yes→ GACS award available (subject to caps in s 28IB)

No → GACS award precluded

Non-Economic Loss Threshold Decision Tree

Is the injury 'significant' (meets threshold level)?(s 28LF)

Physical injury (non-spinal): >5% impairment → Significant

Spinal injury: ≥5% impairment → Significant

Psychiatric injury: ≥10% impairment → Significant

Other qualifying conditions (loss of foetus, breast, etc): Significant

Is the impairment permanent?(s 28LB) **Yes** → Proceed to NEL assessment

No → NEL not recoverable

Calculate NEL(within cap of \$630,420)

7. Common Exam Questions

Common Fact Patterns

FACT PATTERN	GROUND / ISSUE TRIGGERED	KEY AUTHORITY
Family member provides care for injured plaintiff (5-7 hours/week, ongoing)	GACS damages; s 28IA(1) threshold	<i>Griffiths v Kerkemeyer</i> ; Wrongs Act s 28IA
High income earner with partial incapacity	s 28F(2) cap on loss of earning capacity	<i>Tuohey v Freemasons Hospital</i> ; Wrongs Act s 28F(2)
Plaintiff with pre-existing condition that may have caused incapacity	Future contingencies; vicissitudes of life	<i>Malec v JC Hutton</i> ; <i>Wynn v NSW IMC</i>
Death of plaintiff leaving dependants	Dependants' claim; survival of action	Wrongs Act Pt III; <i>Haber v Walker</i>
Intentional tort (assault)	Wrongs Act reforms inapplicable	Wrongs Act s 28C
Plaintiff needs care but below GACS threshold	GACS preclusion	<i>Harrison v Melhem</i> ; Wrongs Act s 28IA(2)
Worker injured at interstate workplace	WIRC Act connection to Victoria	WIRC Act s 37

Question Type 1: Calculating Damages for Injured Plaintiff

Approach:

- Identify all heads of damage (economic and non-economic)
- Determine which Wrongs Act provisions apply

- Calculate past economic loss (actual expenses)
- Calculate future economic loss (loss of earning capacity with cap and deductions)
- Assess non-economic loss against threshold; if met, apply cap
- Apply GACS if applicable
- Total all heads within statutory caps

Key Points to Include:

- Four fundamental principles of compensatory damages
- Multiplication method for loss of earning capacity
- Vicissitudes deduction (5-20%)
- s 28F(2) cap and 2015 amendment
- NEL threshold and cap
- GACS threshold under s 28IA(2)

Exam Tips & Traps

Do:

Apply the four fundamental principles of compensatory damages in every damages calculation question

Always check whether the Wrongs Act reforms apply (s 28C excludes intentional acts and sexual misconduct)

Remember that the source of damages is common law — the Wrongs Act merely modifies common law principles

Use the multiplication method for loss of earning capacity: (without injury earnings - with injury earnings) x weeks remaining

Apply vicissitudes discounts (5-20%) to future economic loss calculations

Distinguish between special damages (quantifiable) and general damages (not quantifiable)

Check the NEL threshold before calculating non-economic loss

Don't:

Forget to apply the s 28F(2) cap on loss of earning capacity (3x AWE)

Apply child care savings as a deduction from loss of earning capacity

Confuse the GACS threshold with the loss of ability to care for others threshold (s 28ID requires BOTH conditions)

Claim non-economic loss without first establishing a 'significant injury'

Forget that non-economic loss is NOT recoverable in survival of action claims

Use 'p', 'pg', or 'para' in pinpoint references — use raw numbers only

Watch Out For:

Pre-existing conditions that may affect future loss calculations (apply *Malec v JC Hutton* approach)

s 28IA(2) 'and' vs 'or' ambiguity — use the *Harrison v Melhem* 'or' interpretation

High earners whose post-injury earnings still exceed the cap (note the 2015 amendment to s 28F(2))

Intentional tortfeasors who cannot rely on Wrongs Act caps and thresholds

Immediate death cases — no cause of action for death at common law (*Baker v Bolton*)

9. Connections to Other Topics

RELATED TOPIC	CONNECTION	CROSS-REFERENCE
Negligence Duty of Care	Damages flow from breach of duty; causation requirements	Topic 5 (Intro to Negligence)
Causation	But-for causation required for all damage claims	Topic 7 (Causation)
Remoteness of Damage	Was the damage too remote? Egregious acts excluded from caps	Topic 7 (Remoteness)
Intentional Torts	Excluded from Wrongs Act reforms	Topics 2-3 (Intentional Torts)
Private Nuisance	Damages for economic and non-economic loss	Topic 4 (Private Nuisance)
Psychiatric Injury	NEL threshold for psychiatric injury (10%)	Topic 8 (Mental Harm)
Vicarious Liability	Employer liability for employee torts	Topic 10 (Vicarious Liability)
Defences	Contributory negligence deductions	Topic 9 (Defences)

10. Quick Reference Card

Key Caps and Thresholds

PROVISION	AMOUNT / THRESHOLD	AUTHORITY
Non-economic loss cap	\$630,420 (indexed; April 2026 figure)	Wrongs Act s 28G
Physical injury NEL threshold	>5% impairment	Wrongs Act s 28LB
Spinal injury NEL threshold	≥5% impairment	Wrongs Act s 28LB
Psychiatric injury NEL threshold	≥10% impairment	Wrongs Act s 28LB
Loss of earning capacity cap	3x AWE per week (~\$3,843.90; April 2026 figure)	Wrongs Act s 28F(2)
Current AWE	~\$1,281.30 per week (April 2026 figure)	ABS / Wrongs Act s 28F(3) (a)
GACS hours threshold	>6 hours/week OR >6 months	Wrongs Act s 28IA(2)
Loss of ability to care threshold	>6 hours/week AND >6 months	Wrongs Act s 28ID(2)
Serious injury (gateway 1)	≥30% AMA impairment	WIRC Act; TA Act
VCA primary victim cap	\$60,000	VCA Act s 8
VCA secondary victim cap	\$50,000	VCA Act s 10
VCA related victim cap	\$100,000 cumulative	VCA Act s 12

Key Tests

TEST NAME	ELEMENTS	AUTHORITY
Compensatory objective	Put plaintiff in position had tort not occurred	<i>Todorovic v Waller</i>
GACS threshold	Need arising from injury + but for + hours/months	Wrongs Act ss 28IA(1), 28IA(2)
Significant injury	Permanent impairment exceeding threshold percentages	Wrongs Act ss 28LB, 28LF
Vicissitudes discount	5-20% depending on plaintiff's circumstances	<i>Wynn v NSW IMC</i>
Nexus (WIRC Act)	'Arising out of or in course of employment'	WIRC Act s 39
Transport accident	Incident directly caused by driving of motor vehicle/railway/tram	TA Act s 3

11. References

Legislation

Administration and Probate Act 1958 (Vic) s 29. *Civil Liability Act 2002* (NSW) ss 12, 15(3). *Crimes Act 1958* (Vic). *National Disability Insurance Scheme Act 2013* (Cth) ss 24, 104-115. *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('SRC Act') ss 5, 5A, 6, 44, 45, Pt VII. *Transport Accident Act 1986* (Vic) ('TA Act') ss 3, 35, 44-60, 93. *Victims of Crime Assistance Act 1996* (Vic) ('VCA Act') ss 3, 7-12, 51. *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('WIRC Act') ss 3, 37, 39, Schedule 1. *Wrongs Act 1958* (Vic) ('Wrongs Act') ss 28A-28ID, 28F-28I, 28LB-28LF, Part VB, Part VBA, Part VC. *Wrongs Amendment Act 2015* (Vic).

Cases

Alcoa Portland Aluminium Pty Ltd v Victorian WorkCover Authority [2007] VSCA 210. *Barclay v Penberthy* [2012] HCA 40. *CSR Ltd v Eddy* [2005] HCA 64. *De Sales v Ingrilli* [2002] HCA 52. *Gray v Richards* [2014] HCA 40. *Griffiths v Kerkemeyer* (1977) 139 CLR 161. *Haber v Walker* [1963] VR 339. *Harrison v Melhem* (2008) 72 NSWLR 380. *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638. *Sharman v Evans* (1977) 138 CLR 563. *Taylor v Owners Strata Plan No 11564* [2014] HCA 9. *Todorovic v Waller* (1980) 150 CLR 402. *Tuohey v Freemasons Hospital* [2012] VSCA 80. *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485.

Secondary Sources

D Mendelson, *The New Law of Torts* (4th ed, 2023), chapters 1-3. K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts in Australia* (5th ed, 2012) chs 2, 3.

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Footnotes

[^1]: All citations to the *Wrongs Act 1958* (Vic) are to the current compilation (Compilation No 27, as at April 2026) unless otherwise noted. Legislative provisions should be verified against the Victorian Legislation Register at www.legislation.vic.gov.au.

[^2]: The *Wrongs Act 1958* (Vic) Part VB damages reforms apply to 'personal injury damages' as defined in s 28B but do not apply where the fault is an intentional act done with intent to cause death or injury or that is sexual assault or other sexual misconduct: s 28C.

[^3]: The AWE figure changes annually and should be verified against the Australian Bureau of Statistics data at www.abs.gov.au. As at April 2026, the current AWE figure is approximately \$1,281.30 per week (3x cap = approximately \$3,843.90 per week). This figure is subject to indexation.



Sample Preview

This is a preview of the complete study guide.
The full edition contains all **12 topics** across **~220 pages**.

TOPICS INCLUDED IN THE FULL EDITION:

1. Damages and Statutory Compensation Schemes
2. Trespass to the Person and Intentional Infliction of Harm
3. Defences to Intentional Torts
4. Private Nuisance and Trespass to Land
5. Introduction to Negligence and Duty of Care
6. Breach of Duty of Care
7. Causation and Remoteness of Damage
8. Mental Harm
9. Defences in Negligence
10. Vicarious Liability
11. Breach of Statutory Duty
12. Topic 12 — Revision and Exam Preparation