

Recent Trends in Damages

Diana Costaras, Barrister, Vic Bar and Foley's List

Danielle Meyer, Principal, Robinson Gill Lawyers

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Purpose of damages

- Compensation
- “but for” test
- Eggshell skull rule
- Remoteness

Pain and suffering

- Loss of amenity and loss of enjoyment of life.
- Objective
- Cannot claim interest

Pecuniary loss

- Loss of earning capacity
- Determined at the date of the decision
- No entitlement to interest in the period between the date of injury and the date of commencement of the Common Law proceedings.

The WIRCA

- Definitions of pain and suffering and pecuniary loss in s. 325 (but refer to s. 342)
- Implied prohibition on exemplary damages (s. 340)
- Minimums and maximums – CPI increases
- Reductions for contributory negligence and statutory compensation already paid (s.343)
- Discount to present day value (s. 345(1)).

The TAA

- Definitions of pain and suffering and pecuniary loss (s. 93(7))
- Cannot claim LOEC for first 18 months post MVA (s.93(10)(a))
- Exclusions for medical and like expenses and attendant care (s. 93(10)(b)(ba)(c)).
- Minimums and maximums – CPI increases (s.93(7))
- Reductions for statutory compensation already paid (s. 93(11)(a)&(b) – for LOEC only deduct payments after first 18 months
- Discount to present day value (s. 93(13)).

TAA & WIRCA cases (types of damages)

- *Ottrey bv Bedggood's Transport Pty Ltd* [2022] VSC 59
- *Vision Australia Limited v Adam Elisha no. 2* [2023] VSCA 288

The *Wrongs Act*

- Part VB excludes awards of damages for intentional act done with intent to cause death or injury or that is sexual assault or sexual misconduct (s. 28C).
- Cap for loss of earnings damages (s. 28F).
- Cap for non-economic loss damages (which has been indexed) (s.28G)
- requirements for attendant care (s. 28IA)
- Gordon v Sullivan damages requirements (s.28ID)
- 5% multiplier (s.28I)
- Part VBA requirements for general damages.

Underlying medical conditions/aggravations

- Wilson v Collingwood Store Pty Ltd [2014] VSCA 20 establishes a 2-step test:
 1. Court must identify the extent of the aggravation; and
 2. Adjust damages to allow for the pre-existing risk of further injury.
- Vicissitudes applied to pain and suffering.
- Plaintiff bears the evidentiary onus of (1)
- Defendant bears the evidentiary onus of (2).

The appropriate vicissitudes?

- This has to be done on a case-by-case basis.
- One of the main determiners is the extent of pre-existing/underlying conditions.
- Note that you can allow vicissitudes for positive events too (such as the risk that a plaintiff will return to work).
 - Da Costa v Bitu-Mill
 - Ottrey v Bedggood's Transport Pty Ltd
 - Bell v Nexus Primary Health
 - Hooper v Citywide Service Solutions
 - McGiffin v Fosterville Gold Mine
 - Trtovac v Total Mix Pty Ltd & Anor

Pecuniary loss - evidence

- Promotions/employment trajectories: how motivated was the plaintiff?
 - Hooper v Citywide Service Solutions Pty Ltd
 - Da Costa v Bitu-Mill
 - McGiffin v Fosterville Gold Mine
 - Bell v Nexus Primary Health
 - Elisha v Vision Australia Ltd
 - Lapetina v Elgee Park Pty Ltd [2024] VSCA 39
- Causes for a plaintiff to cease work
 - Atmis v Consolidated Property Services (Australia) Pty Ltd

Mitigation of loss

- The general principle: the plaintiff has a duty so as to minimize the injury caused by a defendant's tortious conduct.
- The plaintiff has a duty to take all reasonable steps to mitigate his/her loss and cannot claim any part of the damage which is due to the plaintiff's neglect to take such steps
- The onus of proving that a plaintiff has acted unreasonably is on the defendant.
- Objective test.

GENERAL DAMAGES AWARDS INCREASING IN ABUSE CASES



s 28C(2)(a) Wrongs Act

- (2) The following awards of damages are excluded from the operation of this Part—
 - (a) An award where the fault concerned is an intentional act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct;

TJ (a pseudonym) v. The Bishop of the Roman Catholic Diocese of Wagga Wagga Mark Edwards [2023] VSC 704

- P abused by a former priest, named Vincent Kiss, was a convicted paedophile.
- First time civil trial against Catholic Church before jury.
- Alleged Kiss repeatedly abused the plaintiff in 1972 when he was in year 9. Abuse continued for more than two years.
- P had successful teaching career, but gave evidence of extensive psychological damage and impact on his life.
- Church submitted to jury that P entitled to \$250,000 in damages for pain and suffering and should not receive any compensation for past or future economic loss.

Jury Verdict

- \$1.1 million for pain and suffering
- \$965,000 for loss of earnings
- \$1.3 million for exemplary damages
- Total award \$3.3 million

Following The Verdict

- Catholic Church applied for the exemplary damages to be set aside because of lack of legal basis and lack of evidence of deliberate, reckless disregard of P's complaint.
- O'Meara J upheld award of exemplary damages.
- Appeal expected

Comensoli v O'Connor [2023] VSCA 131 (1 June 2023)

- Appeal of decision of Keogh J.
- Keogh J awarded damages for injury arising from historical sexual abuse.
- Keogh J assessed the Respondent's damages as follows:
 - \$525,000 for pain and suffering
 - \$15,000 for future treatment expenses
 - \$1,500,000 for loss of earning capacity

COA considered whether quantum of general damages manifestly excessive.

Beach, Niall, Kaye JJA:

“It is of central importance to acknowledge the tender age at which the Respondent was subject to grave sexual abuse. The abuse occurred at a time when the respondent was young, extremely vulnerable and dependent on those around him for care and support. His ability to navigate the inevitable challenges of life was severely compromised.”

COA found trial judge's conclusion that effects of abuse life altering plainly open.

- Trial judge took into account all factors that had deleterious effect on respondent's life.
- Judge entitled to draw comparison with respondent's siblings
- Destructive impact of child sexual abuse becoming better understood

General damages award not manifestly excessive.

Kneale v. Footscray Football Club Ltd [2023] VSC 679

Jury found Footscray Football Club liable to Adam Kneale in negligence for injuries caused by sexual abuse perpetrated Footscray volunteer, Graeme Hobbs.

Richards J delivered judgment addressing rulings made during the trial. Following rulings were made:

- Whether there was evidence on which a jury could find that vicarious liability attached to the “sporting club-volunteer” relationship between Footscray and Hobbs (this was put separate to the negligence claim against the club)— no.
- Whether there was any evidence on which a jury could award aggravated or exemplary damages to Mr Kneale - no.
- Whether past loss of earnings claims can be indexed so that they are valued at “today’s money” - yes.
- Whether Part VB of the Wrongs Act 1958 (Vic) applied to P’s future economic loss damages claim on basis that it was an “award of personal injury damages” for the purposes of that part, such that a greater discount rate applied to any award of damages for future economic loss—no.



Thank You

Questions?