



McCabe Terrill Lawyers Pty Limited

Aussie Liability Law 101

Prepared by

Kevin Gibbons

With assistance from

Yolanta Figiel (Melbourne)

Matthew Beashel (Sydney)

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(Melbourne), Matthew Beashel (Sydney)

Law in Australia	3
Introduction.....	3
The Court System	4
Personal Injury and Damages	6
Liability	7
Causation	9
Assumption of Risk.....	9
Professional Standards	9
Contributory Negligence.....	9
Intoxication	9
Volunteers & Samaritans.....	10
Proportionate Liability.....	10
Appendices - General.....	11
New South Wales	
Appeals, Table of non-economic loss, summary of Civil Liability Act, lost caps	13
Western Australia	19
Northern Territory	23
Commonwealth	26
South Australia	30
Victoria	34
Tasmania.....	37
Australian Capital Territory.....	41
Queensland	44

Law in Australia

Introduction

1. As in England the legal system in Australia is a mixture of common law, equity and legislation.
2. Legislation comprises Acts of Parliament and regulations which are often the administrative engine rooms under which the Acts operate.
3. Also like England Australia has a judicial system comprising first instance Courts and Appellate Courts. Because Australia is a Federal system each State and Territory has an Appellate Court. There is an entitlement to appeal from those Appellate Courts to the High Court of Australia so that in general terms like England there is a double Appellate system.
4. Except for relatively minor matters first instance decisions are appealable. However, again like in England Appellate Courts are not required to hear appeals of all trials which are the subject of appeal. Some cases require leave to appeal before being heard in Appellate Courts. This process of leave to appeal applies regularly to all cases, except constitutional cases, in Australia's highest appeal Court, the High Court, like it does in the House of Lords.
5. However, unlike England, Australia is a Federal system. There are nine legal systems. One for the Commonwealth covering Federal law, and, one for each State and Territory.
6. The power and rights of the Commonwealth are very broad but controlled by the power granted under the Constitution. The Commonwealth and the States and Territories have the right to cede special powers to the Commonwealth. The States and the Commonwealth also have the right to agree to operate identically or similarly in order to avoid the uneven operation of law across Australia. In relation to numerous areas including the management of civil liability there has been cooperation between the Commonwealth and the States and that cooperation will continue into the future.
7. Commonwealth law can supersede the law of the States in various areas as permitted by the Constitution. It does in relation to corporations law, major financial law and trade practices. Those three areas have special resonance for the law of professional liability and directors and officers. The Trade Practices Act is also relevant to products liability. It incorporates the Australian version of the European product liability directive.
8. This paper looks at the Court system in Australia and the general operation of the law of personal injury, property damage and economic loss.
9. This paper does not address the minutiae of the law in those general areas. This paper seeks to indicate the sources of the law, not how a particular set of circumstances will be resolved in practice.
10. In the period 2001-2004 the States and the Commonwealth have progressively introduced legislation affecting liability in negligence for public liability, products liability, professional liability and medical malpractice. They have also introduced legislation to do with a calculation of damages for personal injury cases. These changes were in response to the liability insurance crisis arising out of medical

malpractice insurance, the collapse of HIH in 2001 and the impact on the world insurance market of the terrorist attack in New York on 11 September 2001.

11. The financial limits relevant to claims for personal injury vary between the States and the Commonwealth but their general effect has been to reduce some items of damage for personal injury and to encourage higher awards of contributory negligence. The table of financial limits are appendices to this paper.
12. In NSW, Queensland and ACT the changes include costs caps in claims for personal injury. Those caps initially discouraged lawyers from pursuing smaller claims. It also put great pressure on insurance lawyers. Many plaintiffs and defendants lawyers left the area of personal injury.
13. Progressively, however, the Courts, especially the intermediate (State) Appellate Courts have been less sympathetic to the spirit of the changes.
14. For convenience we attach various appendices including a summary of the relevant provisions of the changes to civil liability, tables of general damages, a diagram and summary of the Court and Appellate system and a summary of costs caps where they apply.
15. The appendices are organised on a state and territory basis and cover tables of damages, appeals and a summary of the major statutory changes covering the general sources of tort law reform.
16. As in England many courts now have procedures which are likely to increase costs which require parties to serve evidence in written form and comply with timetables intended to streamline how a case is conducted at trial. Many courts have the power to order parties to mediation and order that technical parts of cases are conducted before a referee. Also e-litigation will become the norm in superior courts with regard to professional liability and commercial litigation. It is estimated that the costs of e-litigation in run of the mill cases will increase costs considerably unless in a particular case, a court, can be persuaded not to order e-litigation processes.
17. Much of what is described in the following points is illustrative. It is more specifically set out in the material and information in the appendices.

The Court System

18. Like all common law legal systems the Court systems in Australia are based on the system of trial and appeal.
19. There are some limited cases where there is no appeal from a Court's decision. The examples are generally in relation to small claims determined in a small claims tribunal. An exception at the other end is in respect of all cases started in High Court dealing with constitutional matters.
20. In some cases appeals are limited to errors of law.
21. In most cases affecting legal liability, appeals are permitted as to errors of law and errors of fact.
22. The High Court is the final Court in Australia and its decisions are binding on all other Courts in Australia.
23. Each State and Territory has an intermediate appeal Court.

24. In relation to commonwealth matters in the Federal Court the Federal Court has an intermediate appeal Court.
25. The decisions of those intermediate appeal Courts are binding on judges in the relevant State, Territory or the Federal Court.
26. In respect of State and Commonwealth Courts there are a variety of trial Courts. Some are specialised Courts of limited jurisdiction usually related to a particular and confined subject matter eg tenants disputes, small claims disputes, industrial relations, planning issues, family issues, administrative law issues.
27. Other Courts are more general and adjudicate a broad range of legal cases eg District Court, County Court, Supreme Court. Each State and Territory has tiers of Courts. The Supreme Courts have unlimited jurisdiction. The Intermediate Courts have limited jurisdiction. Their limitation to hearing damages claims are based on the amount of money involved. In most jurisdictions there are up to three tiers of Courts.
28. All Courts are creatures of statute. In all but State Supreme Courts and the High Court when acting as an Appellate Court the jurisdiction of Australian Courts to make orders is controlled by the statutes creating them. The state courts of general jurisdiction can adjudicate in liability claims involving Commonwealth law.
29. In the appendices dealing with the Courts we set out financial limits of the intermediate Courts.
30. While the legal systems are based on the right of appeal the volume of litigation has compelled some States to control the number of appeals which can progress as of right.
31. For example in NSW an award for an amount of less than \$100,000 can only be appealed with the leave of the Supreme Court. We set out in the appendices dealing with the Courts when leave to appeal is required from an intermediate court.
32. In the case of the High Court it only hears appeals from other Courts where it gives leave to do so. Otherwise it would be impossible for the High Court to decide matters in a timely way. In general terms the High Court gives leave to appeal in approximately 10% of the matters in which leave to appeal is sought.
33. For leave to appeal to the High Court to be granted the matter must involve some serious issue of general importance as well as legal error or perhaps some gross injustice resulting from serious legal error.
34. Like in England the Courts have their own systems to streamline cases before the Court. Most general Courts divide up the cases before them according to the classes of claim eg personal injury, construction, professional indemnity, technology, etc.
35. As indicated in the introduction different processes are imposed by the Courts depending upon the class of case concerned. Some cases are more intensely managed by the Court than others. Cases which are more intensely managed involve more legal costs and expenses. Some Courts have also adopted e-litigation which can increase costs very substantially.

Legal Liability

General

Personal Injury and Damages

36. Like in England claims for personal injury arise from industrial accidents and motor vehicle accidents. They also arise from accidents which occur on residential property, accidents in public commercial spaces eg shopping centres and car parks, accidents on roads, footpaths and in recreational public spaces, accidents as a result of sporting events and accidents caused by products.
37. Until 2002 legislation was relevant to determining damages for workers compensation and motor vehicle liability, but, damages for personal injury in other claims was controlled by the common law and the judges who decided the cases and appeals. Their only fetter was the evidence and later, the wisdom of an Appeal Court.
38. However, following the insurance problems arising out of the HIH collapse, the crisis in the medical indemnity schemes and the terrorist attack in New York on 11 September 2001 the States and the Commonwealth have pursued a co-operative approach relating to liability for negligence and awards for personal injury including medical malpractice.
39. The changes were also prompted by the desire of government to lessen the cost of litigation, remove small claims from the system, reduce awards to pacify the insurance industry especially in relation to general damages, wage loss and gratuitous assistance, and to allow commercial insurance to be generally available, especially to small business, sporting and community groups.
40. The changes that were introduced required judges to award damages controlled by the legislation and in accordance with criteria dictated by the legislation. The method of calculating damages was, by the legislation, rendered more transparent.
41. While the States and the Commonwealth adopted similar (not identical) outcomes each State and the Commonwealth adopted their own procedures and processes for managing claims. For example the administration of claims in Queensland (PIPA) is very procedurally intensive which, as it turns out, has tended to increase costs substantially. The topic of procedure for pursuing claims is not covered by this paper.
42. The various jurisdictions have capped general damages and only permit recoveries for general damages if the harm is significant. The wording of what is significant varies. In New South Wales it is related to a most extreme case. In other States the words are significant injury and the like. The appendices include the relevant words for each State.
43. For example in NSW a person is only entitled to recover general damages (now called non economic loss) if their harm exceeds 15% of a most extreme case. If the assessment is between 15%-33% then the entitlement to damages is calculated on a diminished scale. For example 15% of a most extreme case entitles one to an award of general damages of 1% of the maximum which may be awarded. If the determination is 20% of a most extreme case then that component of damages is 3.5% of the maximum. If the determination is 29% then the award is 18% of the

- maximum. It is only when one reaches 33% that the determination and the award are pro-rated based on the % of a most extreme case.
44. The table of awards in the various jurisdictions is set out in the appendices. Except for ACT each State and the Commonwealth has a threshold of some form or another.
 45. Except for claims under the *Trade Practices Act* and claims in South Australia there seems a uniform approach with a maximum recovery for wage loss. It is three times the average weekly earnings. The underlying assumption is that very high income earners are likely to have the benefit of private insurance. In respect of claims under the *Trade Practices Act* the multiplier is only 2 not 3. In South Australia there is a capped upper limit unless there are special circumstances.
 46. Except for Western Australia the other jurisdictions have thresholds for gratuitous domestic assistance. There is no threshold for recovering paid assistance. Again the relevant variations are set out in the appendices. However, this head of damage, for domestic assistance, which was freely available and could be a large ticket item, before 2002 has recently emerged as a significant item. Prior to 2002 future care was awarded on a gratuitous basis, and often generously. It is now common for the claimant's to claim future domestic assistance on a paid basis. The caps do not apply in relation to domestic assistance which is paid for.
 47. The civil liability regimes do not apply to accidents which have their own special damages systems. We set out in the appendices which damages claims are omitted from the general tort reform. Some States took the opportunity to make uniform damages in motor accident cases and public liability cases.
 48. However, the general personal injury damages systems have some other significant exceptions relevant to claims for public liability. The most significant is in respect of claims for damage intentionally inflicted or if the injury resulted from the use of tobacco products. In the bulk of the States damages from those causes remain at common law. The reason is that those defendants and their insurers should not have the benefit of reduced damages. The appendices indicate the exceptions for each State.
 49. The initial reaction in the legal profession especially in NSW was to reduce the number of claims and to reduce the number of lawyers prepared to act for claimants. There was a corresponding squeezing of defendants lawyers. Fewer lawyers were needed. Initially too there was a high level of judicial support for the changes.
 50. Over the last couple of years there has been a strong cry from senior members of the judiciary that the changes have been unfair and ill considered. That has encouraged trial judges to be robust in their decisions and less willing to find against claimants. It remains to be seen if it leads to a significant rise in claims.

General

Liability

51. The civil liability changes from 2002 attempted to codify many aspects of negligence and re-codify the legislation about contribution between tort feasons. While the codifying legislation does not act universally in respect of determining damages its application in relation to legal liability is much broader and covers negligence and careless conduct in relation to most areas of personal injury, property damage and

- economic loss. The liability provisions intrude into careless conduct in breach of contract and careless conduct in breach of a statute.
52. The codification of negligence law in a statute was an endeavour to respond to the general concern that trial judges were allowing recoveries in very questionable circumstances thus increasing the risk of defendants and impacting on their ability to obtain adequate and cost effective insurance or insurance at all.
 53. The general effect of the codified liability laws was not to enlarge the number of people who may be liable in negligence but to compel judges to more carefully consider issues of duty of care, breach of duty, contributory negligence and causation of loss.
 54. Initially there was a perception that it was more difficult to succeed than it had been at common law, but that it is no longer the view. The current view is that liability results are reflecting a greater likelihood of success for claimants than was the case initially.
 55. Some of the Acts covering the revision of civil liability personal injury claims also had a retrospective impact. They impacted on proceedings commenced after the commencement of the legislation even though a cause of action predated the legislation. In NSW the cut off point for personal injury claims in fact predated the commencement of legislation by three months which took many lawyers by surprise and caused alarm.
 56. Again we set out in the appendices the relevant retrospective provisions. In relation to proportionate liability in the jurisdictions in which it is available, however, the changes are not retrospective. We deal with proportionate liability later.
 57. There has developed a senior judicial perception that in relation to duty of care and breach of duty there is not much difference between the common law position and the new statutory position.
 58. However, the recording of the general liability principles in a piece of legislation is a vast improvement on the position which previously existed. It imports a bit more transparency to the process.
 59. For example in the legislation in NSW a person alleged to be at fault is only required to take precautions if a reasonable person in the same circumstances would have taken those precautions. It requires the trial judge to assess a number of specific criteria including the probability that harm would occur, the likely seriousness of the harm, the burden of taking precautions and the social utility of the activity that creates the risk. While the common law probably required them to do that previously, it seemed less measurable as to whether they did it or not.
 60. The legislation in NSW also says specifically that the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to liability. Apologies are in the same category. They do not constitute admissions of liability. A perception had been that at common law Judges were some times casual on those points.
 61. The legislation in NSW also says that the subsequent taking of action that would have avoided the risk had it been done before does not of itself give rise to liability. Again a perception was that Judges had previously been casual about that, too.

62. These things and how they are reflected in each State Territory are more fully set out in the appendices.

Causation

63. The legislation in NSW also codifies the general principles of causation. Damage is the gist of a claim in negligence therefore that harm was caused by a negligent act is of significance in connection with a negligence claim. The legislation therefore attempts to codify causation into factual causation and then a determination of whether this should result in liability.
64. There is a similar provision in most of the States.

Assumption of Risk

65. Prior to the statutory changes the High Court and other appellate courts had made plain that in all negligence cases there was an expectation that people had to take responsibility for their own actions. Accordingly, the question of whether a person was owed a duty of care if they did not take personal care for their own safety was being strongly indicated at common law.
66. The legislation in NSW has a specific provision dealing with assumption of risk and harm derived from recreational activities. There will be no liability for harm suffered from obvious risks resulting from dangerous recreational activities. Again the express provision compels Judges to address such things and to be seen to be addressing them.
67. There is a similar provision in most States, except ACT and NT.

Professional Standards

68. In relation to claims for professional liability the legislation in NSW provides that a person practicing a profession does not incur liability in negligence if it is established that the professional person acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice so long as that peer professional opinion is rational. This criteria generally operates as a defence on which the professional person can rely. There seems to be an exception in New South Wales in some health professional cases. It is dealt with in the appendix.
69. There is a similar provision in some States but not all.

Contributory Negligence

70. The legislation in NSW attempts to codify the standard of care relevant to contributory negligence. The legislation also provides that a person's contributory negligence can reduce a claim to nil even if the defendant has been negligent. This is a new position. The absence of such a possibility in prior legislation meant that contributory negligence could only reduce a claim not negate it.
71. There is no similar provision where contributory negligence can negate a claim in the other jurisdictions.

Intoxication

72. The legislation in NSW has special provisions dealing with the impact of intoxication on the duty of care and contributory negligence.

73. There is a similar provision in Victoria, Tasmania, ACT and Queensland.

Volunteers & Samaritans

74. There are provisions in the legislation in NSW which protect volunteers of community organisations and Samaritans from liability arising from activities in those capacities. They too are more fully set out in the appendix.
75. There is a similar provision in all jurisdictions except in relation to Samaritans and a similar provision in all jurisdictions in relation to volunteers except for WA and SA.

Proportionate Liability

76. Significantly in relation to claims for property damage and economic loss (including liability for certain economic loss under the Trade Practices Act and the Corporations Act) proportionate liability is now incorporated. Except for Victoria, the proportionate liability provisions are not retrospective.
77. Most jurisdictions have adopted proportionate liability. NT and SA are the exceptions, unless those courts are dealing with Federal law under the *Corporations Act*, or the *Trade Practices Act*, or the *Australian Securities and Investments Commission Act*.
78. The provisions in relation to proportionate liability do not apply to personal injury claims.
79. The effect of the proportionate liability provisions, which abolishes the rule of joint and several liability in respect to the matters to which provisions apply, is to transfer the risk of impecunious defendants to the plaintiff. A defendant in the class of cases caught by the proportionate liability provisions is only required to contribute a sum to the plaintiff (assuming liability is found) which the Court considers to be just. Accordingly a particular defendant is only liable to the plaintiff for the amount determined by the Court having regard to the responsibility of all the wrongdoers who may have contributed to the loss.
80. In the States where proportionate liability is available it is not essential that another wrongdoer be a party to the litigation.
81. In Victoria, however, proportionate liability generally only applies if all of the wrongdoers are parties in the proceedings.
82. In NSW and Victoria proportionate liability was available in some building cases before the tort law reforms. Those previously existing provisions were repealed on commencement of the new provisions in those states.

Appendices

General

In relation to appendix 3 we set out the detailed operation of the relevant legislation for NSW. In respect of each other jurisdiction we cross-reference the relevant provisions in that jurisdiction to the same paragraph number as in appendix 3 for NSW. The numbers in (j) is the relevant provision of the Act relating to the particular jurisdiction in the particular appendix.

If there is no comparable provision we make a notation to that effect (NRP).

We treat the Northern Territory differently because it has much less comparability to the other States no doubt due to the particular and special social environment which exists in that jurisdiction.

We also treat the Commonwealth courts differently because relevant exposures in relation to Commonwealth law about personal injury claims is under the *Trade Practices Act* which does not have a negligence component. The principal changes in relation to personal injury claims under the *Trade Practices Act* are to do with damages, not liability.

However, some claims for economic loss for breach of the *Trade Practices Act*, *Corporations Act*, and the *Australian Securities and Investments Commission Act* attract the operation of the proportionate liability provisions.

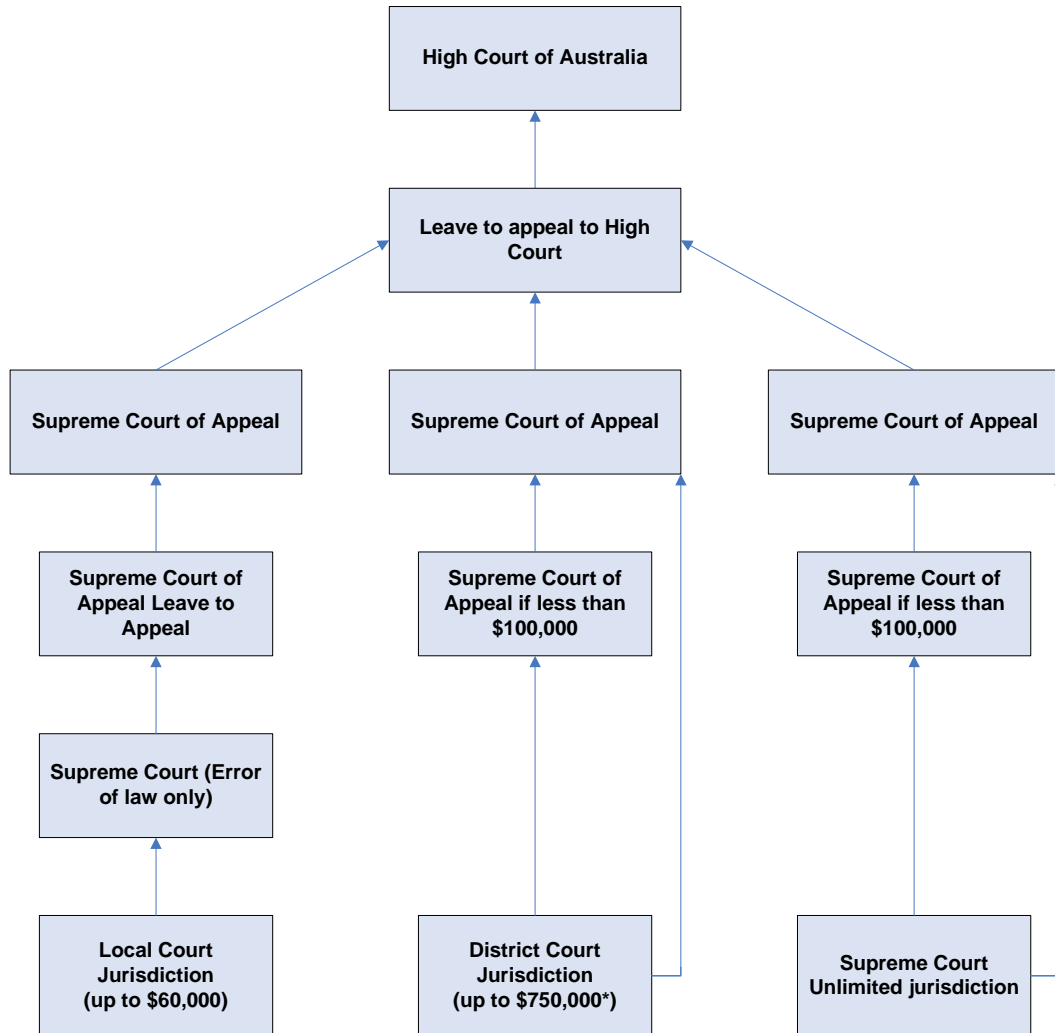
In relation to the Commonwealth there is an appendix 5 dealing with proportionate liability under the *Corporations Act* and the *Trade Practices Act*.

In the other appendices proportionate liability is dealt with in the body of an appendix at para 3.9 in each appendix.

NSW

NSW Appendix 1

1.1 A diagram of the Court system covering jurisdiction limits and appeals.



* Parties can agree to extend jurisdiction. In certain circumstances the jurisdiction can be deemed to be extended for up to \$1.125 million.

NSW Appendix 2

- 2.1 Attached is a damages table for non economic loss under the *Civil Liability Act* (NSW) 2002.

The current maximum value is \$442,000 for a most extreme case.

Table of Damages for Non-economic Loss of a Most Extreme Case (MEC)

%MEC	% of Max Amount	Award (rounded to closest \$500)
Below 15	Nil	Nil
15	1	4,500
16	1.5	6,500
17	2	900
18	2.5	11,000
19	3	13,500
20	3.5	15,500
21	4	17,500
22	4.5	20,000
23	5	22,000
24	5.5	24,500
25	6.5	28,500
26	8.0	35,500
27	10	44,000
28	14	62,000
29	18	79,500
30	23	101,500
31	26	115,000
32	30	132,500
33-100	Same as % of MEC	Pro rata of maximum award

NSW Appendix 3

- 3.1 Summary of Civil Liability Act NSW:

General

- 3.1.1 The purpose of the legislation is to limit the awards of damages for personal injury unless the legislation specifies to the contrary. Some exceptions to the damages regime are due to the existence of damages regimes under other legislations eg workers compensation, motor accidents (section 3B, 11A);
- 3.1.2 Other exceptions from the damages awards under the Act include damages claimed as a result of an intentional act, dust diseases, tobacco products and sporting injuries insurance claims.
- 3.1.3 Harm means personal injury or death, damage to property, economic loss (section 5);
- 3.1.4 Negligence means failure to exercise reasonable care and skill (section 5);
- 3.1.5 Personal injury includes prenatal injury, impairment of physical and mental condition and disease (section 5);

- 3.1.6 The Act is applicable to damages claimed for harm resulting from negligence regardless of whether the claim is in tort, contract, under statute or otherwise (section 5A);
- 3.1.7 The liability provisions of the legislation relate to the liability component with regard to motor accidents compensation (section 3B (2));
- 3.1.8 The liability provisions of the legislation do not apply to claims for workers compensation (section 3B (1));
- 3.1.9 The liability provisions of the legislation do not apply to awards in respect of tobacco products liability, liability for intentional acts, liability for dust (asbestos) diseases (section 3B);

Liability

3.2 A person is not negligent in failing to take precautions against risk of harm unless:

- (i) The risk was foreseeable.
- (ii) The risk was not insignificant.
- (iii) A reasonable person would have taken those precautions.

In determining what a reasonable person should have done a Court must consider all relevant things including:

- (iv) The probability that the harm would occur.
- (v) The likely seriousness of the harm.
- (vi) The burden of taking precautions to avoid that risk.
- (vii) The social utility of the activity that creates the risk

(section 5B).

3.3 The fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which something was done and the subsequent taking of action which, if taken earlier, would have avoided the risk of harm does not of itself give rise to or affect liability or constitute an admission of fault (section 5C).

3.4 (i) Causation between harm and negligence comprises:

Factual causation meaning that the negligent conduct was a necessary condition of the occurrence of the harm and that it is appropriate to the persons liability to extend to that harm (section 5D).

(In the case of physical personal injury the relationship between conduct and harm is direct and causation is not a problem. However in mental harm cases and financial loss cases the direct connection between the conduct and the harm is less obvious and more contentious).

- (ii) In determining liability for negligence the plaintiff always bears the onus of proving on the balance of probabilities any fact relevant to the issue of causation (section 5E)
- 3.5
- (i) Obvious risk means a risk which would have been obvious to a reasonable person and includes matters of common knowledge and includes risks which may not be prominent, conspicuous or physically observable. (section 5F)
 - (ii) There is no general duty to warn a person of an obvious risk unless the person requests the information or some other law requires it to be disclosed (section 5H)
 - (iii) There is no liability for the materialisation of an obvious risk encountered in a dangerous recreational activity (section 5L).
- 3.6
- (i) There is no liability in respect of a recreational activity where the plaintiff has received a risk warning (section 5M). The risk warning to be reliable must be given by or on behalf of the wrongdoer.
 - (ii) The risk warning may be given to a child through the child's parent or some other adult accompanying the child (section 5M).
- 3.7
- (i) The standard of care for professionals is the standard widely accepted in Australia by peer professional opinion so long as that opinion is not irrational. That is that if a defendant can show their conduct had peer support liability may be avoided (section 5O).
 - (ii) However, in the case of health care professionals they do not have the benefit of the provisions of section 5O if their liability arises in connection with the giving of or the failure to give a warning advice or information in respect of the risk of death or injury associated with that health care service (section 5P).
- 3.8
- (i) Contributory negligence is the failure of an injured person to exercise reasonable care based on what they knew or ought to have known at the time (section 5R).
 - (ii) Contributory negligence can defeat a claim (section 5S).
- 3.9
- (i) Proportionate liability applies in respect of claims for economic loss or damage to property. It does not apply in relation to a claim arising out of personal injury (section 34).
 - (ii) For the purposes of an apportionable claim it does not matter that a concurrent wrongdoer is insolvent or being wound up, has ceased to exist or has died (section 34).
 - (iii) In the case of economic loss a concurrent wrongdoer does not have the benefit of proportionate liability if their conduct has been intentional or fraudulent (section 34A).
 - (iv) There are cost penalties against a defendant who seeks to invoke the proportionate liability provisions at the hearing if it has failed to provide in a timely manner to the plaintiff:

- (a) The identity of the other person;
- (b) The facts and circumstances that may make that other person a concurrent wrongdoer

(section 35A).

- (v) Claims which are subject to proportionate liability are not retrospective. The provision only relates to claims where the cause of action is after 26 July 2004.

3.10 The fact that a person may be intoxicated does not of itself increase or otherwise affect the standard of care owed to that person (section 49).

3.11 Volunteers in the performance of community work and Samaritans do not incur civil liability when their activities are done in good faith (section 57 and 61 respectively).

Personal Injury Damages

3.12 An award of damages must not be contrary to the legislation (section 11A).

3.13 The legislation makes specific provision in relation to:

- (a) General damages (non economic loss) (section 16);
- (b) Economic loss for loss of earnings (sections 12 & 13);
- (c) Gratuitous attendant care services (section 15);
- (d) No interest on general damages (section 18);
- (e) No exemplary, aggravated or punitive damages can be awarded in negligence claims (section 21).

All other heads of damage to which a person might be entitled are at large and are not affected by the Act.

3.14 In respect of loss of earnings the maximum amount recoverable is three times average weekly earnings (section 12).

3.15 Before a Court can award an amount for diminished earning capacity including a buffer for future economic loss a Court must make determinations in accordance with evidence about a person's most likely future circumstances but for the injury (section 13).

3.16 (i) There is a threshold for gratuitous domestic care services. No damages may be awarded unless they are provided

- (a) for less than 6 hours per week; and
- (b) for less than 6 months.

If that threshold is not exceeded a Court is not permitted to award damages for gratuitous care services (section 15). On 12 November 2008 the Civil Liability Act was amended in NSW in respect of this provision to the form appearing above. Previously the Courts in NSW but not other States imposed a threshold whereby an

award for GDA was not available unless the assistance was provided for at least 6 hours and for a period or periods of 6 months. The amendments in NSW apply to existing proceedings which have not been finalised as well future claims. Accordingly unless the other States follow suit awards in respect of GDA will resume being out of step with the other States and that some awards for past GDA will be lower in NSW than the other States which have caps for GDA.

If the services to be provided exceed 40 hours per week then the amount recoverable for gratuitous domestic assistance is capped by reference to average weekly earnings.

Until 29 May 2008 it was the law that the same threshold of six hours per week for no less than six months also applies for future gratuitous care services (section 15). However, that there is a second threshold for the future has been overruled.

The Act does not impose any limitation or any threshold in relation to care services which are paid for or will be paid for. The threshold as to time or amount under the legislation only applies to gratuitous care services.

- (ii) The High Court recently determined that it was wrong at common law to award damages to an injured person on account of their inability to provide gratuitous services to their dependent. That is that it was wrong to award a mother damages for her inability to provide gratuitous services to an infant for whom the injured mother was the primary carer. Following that High Court decision the legislation was amended to allow an injured person to recover damages on account of their inability to provide gratuitous services to their dependents if those dependents having regard to their age or their physical or mental incapacity are unable to provide those services for themselves (section 15B).

3.17 Damages for non economic loss shall not be awarded unless the severity of a claim is at least 15% of a most extreme case (section 16).

If the severity of a claim for non economic loss is equal to a greater than 15% of a most extreme case a Court must determine the proportion of a most extreme case which applies. The legislation then sets out a table which converts that proportion to a dollar value (see appendix 2 for the table of percentages and values).

The value of a most extreme case is indexed annually (October) (section 17). The current value of a most extreme case is \$442,000.

NSW Appendix 4

Cost Caps

In NSW limitations on cost recoveries by successful plaintiffs or successful defendants in personal injury actions is capped in certain circumstances. The caps apply in any case for personal injury claims in a NSW Court including claims for personal injury damages under the *Trade Practices Act*.

The caps can be released in certain circumstances where parties have engaged in offers or when the Court of its own volition determines to release the caps.

In general terms where a plaintiff obtains a personal injury award of less than \$100,000 then the successful plaintiff is only permitted to recover from the

unsuccessful defendant an amount which is \$10,000 or 20% of the award, whichever is greater in respect of solicitor's costs and barrister's fees.

That amount is inclusive of GST.

(section 338 Legal Profession Act, 2004).

Costs which would otherwise be capped, however, can be awarded on an indemnity basis if the other party fails to accept an offer of compromise which is reasonable (section 340 Legal Profession Act, 2004).

Accordingly it is common that in respect of claims of a value likely to be less than \$100,000 plaintiffs regularly make compromise offers. If those offers are not accepted and the plaintiff obtains a higher award, although less than \$100,000 their legal costs after the offer of compromise are recoverable as if the cost caps do not apply.

If the amount sought to be recovered is in fact less than \$100,000 and the plaintiff loses the action the plaintiffs liability for the other parties' costs are limited by the caps (section 338 Legal Profession Act, 2004).

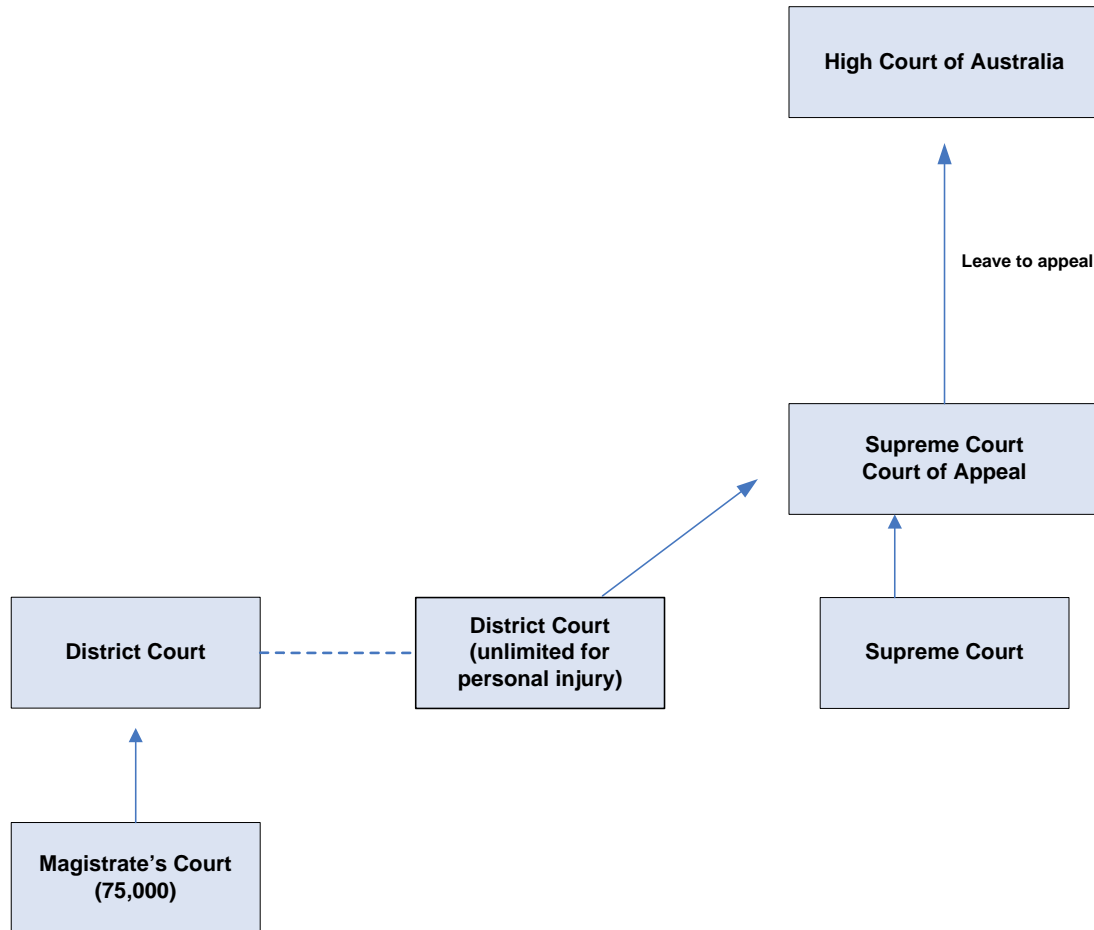
Usually plaintiffs do not express any limitation in the value of their recovery until the close of the trial. However, if the plaintiff sought to recover in the statement of claim an award less than \$100,000 and the plaintiff was unsuccessful then that plaintiff's liability to pay the defendants costs would be capped.

There is special uplift provision where a matter is first referred to arbitration before hearing. However, the uplift provisions are now rarely available because the courts refer so few (no) matters to arbitration.

Western Australia (WA)

WA Appendix 1

1.1 A diagram of the Court system covering jurisdiction limits and appeals.



WA Appendix 2

2.1 There is no maximum sum.

No damages for general damages are able to be awarded if the value of general damages is less than \$14,500.

If the value for general damages is between \$14,500-\$44,500 the award is for the difference between those two sums.

If the value of the award is more than \$44,500, then, there is to be deducted from the award the amount of \$14,500.

WA Appendix 3

3.1 Summary of Civil Liability Act (WA):

General

3.1.1 The purpose of the legislation is to limit the awards of damages for personal injury unless the legislation specifies to the contrary. Some exceptions to the damages regime are due to the existence of damages regimes under other legislations eg workers compensation, motor accidents (section 6, 3A);

3.1.2 Also includes exceptions as a result of intentional acts, dust diseases, tobacco products and some civil aviation liability;

3.1.3 Same as NSW (3);

3.1.4 NRP;

3.1.5 Same as NSW (3);

3.1.6 Same as NSW (5A(2));

3.1.7 Same as NSW (5A(1)) (3A item 2);

3.1.8 Same as NSW (5A(1)) (3A item 3);

3.1.9 Same as NSW (5A(1)) (3A item 4).

Liability

3.2 (i)-(vii) Same as NSW (5B)

3.3 NRP

3.4 (i) Same as NSW (5C).

However in cases of personal injury evidence of what the injured person would have done if the tortfeasor had not been at fault is inadmissible (5C(3(b))).

However it is permissible to adduce that evidence in claims for property damage or economic loss (5C(3(a))).

- (ii) Same as NSW (5D).
- 3.5
 - (i) Same as NSW (5F).
 - (ii) Same as NSW (5H(3)).
 - (iii) Same as NSW (5H(1)).
- 3.6
 - (i) Same as NSW (5I).
 - (ii) Same as NSW (5I(2)(3)).
- 3.7
 - (i) Same as NSW (5PB(1)).
 - (ii) Same as NSW (5PB(2)).

Including advice as to the risk of injury to a foetus being carried by a pregnant patient.
- 3.8
 - (i) Same as NSW (5K).

There is a presumption of contributory negligence if the injured person was intoxicated (5L).

 - (ii) NRP.
- 3.9
 - (i) Same as NSW (5AI(1)).
 - (ii) Same as NSW (5AJ(1)).
 - (iii) Same as NSW (5AJA).
 - (iv) Same as NSW (5AK).
 - (v) Not retrospective. Only relates to causes of action after the commencement of the *Civil Liability Act 2003*, section 9 (5AJ(3)) 1 December 2003.
- 3.10 NRP.
- 3.11 Volunteers NRP.
Samaritans same as NSW (5AD) (unless Samaritan is intoxicated, 5AE).

Personal Injury Damages

- 3.12 Same as NSW (6(1)).
However in WA the Act in respect of personal injuries is not retrospective (6(4)).
- 3.13
 - (a) Makes specific provision for non economic loss. It is called non pecuniary loss (9) there is no maximum sum;
 - (b) Same as NSW (11);
 - (c) Same as NSW (12-13);

- (d) NRP;
- (e) NRP;
- 3.14 Same as NSW (11).
- 3.15 NRP.
- 3.16 (i) NRP.
(ii) NRP.
- 3.17 See appendix 2. If an award for non pecuniary loss does not exceed \$14,500 then there can be no award for non pecuniary loss (9, 10). There are no special words of guidance such as a significant injury or a most extreme case.

WA Appendix 4

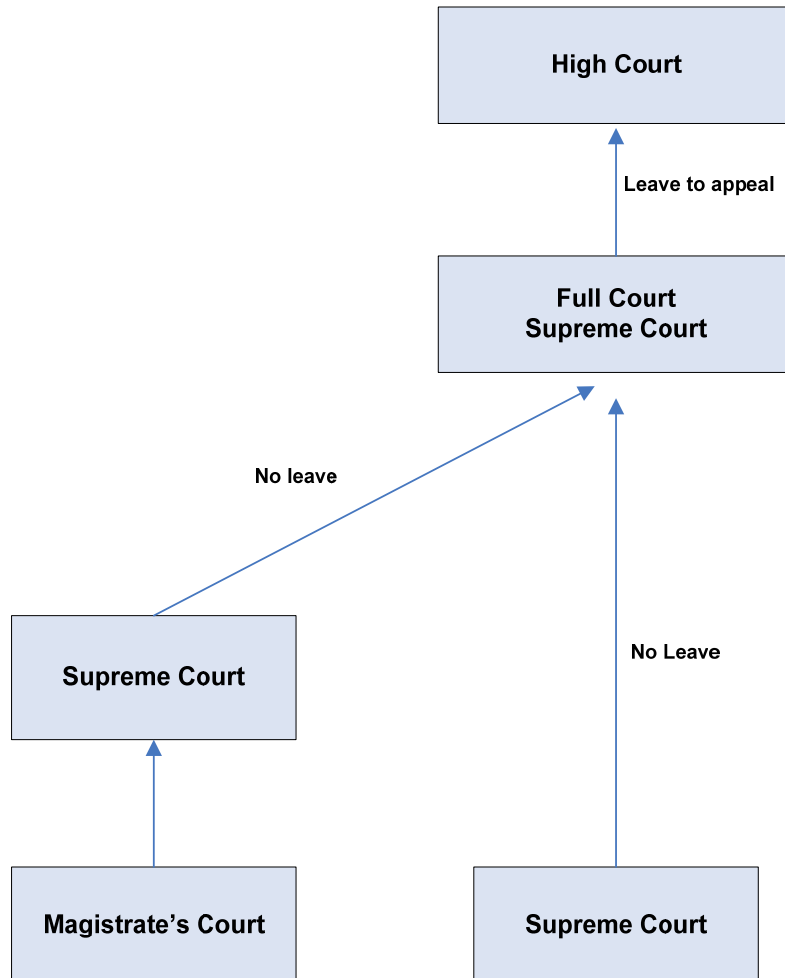
Cost Caps

There are no cost caps.

Northern Territory

NT Appendix 1

1.1 A diagram of the Court system covering jurisdiction limits and appeals.



Personal Injuries (Liabilities and Damages) Act 2003

No doubt due to the special social circumstances which exist in the Northern Territory that jurisdiction has adopted some of the spirit of the tort reform changes in other jurisdictions but little of the minutiae.

It is simpler to deal with the Northern Territory in descriptive form.

Such changes as have been made in relation to liability only relate to liability and claims for personal injuries.

Excluded from the Act are awards in relation to motor accidents, workers compensation, dust diseases and some *Trade Practices Act* liabilities.

Liability

There are similar provisions in relation to volunteers of community organisations and good Samaritans as exist in NSW (sections 7 and 8).

There is a special provision which excuses owners and occupiers of premises from civil liability for personal injury to a person who is entering the premises for a criminal purpose where the criminal offence is punishable by imprisonment (section 9).

Unless there are exceptional circumstances a wrongdoer does not incur civil liability for personal injury if the injured person was engaged in conduct constituting an offence punishable by imprisonment and the injured person's contributory negligence materially contributed to the risk of injury (section 10).

A wrongdoer can express regret at having caused personal injury without that regret being used as an admission of liability or negligence if the expression of regret does not contain an acknowledgement of fault (sections 11 and 12).

There is a presumption of contributory negligence against an injured person over the age of 16 years if the injured person was intoxicated. The presumption about contributory negligence is rebuttable (section 15).

The amount of reduction for contributory negligence where the injured person is intoxicated is at least 25% (section 17).

There is a threshold of six hours per week for more than six months for gratuitous domestic assistance (section 23).

There is to be no award of aggravated or exemplary damages in respect of personal injury (section 19).

Damages for lost earning capacity cannot exceed three times average weekly earnings (section 20).

Future lost earning capacity must be determined having regard to a person's most likely future circumstances had the personal injury not occurred (section 21).

The current maximum amount of damages for non pecuniary loss (general damages) is \$350,000 (and is indexed) (section 27).

No award for non pecuniary loss can be made unless an injured person's degree of permanent impairment is more than 5% of the whole person (section 27).

If the degree of permanent impairment is 85% or more the award for non pecuniary loss is the maximum amount (section 27).

Evidence of permanent impairment is to be given only by a medical practitioner who has assessed the degree of permanent impairment in accordance with the applicable guidelines (26(3)).

Below is a table as to the amount of general damages to be awarded:

Degree of Permanent Impairment	Amount of Damages to be Awarded
5%-10%	\$7,000
10%	\$10,500
11%	\$14,000

Degree of Permanent Impairment	Amount of Damages to be Awarded
12%	\$21,000
13%	\$28,000
14%	\$42,000
15%-84%	The relevant percentage of the maximum amount which is \$350,000

No interest is to be awarded on non pecuniary loss or gratuitous services (section 29). There are no proportionate liability provisions except in respect of the operation of the *Trade Practices Act* and *Corporations Act* (see Commonwealth).

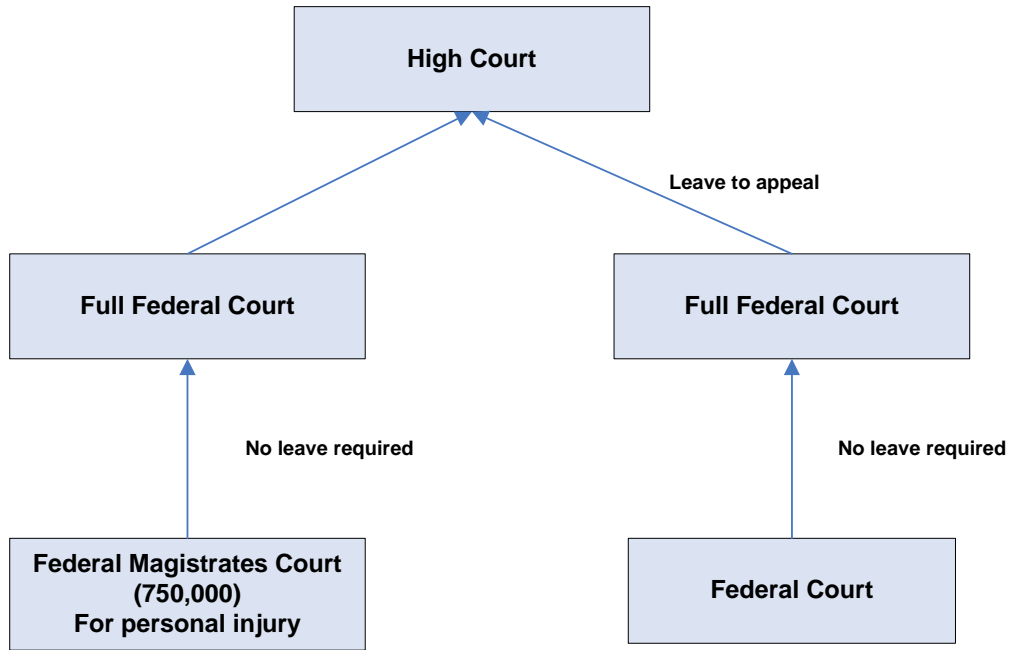
Commonwealth

Trades Practices Act

Personal Injury

CWLTH Appendix 1

1.1 Attached is a diagram of the Federal Court system covering jurisdiction limits and appeals.



CWLTH Appendix 2

- 2.1 Attached is a general damages table under the *Trade Practices Act*. The current maximum value is \$350,000 for a most extreme case.

Table of Damages for Non-economic Loss of a Most Extreme Case (MEC)

%MEC Same as NSW	% of Max Amount Same as NSW	Award (rounded to \$500 up to nearest \$10)
0-14	Nil	
15	1	3,500
16	1.5	5,250
17	2	7,000
18	2.5	8,750
19	3	10,500
20	3.5	12,250
21	4	14,000
22	4.5	15,750
23	5	17,500
24	5.5	19,250
25	6.5	22,750
26	8	28,000
27	10	35,000
28	14	49,000
29	18	63,000
30	23	80,500
31	26	91,000
32	30	105,000
33-100	Same as % of MEC	Pro rata of maximum award

CWLTH Appendix 3**Trade Practices Act****General**

- 3.1 The purpose of the legislation is to limit the awards of damages for personal injury in respect of some liability under the Trade Practices Act. The purpose of the legislation too is to eliminate claims for personal injury for breach of section 52 of the Trade Practices Act. Another purpose of the legislation is to limit the awards of damages for personal injury arising from products or goods. Claims for personal injury from an implied term in a consumer contract for the supply of services are not limited like other personal injury claims.
- 3.2 Other exceptions include injury resulting from the use of tobacco products (87E).
- 3.3-3.8 NRP.
- 3.9 See appendix 5.
- 3.10-3.11 NRP

Personal Injury Damages

- 3.12 Same as NSW (87L).
- 3.13 (a) As per NSW (87L-T);
(b) Same as NSW (87U-V);
(c) Same as NSW (87W, X);
(d) Same as NSW (87ZA);
(e) Same as NSW (87ZB).
- 3.14 In respect of loss of earnings, the maximum amount recoverable is two times average weekly earnings (87U).
- 3.15 NRP.
- 3.16 Please see page 16 para 2.16 for relevant differences with NSW.
(i) Same as NSW (87W);
(ii) Same as NSW (87X).
- 3.17 Same as NSW (87S). The current maximum for a most extreme case is \$350,000.

CWLTH Appendix 4**Cost Caps**

There are no cost caps. If the proceedings are brought in a court where no cost caps apply.

CWLTH Appendix 5**Australian Securities and Investment Commission Act**

- (i) There is an identical proportionate liability provision in the *Australian Securities and Investment Commission Act* in respect of claims for damages for economic loss or property damage for misleading and deceptive conduct in contravention of 12DA of that Act. That section relates to conduct in relation to financial services.
- (i) The proportionate liability provisions in relation to the *Australian Securities and Investment Commission Act* are not retrospective and only relate to claims where the cause of action is after 26 July 2004.

Proportionate Liability

- (i) Applies in respect of a claim for damages for economic loss or property damage for conduct in contravention of section 52 (87CB(1)).
- (ii) It does not matter that a concurrent wrongdoer is insolvent or being wound up or has ceased to exist or died (87CB(5)).

- (iii) A concurrent wrongdoer does not have the benefit of the proportionate liability provision if their conduct has been intentional or fraudulent (87CC).
- (iv) Proportionate liability can apply whether or not all concurrent wrongdoers are parties to the proceedings (87CD(4)).
- (v) There are cost penalties against a defendant who seeks to invoke the proportionate liability provisions of the hearing if it has failed to provide in a timely manner to the plaintiff:
 - (i) the identity of the other person;
 - (ii) the facts and circumstances that may make that other person a concurrent wrongdoer (87CE).
- (vi) Claims which are subject to proportionate liability are not retrospective. The provision only relates to claims where the cause of action is after 26 July 2004.

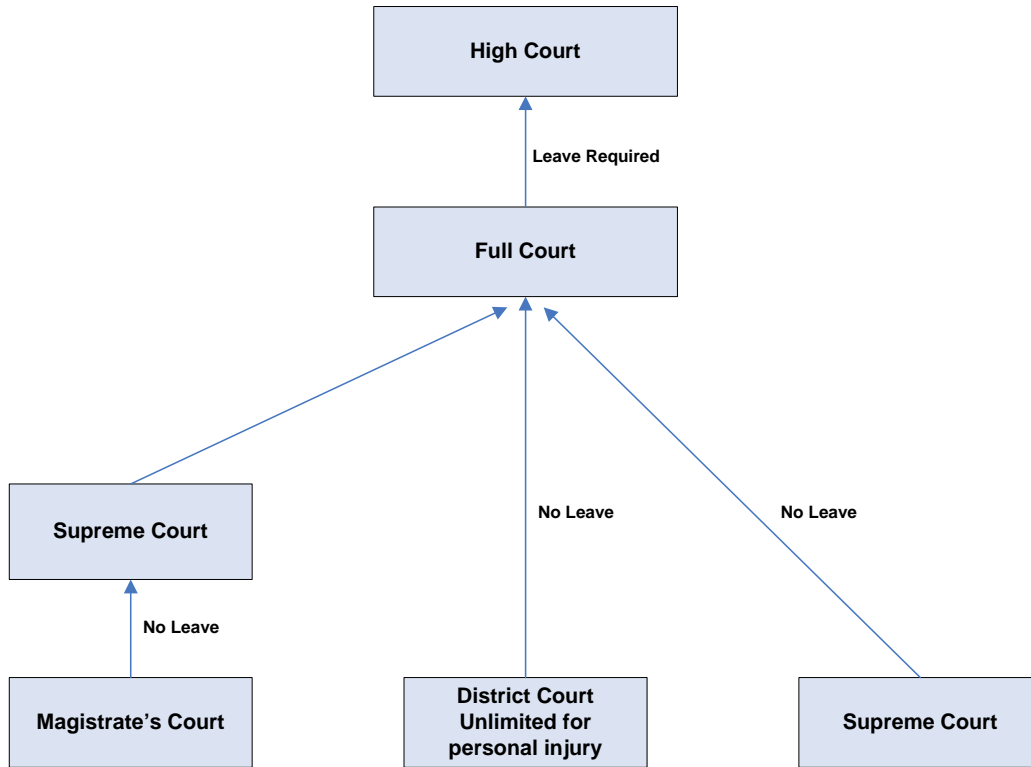
Corporations Act

- (i) There is an identical proportionate liability provision in the Corporations Act in respect for claim for damages for economic loss or property damage for misleading and deceptive conduct in contravention of 1041H of that Act. That section relates to conduct in relation to a financial product or a financial service that is misleading or deceptive or is likely to mislead or deceive.
- (ii) The proportionate liability provisions in relation to the *Corporations Act* are not retrospective and only relate to claims where the cause of action is after 26 July 2004.

South Australia

SA Appendix 1

1.1 A diagram of the court system covering jurisdiction limits and appeals.



SA Appendix 2

- 2.1 There is a maximum amount for non economic loss. The particular maximum which applies depends upon the year of accident. The current maximum for current accidents is \$264,050.

Damages for non economic loss shall not be awarded unless the injured person is significantly impaired from leading a normal life for a period of at least seven days.

Because SA is relatively unique we set out the table as for accidents in 2003.

Awards for non economic loss are dependent on three variables:

- (1) Year of accident;
- (2) Grading claims 0-60;
- (3) Indexation.

We set out a table based on accidents in 2002 when the legislation was passed. A person is entitled to an award of non economic loss if for seven days they have a significant impairment.

Scale	Multiplier	Example
0-10	1,150 per item	10: $1,150 \times 10 = 11,500$
11-20	11,500 + 2,300 per item	15: $11,500 + 5 \times 2,300 = 23,000$
21-30	34,500 + 3,450 per item	25: $34,500 + 5 \times 3,450 = 51,750$
31-40	69,000 + 4,600 per item	35: $69,000 + 5 \times 4,600 = 92,000$
41-50	115,000 + 5,770 per item	45: $115,000 + 5 \times 5,750 = 143,850$
51-60	172,500 + 6,900 per item	55: $175,500 + 5 \times 6,900 = 207,000$

SA Appendix 3

- 3.1 Summary of Civil Liability Act

General

- 3.1.1 The purpose of the relevant amendments in relation to tort law reform is to limit awards of damages for personal injury and to codify many of the provisions arising out of lpp report except the damages regime in relation to workers compensation or compensation for victims of crime (3).
- 3.1.2 NRP.
- 3.1.3 Same as NSW (3).
- 3.1.4 Same as NSW (3).
- 3.1.5 Same as NSW (3).
- 3.1.6 The Act is applicable to all damages claimed for harm resulting from negligence including motor accident claims (4).
- 3.1.7 The liability provisions relate to liability in all cases to which assessment of damages arise under the Act (4).

3.1.8 The liability provisions of the legislation do not apply to claims for workers compensation (4, 3).

3.1.9 NRP.

Liability

3.2 Same as NSW (32).

3.3 NRP.

3.4 (i) Same as NSW (34);

(ii) Same as NSW (35).

3.5 (i) Same as NSW (36);

(ii) Same as NSW (38);

(iii) Same as NSW (39).

3.6 (i) NRP;

(ii) NRP.

3.7 (i) Same as NSW (41);

(ii) Same as NSW (41).

3.8 (i) Same as NSW (3);

(ii) NRP.

3.9 NRP.

3.10 NRP.

3.11 NRP in relation to volunteers.

3.12 Same as NSW in relation to Samaritans (74).

Personal Injury Damages

3.12 Same as NSW (4, 51).

3.13 (a) Same as NSW (52);

(b) Same as NSW (54 & 55);

(c) Same as NSW (58);

(d) Same as NSW (56);

(e) NRP.

- 3.14 In respect of loss of earnings, the maximum amount recoverable is \$2,494,310 in respect of accidents occurring in 2006, unless the court otherwise determines in special circumstances (54). When originally instituted the cap was \$2,2m.
- 3.15 NRP.
- 3.16 (i) There is no particular threshold for gratuitous domestic assistance, however, awards will only be made in respect of services provided by a parent, spouse, partner, or child (58(1)).
- The maximum amount recoverable is the equivalent of four times average weekly earnings (58(2)).
- Unless the court otherwise orders based on special circumstances (58(3)).
- (ii) NRP.
- 3.17 Damages for non economic loss shall not be awarded unless the injured person is significantly impaired from leading a normal life for a period of at least seven days (52). (See Appendix 2)

SA Appendix 3

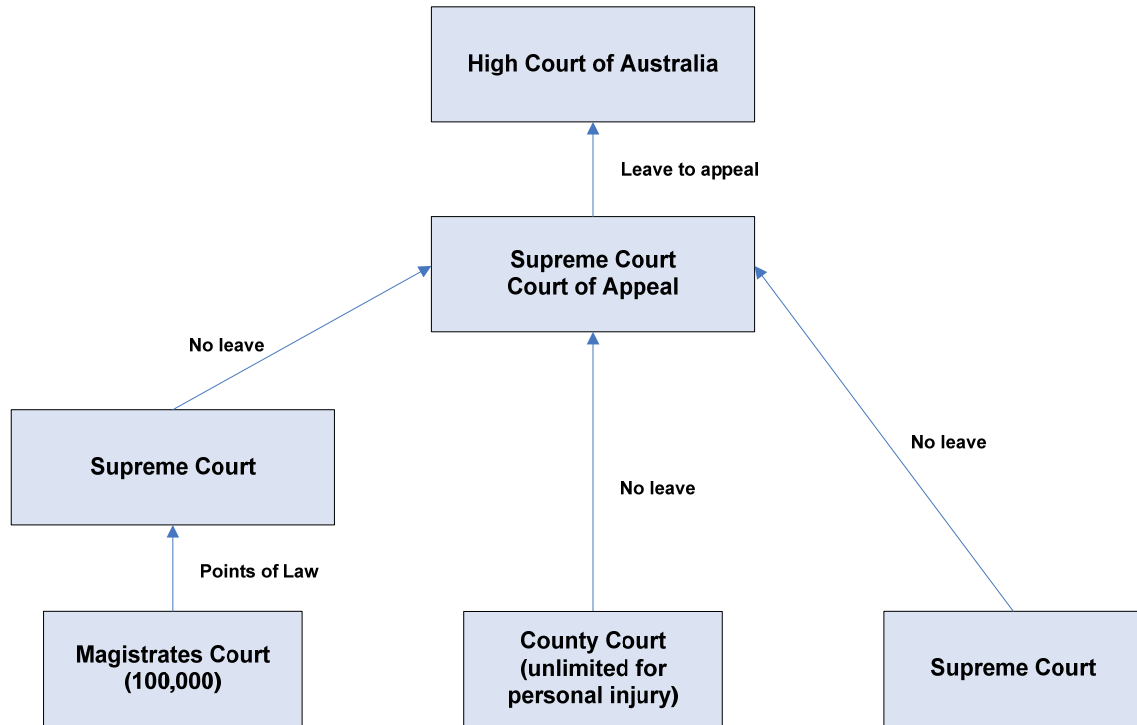
Cost Caps

There are no cost caps.

Victoria

VIC Appendix 1

1.1 A diagram of the court system covering jurisdiction limits and appeals.



VIC Appendix 2

- 2.1 Attached is a damages table for *Wrongs Act (Vic) 1958*. The current maximum amount for a significant injury is \$371,380.

Once the Court makes an assessment of impairment and assesses it is over 5% (10% for cases of psychiatric injury), the value of the award for non economic loss is pro rated by reference to the maximum award.

VIC Appendix 3

- 3.1 Summary of Wrongs Act (Vic) 1958
- 3.1.1 The purpose of the tort reform amendments to the Act was to limit the awards of damages for personal injury excluding workers compensation and transport accidents.
 - 3.1.2 Also includes exceptions as a result of intentional acts.
 - 3.1.3 Same as NSW.
 - 3.1.4 Same as NSW.
 - 3.1.5 Same as NSW (28B).
 - 3.1.6 Same as NSW.
 - 3.1.7 NRP.
 - 3.1.8 NRP.
 - 3.1.9 Same as NSW.

Liability

- 3.2 Same as NSW (48).
- 3.3 Same as NSW (49).
- 3.4 (i) Same as NSW (51);
(ii) Same as NSW (52).
- 3.5 (i) Same as NSW (53);
(ii) NRP;
(iii) Same as NSW (55).
- 3.6 (i)-(ii) NRP.
- 3.7 (i) Same as NSW (59);
(ii) Same as NSW (60).
- 3.8 (i) Same as NSW (62);

- (ii) Same as NSW (63).
- 3.9
- (i) Same as NSW (24AF);
 - (ii) Same as NSW (24AH);
 - (iii) NRP;
 - (iv) For proportionate liability to apply, a concurrent wrongdoer must be a defendant in the proceedings unless that person is dead or in the case of a corporation it has been wound up (24AI);
 - (v) Claims which are subject to proportionate liability appear to be retrospective and relate to proceedings after 1 January 2004.
- 3.10 Same as NSW.
- 3.11 Same as NSW in respect of volunteers and Samaritans (part IX, VIA, respectively).

Personal Injury Damages

- 3.12 Same as NSW (28C).
- 3.13
- (a) General damages (non economic loss) (part VBA and 28G);
 - (b) Loss of earnings (28F);
 - (c) Gratuitous attendant care services (28IA and 28ID).
- 3.14 Same as NSW (28F).
- 3.15 NRP.
- 3.16 Please see page 16 para 2.16 for relevant differences with NSW.
- (i) Same as NSW (28IA);
 - (ii) Same as NSW (28ID).
- 3.17 Damages for non economic loss shall not be awarded unless the person has suffered significant injury (28LE). Significant injury involves whole person impairment of more than 5% and in the case of psychiatric injury the threshold level is 10% (28LB).

There is a maximum amount for damages for non economic loss which is indexed (28G). The current maximum value is \$371,380.

VIC Appendix 4

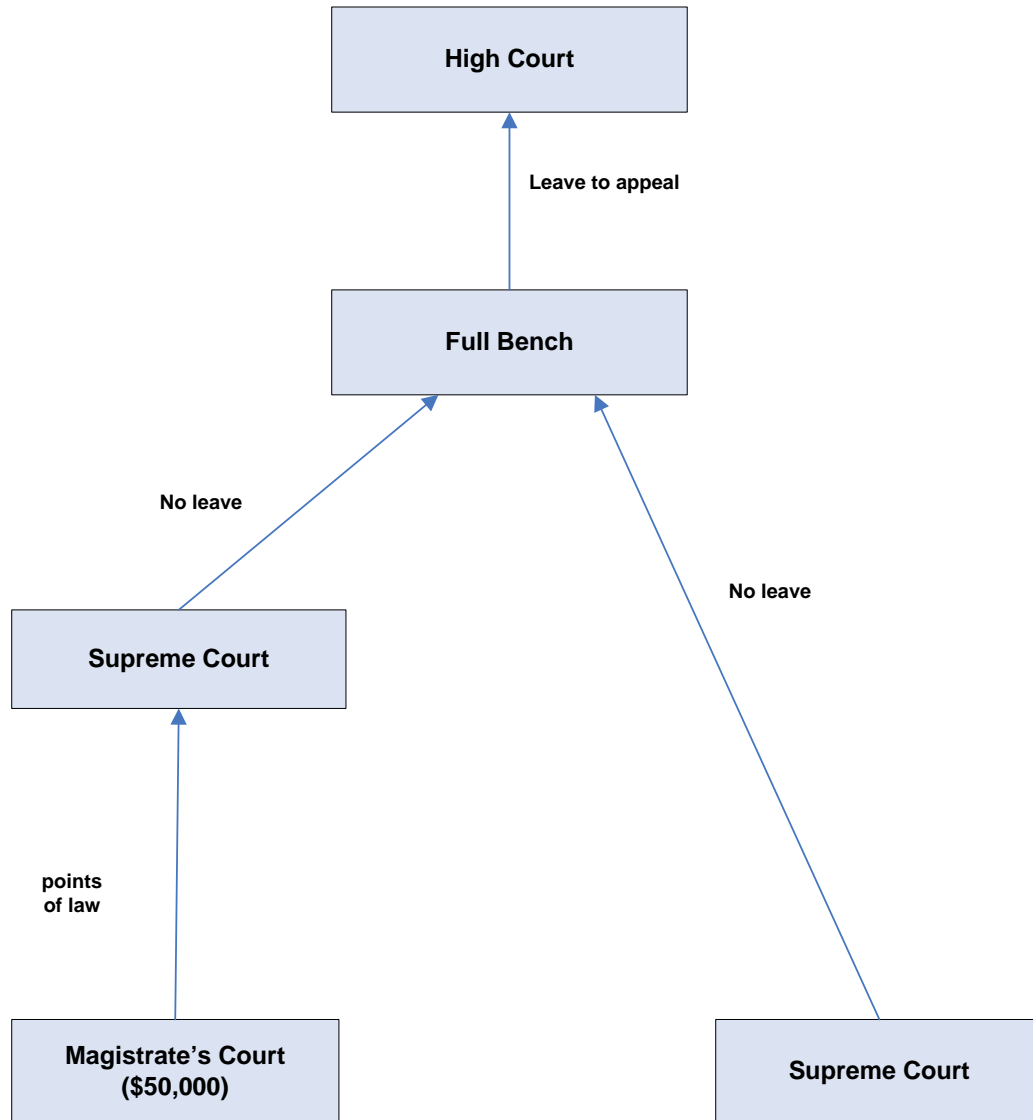
Cost Caps

There are no cost caps.

Tasmania

TAS Appendix 1

1.1 A diagram of the court system covering jurisdiction limits and appeals.



TAS Appendix 2

- 2.1 There is no maximum limit on awards for non economic loss. There is a minimum threshold of \$4,000.

TAS Appendix 3

- 3.1 Summary of *Civil Liability Act*.

General

- 3.1.1 The purpose of the legislation is to limit the awards of damages for personal injury unless the legislation specifies to the contrary. There are some exceptions to the damages for workers compensation and motor accidents (3B).
- 3.1.2 Other exceptions from the damages awards under the Act include damages claimed as a result of an intentional act or in respect of the use of tobacco products (3B).
- 3.1.3 Same as NSW (9).
- 3.1.4 Responds to liability for harm resulting from breach of duty (10).
- 3.1.5 Personal injury not specifically defined.
- 3.1.6 The Act is applicable to damages claimed for harm resulting from breach of duty (24).
- 3.1.7 The liability provisions only relate to claims covered by the Act (10).
- 3.1.8 Same as NSW (3B).
- 3.1.9 Same as NSW (3B).

Liability

- 3.2 Same as NSW (11).
- 3.3 Same as NSW (12).
- 3.4 (i) Same as NSW (13);
(ii) Same as NSW (14).
- 3.5 (i) Same as NSW (15);
(ii) Same as NSW (17);
(iii) Same as NSW (18).
- 3.6 (i) NRP;
(ii) NRP.
- 3.7 (i) Same as NSW (22);

- (ii) Same as NSW (22(5)).
- 3.8
 - (i) Same as NSW (23);
 - (ii) NRP.
- 3.9
 - (i) Same as NSW (43A);
 - (ii) Same as NSW (43A);
 - (iii) Same as NSW (43A);
 - (iv) Same as NSW (43D);
 - (v) The proportionate liability provisions are not expressed to be retrospective. They relate to causes of action after 1 June 2005.
- 3.10 There is a presumption of contributory negligence if the injured person is intoxicated entitling the wrongdoer to a reduction on the count of contributory of at least 25% (5).
- 3.11 Same as NSW in relation to volunteers (47). There is a like protection in relation to community organisations.

Personal Injury Damages

- 3.12 Same as NSW (24).
- 3.13
 - (a) General damages (non economic loss) (27);
 - (b) Economic loss, loss of earnings (26);
 - (c) Gratuitous attendant care services (28B);
 - (d) NRP;
 - (e) NRP.
- 3.14 Same as NSW (26).
- 3.15 NRP.
- 3.16 Please see page 16 para 2.16 for relevant differences with NSW.
 - (i) Same as NSW (28B);
 - (ii) NRP.
- 3.17 Damages for non economic loss shall not be awarded unless the severity of a claim is valued over \$4,000.

There is currently no maximum limit in relation to awards for non economic loss.

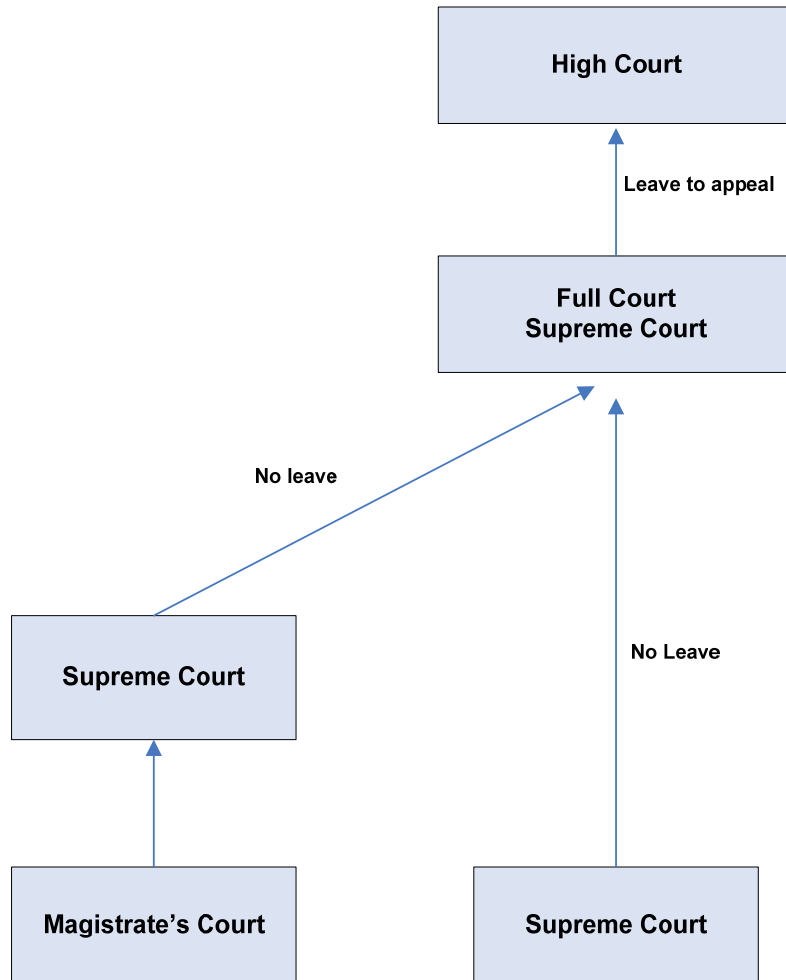
TAS Appendix 4

Cost Caps

There are no cost caps.

Australia Capital Territory (ACT)**ACT Appendix 1**

1.1 A diagram of the Court system covering jurisdiction limits and appeals.



ACT Appendix 2

- 2.1 Nothing reproduced. There is no maximum or minimum threshold unless the claim is a medical claim. In respect of medical claims there is a minimum threshold of \$12,000.

ACT Appendix 3

- 3.1 Summary of *Civil Law (Wrongs) Act 2002*:

General

- 3.1.1 The purpose of the legislation is not to limit the awards of damages per se. The relevant provisions do not apply to workers compensation;
- 3.1.2 NRP;
- 3.1.3 Same as NSW (40);
- 3.1.4 NRP;
- 3.1.5 NRP;
- 3.1.6 Same as NSW (92);
- 3.1.7 Same as NSW (93(1));
- 3.1.8 Same as NSW (41);
- 3.1.9 NRP.

Liability

- 3.2 Same as NSW (43).
- 3.3 Same as NSW (44).
- 3.4 (i) Same as NSW (45);
(ii) Same as NSW (46);
- 3.5-3.7 NRP.
- 3.8 (i) Similar to NSW (Part 7.3);
(ii) Same as NSW (47).
- 3.9 (i) Same as NSW (107B);
(ii) Same as NSW (107D);
(iii) Same as NSW (107E);
(iv) Same as NSW (107F(4) and 107G);

- (v) Claims are not retrospective. Proportionate liability only applies to causes of action after 26 July 2004.
- 3.10 NRP. Contributory negligence must be presumed if the injured person was intoxicated at the time of an accident and the defendant claims contributory negligence (95).
- The presumption of contributory negligence can be rebutted (95(2)).
- 3.11 Same as NSW in respect of volunteers (6) and Samaritans (5).

Personal Injury Damages

- 3.12 The legislation does not seek to cap non economic loss, however, it does impact on some other heads of damage. The Act applies to all personal injury claims except workers compensation (93).
- 3.13 The legislation only makes specific provision in relation to:
- (a) Economic loss for loss of earnings (98);
 - (b) Loss of capacity to perform domestic services.
- All other heads of damage such as non economic loss, the need for gratuitous domestic assistance are to be determined at common law.
- 3.14 Same as NSW (98).
- 3.15 NRP.
- 3.16 (i) There is no limitation on the award for gratuitous domestic care services to be supplied to an injured person;
- (ii) Same as NSW (100).
- 3.17 Not relevant in respect of general personal injury claims. There is a minimum threshold of \$12,000 for medical claims.

ACT Appendix 4

Cost Caps

In ACT there are de facto cost caps on recoveries by successful plaintiffs or successful defendants in personal injury actions. The caps apply in any case for personal injury claims in an ACT Court including claims for personal injury damages under the *Trade Practices Act*.

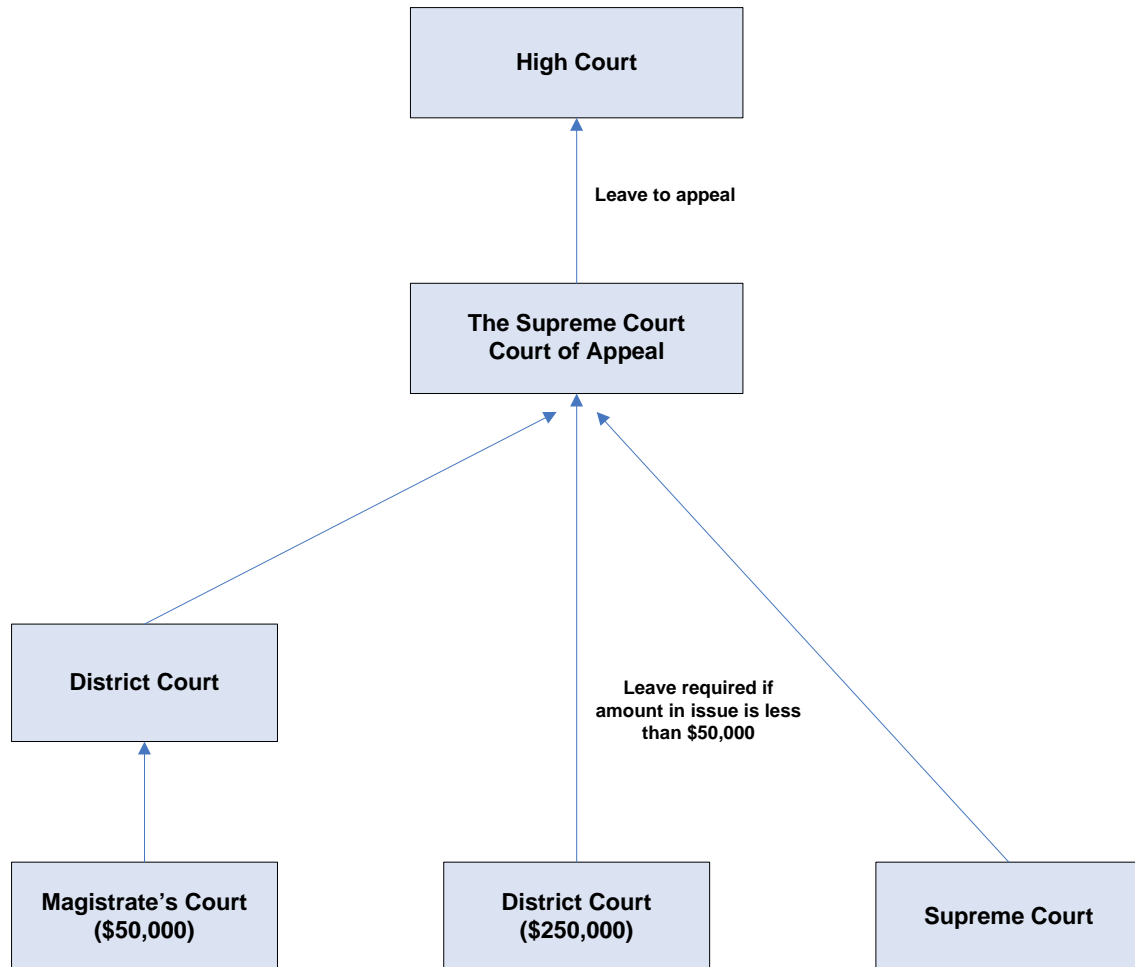
The caps can be released in certain circumstances where parties have engaged in offers or wherein the exercise of the Court's discretion it releases the caps.

In general terms where a plaintiff obtains a personal injury award of less than \$50,000 then the successful plaintiff is only permitted to recover from the unsuccessful defendant an amount which is \$10,000 or 20% of the award, inclusive of counsel's fees, plus other disbursements (chapter 14).

Queensland

QLD Appendix 1

1.1 A diagram of the court system covering jurisdiction limits and appeals.



QLD Appendix 2

- 2.1 The maximum award for general damages is \$250,000. It is not indexed.
There is no minimum threshold.
It is possible that the maximum amount will be reviewed in the near future.

QLD Appendix 3

- 3.1 Summary of *Civil Liability Act* (QLD).

General

- 3.1.1 The purpose of the legislation is to limit the awards of damages for personal injury unless the legislation specifies to the contrary. Some exceptions to the damages regime are due to the existence of damages regimes under other legislation, e.g. workers compensation (5).
- 3.1.2 There seem to be no other exceptions from the damages award under the ACT (50).
- 3.1.3 Same as NSW (Dictionary).
- 3.1.4 Breach of duty of care means failure to take reasonable care or to exercise reasonable skill (or both) (Dictionary).
- 3.1.5 Same as NSW (Dictionary).
- 3.1.6 Same as NSW (Dictionary, definition of claim).
- 3.1.7 Same as NSW (4).
- 3.1.8 Same as NSW (5).
- 3.1.9 NRP.

Liability

- 3.2 Same as NSW (9).
- 3.3 Same as NSW (10).
- 3.4 (i) Same as NSW (11);
(ii) Same as NSW (12).
- 3.5 (i) Same as NSW (13);
(ii) Same as NSW (15);
(iii) Same as NSW (19).
- 3.6 Please see page 16 para 2.16 for relevant differences with NSW.
(i) NRP;

- (ii) NRP.
- 3.7 (i) Same as NSW (22);
(ii) Same as NSW (22(5)).
- 3.8 (i) Same as NSW (23);
(ii) Same as NSW (24).
- 3.9 (i) Same as NSW (28);
(ii) Same as NSW (30);
(iii) NRP;
(iv) Same as NSW (32);
(v) Claims which are subject to proportionate liability are not retrospective. Proportionate liability only relates to causes of action after 1 March 2005.
- 3.10 Same as NSW (46).
- 3.11 Same as NSW in relation to volunteers.
NRP in relation to Samaritans.

Personal Injury Damages

- 3.12 Except for workers compensation applies in relation to an award of personal injury damages (50).
- 3.13 The legislation makes specific provision in relation to:
 - (a) general damages (62);
 - (b) economic loss for loss of earnings (54);
 - (c) gratuitous attendant care services (59);
 - (d) no interest on general damages (60);
 - (e) no exemplary aggravated or punitive damages (52).
- 3.14 Same as NSW (54).
- 3.15 Similar to NSW (55).
- 3.16 (i) Same as NSW (59);
(ii) NRP.
- 3.17 There is no threshold for general damages. But the maximum award is \$250,000 for an injury of the gravest conceivable kind (61).

The value of the gravest conceivable kind is not indexed.

QLD Appendix 4**Cost Caps**

There are cost caps for claims for personal injury.

There is no award of costs where the value of the award is less than \$30,000.

If the value of the award is between \$30,000 and \$50,000 then standard costs only apply up to \$2,500 for legal costs.