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KIDD'S DAMAGES

(P.I. & DEFAMATION) Oct. 2014

AUSTRALIAN PRINCIPLES & PRECEDENTS

(ASSESSING DAMAGES FOR PERSONAL INJURIES & DEFAMATION)

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Acknowledgements

I thank the Michael Kernot and Jarrod Warren (barristers SA) for their ideas and assistance in the preparation of this publication.

Preface

David Kidd (LLB Hons, BA, GDLP) was admitted to the Supreme Court of South Australia as a barrister and solicitor in 1994. Since that date he has specialized in providing legal research services to the legal profession.

This experience has enabled him to create law publications specifically tailored to meet the practical day-to-day research needs of legal practitioners.

This publication aims to do this by providing in full, relevant statements of legal principle on a host of assessment of P.I. damages and defamation damages issues and by providing summaries of assessments.

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Damages SA

Table of Subject and Key Word Headings

Agricultural Enterprises

See *Clement v Backo & Suncorp Metway Insurance* 16/3/07 [2007] QCA 81at [32] McMurdo P (Full Court) and *Clement v Backo & Anor* 26/4/06 [2006] QSC 129 at [54] where the need to take into account the vagaries of an agricultural enterprise in assessing damages for loss of income from such enterprises is recognised.

See *Kay v Murray Irrigation Limited* 11/12/09 [2009] NSWSC 1411 where likely yields from rice cropping were considered in determining economic loss. Fullerton J also considered damages for replacement labour as P could no longer do the physical aspects of rice farming. The impact of likely water allocations was also considered.

In *Meakes v Nominal Defendant* 15/3/11 [2011] NSWDC 9 Levy SC DCJ assessed past damages for the **cost of employing a fencing contractor** and the **future costs of employing rural labour** in a case where a lawyer suffered a minor shoulder injury which affected his ability to contribute to a farm which he acquired as a co-owner subsequent to his injury. Plans for the acquisition of the farm had been firmly in place before his injury. **Relevance of co-ownership discussed**. Appeal allowed in *Nominal Defendant v Meakes* 4/4/12 [2012] NSWCA 66 [60 MVR 380].

In *Kerney v Mead & Anor* 3/6/11 [2011] NSWSC 518 Garling J was **not prepared to make an award for loss of farm earnings** where a **part-time farmer who'd never made a profit** from his cattle was seriously injured, and where there was **limited evidence to justify claim**. See from paragraph 234. On an appeal limited to the issue of economic loss in *Mead v Kerney* 23/7/12 [2012] NSWCA 215 it was contended "that the primary judge erred in concluding that, although the respondent had a theoretical earning capacity of forty per cent, that capacity was of no value because there was no prospect of him obtaining work to utilise it" @4. **Appeal dismissed**.

In *Schimke v Clements & Suncorp Metway Insurance* Ltd 22/6/11 [2011] QSC 182 Applegarth J assessed damages in a **dependency claim where farmer was killed in road accident**. P and her deceased husband both worked hard on the farm, but they had been experiencing drought years.

…

Contingencies

[See also Discount rate & Future Economic Loss/Loss of Earning Capacity]

Absentmindedness

"If the deceased was in the habit of acting as absentmindedly as he did on this occasion, the risk of accident could hardly be regarded as negligible."
Geraghty v Angus & Ors [1938] SASR 455 @ 461 Napier J Not on austlii

Against defendant (operating)

"Vicissitudes sometimes operate against Defendants : *Wynn v NSW Ministerial Corporation* [1995] HCA 40; (1995) 184 CLR 485 at 497 citing *Bresatz v Przibilla* [1962] HCA 54; (1962) 108 **clr** 541 at 544 per Windeyer J. Having regard to the Plaintiff's limited pre-accident education and level of functioning I find that the prospects of the Plaintiff obtaining mitigatory residual earnings of the order of $50 per week net over the remainder of his theoretical working life to be quite modest. I therefore believe that the assessed residual earning capacity of $50 per week should be discounted to reflect the vicissitudes operating adverse to the interest of the Defendant in this case"@563. **Saleh v The Nominal Defendant** 15/5/09 [2009] NSWDC 1 Levy SC DCJ [note: Appeal allowed in *Nominal Defendant v Saleh* 17/2/11 [2011] NSWCA 16]

Boxing injuries

In *Lewis v Clifton & Ors* 29/7/11 [2011] NSWDC 79 Elkaim SC DCJ did not factor in the possibility of P suffering income reducing injuries in his sport of boxing. See from paragraph 125. **Appeal dismissed** at *Clifton & Ors v Lewis* 30/7/12 [2012] NSWCA 229

Chance of obtaining more remunerative employment

See *Hayes* at Loss of chance – Business/employment opportunities

Children (having)

In *Thornton v Lessbrook P/L* 26/8/10 [2010] QSC 308 Applegarth J, in a Lord Campbell's Act type action for pecuniary loss under the Civil Aviation (Carriers' Liability) Act 1964 (Qld), took into account as a contingency **the prospect of the P and his deceased defacto/fiancé having had children**, and how this would **impact on P's future economic loss**. The deceased was a police officer with law and science degrees who had significant career prospects in the police force. She was killed in an aeroplane accident. P was also a police officer. They were born in 1974 and 1977 respectively. There was **no reason in principle to treat the contingency of children being born any differently from any other contingency**.

Civil Liability Act 2002 (NSW), s13

[Chandler] "54 The calculation of future economic loss was required to be undertaken in accordance with s 13 of the *Civil Liability Act*. The *Civil Liability Act* commenced on 20 March 2002 and the provisions of Part 2, within which s 13 is to be found, apply to proceedings (such as these) commenced after the commencement of the Act: Schedule 1, cl 2. Section 13 provides:

'13 (1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.

(2) When a court determines the amount of any such award of damages for future economic loss it is required to adjust the damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events might have occurred but for the injury.

(3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which the damages were adjusted.'

55 Whether, and if so in what way, s 13(1) affects the exercise required in assessing damages under the general law is not entirely clear. Under the general law, a plaintiff is required to demonstrate that a disability resulting from a tortious act will continue in the future and will affect his or her earning capacity, in a manner which will probably cause financial loss: c.f. McCracken v Melbourne Storm Rugby League Football Club Ltd [2007] NSWCA 353. The phrase 'most likely future circumstances' may be comparative, in the sense of identifying from a possible range those circumstances most likely to eventuate, or qualitative, in the sense of requiring an outcome that is not merely probable, but 'most likely' to arise. The former appears to be the natural meaning of the phrase, read in context, and does not significantly affect a general law assessment. That construction was accepted by Hodgson JA in MacArthur Districts Motor Cycle Sportsmen Inc v Ardizzone [2004] NSWCA 145; 41 MVR 235 at [11].

56 Subsection 13(2) is either addressed to the usual allowance for vicissitudes, or to the kind of calculation required by Malec v JC Hutton Pty Ltd *[1990] HCA 20;* (1990) 169 CLR 638, or possibly both, c.f. Ardizzone at [6]-[8].

57 Generally speaking, a figure of 15% is allowed for vicissitudes. In the present case, future economic loss was reduced by 20%, 'bearing in the mind the epilepsy and other health problems that she has had to date': Judgment p 64. No complaint is made by the plaintiff about that allowance. The critical finding was in the following terms (Judgment, p 62-64):

'The plaintiff has a residual capacity, although she did have some difficulties as an administrative assistant to the Townsville Hospital. I am of the view that there is a range of sedentary type employment that she could perform. Most of her employment has been a semi-menial type employment that requires her to squat, stand, push, bend and do a range of activity which would aggravate a knee condition.

...

The plaintiff's restrictions, to which I have referred are permanent and I am of the view that the plaintiff's economic capacity, as a result of this accident, continues at a rate of $150 per week. In properly being able to determine the plaintiff's future economic loss in my view, bearing in mind the epilepsy and other health problems that she has had to date, it would be appropriate to allow $150 per week for 30 years, but to increase for vicissitudes to 20%.'

58 On their face, the reasons may appear not to accord with s 13(3): nevertheless, taking into account other findings that appearance becomes deceptive. First, his Honour concluded that at the time of the accident the plaintiff was earning $300 per week after tax: Judgment, p 60. He noted that in March 2003 the plaintiff obtained employment 'which would appear to have been paid more than employment she had previously been in, although allowing for increases [in inflation?] it was probably about the same': Judgment, p 62.

59 Secondly, in assessing the economic loss from 1 January 2004 to the date of trial, his Honour said that the plaintiff had an economic 'incapacity' which he assessed at $150 per week: Judgment,

p 63. Taking these figures together, it appears that his Honour (unfavourably to the plaintiff, but about which there is no complaint) treated the plaintiff's earning capacity at the date of trial as being the same, in financial terms, as at the date of accident. (This appears by taking together the assessment of incapacity and that of capacity, each calculated at $150.) As a result, it may be inferred that her loss of earning capacity was assessed at 50%.

60 As noted by Hodgson JA in Ardizzone, there are difficulties in knowing precisely what s 13 requires of a trial judge in assessing future economic loss. However, it appears that the trial judge did consider the most likely future circumstances, but for the injury, namely a continued future earning capacity was, in current monetary terms, assessed at $300 per week. It was difficult for the RTA to complain about that calculation: it is most unlikely that her earning capacity was, in monetary terms, the same in December 2006 as in February 2000. Furthermore, she was then working limited hours to allow her to care for three young children. His Honour found that she would have been 'available to work longer hours' once the youngest child (11 years of age in 2006) reached the mid-teens: Judgment, pp 63 and 64. His Honour therefore complied with s 13(1), being satisfied as to the most likely future circumstances but for the injury and stated those assumptions for the purposes of s 13(3). If, as Hodgson JA has accepted, s 13(2) relates to vicissitudes, then allowance was made for the possibility that loss would have occurred but for the injury and a relevant percentage was stated. It follows that there was no breach of s 13." **RTA of NSW V Chandler** 11/4/08 [2008] NSWCA 64 Basten JA Full Court

Contingency which has happened

See *Lamble* at Queensland – References to recent general damages assessments.

Dangerous activities of plaintiff

[See Boxing above & Motorcycling sub-heading below]

Discounting actuarial calculation

"In assessing loss of earning capacity regard must be had to both favourable and unfavourable contingencies. Not all contingencies are adverse : Bresatz v Przibilla (1962) 108 CLR 541"

Articles:

The choice of discount rate in the assessment of damages Sieper E (1990) 17 MULR 614

Expenses of earning a living

In *Brocx v Mounsey* 7/8/09 [2010] WASCA 196 the trial judge "concluded that no deduction should be made for expenses, as those would be met by the employer, and a deduction of 10% should therefore be made for the vicissitudes of life. … [H]e made an additional **5% deduction from the appellant's future loss of earnings as a consultant in order to allow for work-related expenses**" @66. The COA held that he erred as "it appears that his Honour had in mind expenses which would ordinarily be incurred in the course of earning an income as a consultant, rather than expenses of a contingent nature. The former should be … taken into account in determining the net income that the appellant would otherwise have earned, rather than deducted on the basis of a contingency. Secondly, his Honour erred in concluding that in respect of the figures given in evidence for the earnings of a consultant no allowance had been made for ordinary work-related expenses.

Favourable

[Clark] "There was a time when it was customary in South Australia to make a conventional deduction of something like a quarter or a third. But in Teubner v Humble (1963) 108 CLR 491 this approach was disapproved; see per Windeyer J, with whose judgment in this respect Dixon CJ and McTiernan J concurred, at pp 508-509. In Bresatz v Przibilla (1962) 108 CLR 541 @ 544, Windeyer J, with whose judgment Dixon CJ concurred, said:

> 'Moreover, the generalization, that there must be a "scaling down" for contingencies, seems mistaken. All "contingencies" are not adverse: all "vicissitudes" are not harmful. **A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment**. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad.'

Nevertheless, in Faulkner v Keffalinos (1970) 45 ALJR 80 the High Court reaffirmed the necessity to make some allowance for the contingencies of life; see per Barwick CJ at p81, per Windeyer J at p86.

The conclusion I draw from these and other authorities is that **allowance must be made for all the contingencies of life, but that they must be estimated by reference to the particular case and**

not by some rule of thumb. I think the, auguries for the plaintiff's future in this respect before the accident were favourable. His school record and his work record were good. He was interested in the work and applied himself to his textbooks. I think that if there had been no accident it is improbable that he would have remained for long on the minimum boilermaker/welder's rate or that he would not have been able to get and willing to take overtime work and work entitling him to over-award payments of various kinds and I am not prepared to assess these damages on the footing that he would have earned no more than the minimum rate during his working life. On the other hand, there would always have been the chances of sickness, unemployment or non-compensable accident." **Clark v Chandler** (1973) 5 SASR 416 @ 422 Bray CJ Not on austlii

General

[Edwards] "In assessing the Plaintiff's damages for future loss of earning capacity **both favourable and unfavourable contingencies which may affect the Plaintiff's earning capacity need to be considered**. The High Court in Wynn v NSW Insurance Ministerial Corporation (1995) 184 CLR 485 made the following observations regarding contingencies (at 497-498):

'It is necessary to say something as to contingencies or "vicissitudes". Calculation of future economic loss must take account of the various possibilities which might otherwise have affected earning capacity. The principle and the relevant considerations were identified by Barwick CJ in Arthur Robinson (Grafton) Pty Ltd v Carter as follows:

"Ill health, unemployment road or rail accidents, wars, changes in industrial emphasis, so that industries move their location, or are superseded by new and different techniques, the onset and effect of automation and the mere daily vicissitudes of life are not adequately reflected by merely – and blindly – taking some percentage reduction of a sum which ignores them."

It is to be remembered that a discount for contingencies or 'vicissitudes' is to take account of matters which might otherwise adversely affect earning capacity and as Professor Luntz notes, death apart, 'sickness, accident, unemployment and industrial disputes are the four major contingencies which expose employees to the risk of loss of income'. Positive considerations which might have resulted in advancement and increased earnings are also to be taken into account for, as Windeyer J pointed out in Bresatz v Przibilla, '(a)11 "contingencies" are not adverse: all "vicissitudes" are not harmful'. Finally, contingencies are to be considered in terms of their likely impact on the earning capacity of the person who has been injured, not by reference to the workforce generally. Even so, the practice in New South Wales is to proceed on the basis that a 15 percent discount is generally appropriate, subject to adjustment up or down to take account of the plaintiff's particular circumstances.'

The favourable contingencies for the Plaintiff include the possibility of advancement and increased income. Unfavourable contingencies include those referred to in Wynn of sickness, accident and unemployment. The degenerative state of the Plaintiff's discs at the time she was injured is also another matter to take in consideration when considering unfavourable contingencies." **Edwards v Butler** 22/12/04 [2004] SADC 190 Robertson J @ 83

Industrial disputes, unemployment, accident etc

In *Best … v Greengrass* 29/3/12 [2012] WADC 44 Wager J at paragraph 219 made a **5% discount for the contingencies of industrial disputes, unemployment, accident and sickness** in the case of a severely injured worker who wouldn't work again, and who previously worked in a secure and well remunerated position.

Loss of employment due to drug use

In *Brinkley v P & O Trans Australia (WA) P/L & Anor* 30/7/10 [2010] WADC 106 Derrick DCJ decided, when calculating LOEC, not to make an allowance for the contingency that P, a cannibis user, may have been the subject of a positive drugs test at work which might have caused him to lose his job. Nor was any allowance made for possibility of a cannabis-related mental illness.

Motorcycling

"... it is necessary to remember that, in any calling or pursuit requiring manual dexterity, the earning power of the plaintiff must necessarily have been limited and, so long as he persisted in riding a motor cycle, I think that the contingency of accident would always have been a grave risk."
Webb v Black [1937] SASR 360 @ 365 Napier J Not on austlii

New relationship

[See also Re-marriage]

In *Thornton v Lessbrook P/L* 26/8/10 [2010] QSC 308 Applegarth J, in a Lord Campbell's Act type action for pecuniary loss under the Civil Aviation (Carriers' Liability) Act 1964 (Qld), took into account as a contingency the prospect of the P and his deceased de facto/fiancé having children, and how this would impact on P's future economic loss. The deceased was a police officer with law and science degrees who had significant career prospects in the police force. She was killed in an aeroplane accident. P was also a police officer. They were born in 1974 and 1977 respectively. The **contingency of P forming a new relationship** which may or may not be to his financial advantage also considered. After reviewing the law Applegarth J stated "Neither *De Sales* nor *Campbell* supports the proposition that it is appropriate to make a separate and substantial discount simply where there is evidence of a new relationship. Whether it is appropriate to make a separate allowance, and the extent of any allowance, depends upon evidence that reveals whether the new relationship brings with it financial advantage or disadvantage. Further, as … stated in *De Sales*, it would be wrong to assume that the financial consequences revealed in evidence will inevitably continue" @83. The benefit of the deceased's superannuation also factored in.

Over-protective support

See *Keegan v Sussan Corporation (Aust.) Pty Ltd* 7/4/14 [2014] QSC 64 where Henry J considered the over-protective support of P's mother and husband and whether a greater discount should be made. Henry J stated, "Now that the complicating feature of potentially over-protective support by Ms Keegan's mother and husband has been identified, it will be appropriate to infer that aspect will be better addressed in the future in arriving at a conclusion about the prospect of and timing of Ms Keegan's recovery. However, that feature is not itself causative of Ms Keegan's loss and it is not appropriate to discount her loss to date by reason of it" @148.

Pre-existing conditions

[See Pre-existing Conditions]

Premature death/life expectancy

[See also Life Expectancy]

[Spargo] "Whilst it may be said that the contingency of premature death is one of the usual negative contingencies and is one of the vicissitudes of life, and therefore the learned master brought it to account, the reasons expressed by him for the damages awarded under the various heads make it plain that if he did have regard to the contingency, it was only in passing and not in a significant way. It is unnecessary to distinguish Doherty v Liverpool District Hospital [(1991) 22 NSWLR 284] as the decision in that case was the exercise of a discretion upon particular circumstances. However, in that case it must be assumed that the jury did apply the direction of the learned trial judge and have regard to the contingency of premature death of the plaintiff who was of middle age. Mr Boundy was a young man and, as I have said, the contingency of premature death was not brought to account in a significant way. The Australian Life Tables do not bring to account the contingency adequately for two reasons. First, they formed no part of the assessment of damages for future non-economic loss. Secondly, the Tables only bring to account the contingency with respect to future economic losses and expenses in a limited way. In assessing damages for future economic loss, the learned master accepted the evidence of Mr Stratford, a consulting actuary. According to him, the present value of an annuity of $1 per week net loss ceasing upon the attainment of the age 65 or prior death for a male of the age of Mr Boundy was $868. That value had been calculated using the mortality basis of the Tables for males and a discount rate of 5 per cent per the rate prescribed in accordance with s35a(1)(e) of the Wrongs Act. Mr Stratford was not asked to explain the mortality basis. In assessing damages for future treatment and surgery, the learned master selected multipliers from the Tables published in H Luntz, Assessment of Damages for Personal Injury and Death (3rd ed, 1990) which have regard to mortality. Some assistance in understanding the mortality basis of the Tables is to be found in the article of Lawrence J Cohn, a Fellow of the Faculty of Actuaries in Scotland, 'Assessment of Damages in Fatal and Non-Fatal Accident Cases' (1956) 29 ALJ 553, and the discussion in Luntz at 275. The Tables have regard to the duration of human life estimated from the available statistics. They are the result of calculations on a scientific basis according to the probability of survival for each year into the future until the expected event eg retirement. They reflect no more than the average mortality experience and are not concerned with the particular individual whose lifespan is in issue. Here, the only matter personal to Mr Boundy which Mr Stratford brought to account was his age. Consequently, in applying the actuarial evidence in assessing the damages for future economic loss and treatment, the learned master had brought to account no more than the average mortality experience of a male person of the age of Mr Boundy. He did not bring to account any matter personal to Mr Boundy or otherwise justified by the evidence, such as any relevant feature

of his character, personality, lifestyle or any hazards of his chosen occupation. In General Motors-Holden's Pty Ltd v Moularas (1964) 111 CLR 234 at 258, Windeyer J acknowledged the need to evaluate the contingency of premature death in the context of the individual:

> '**If the calculation put before [the jury] be an actuarial one, made by reference to average mortality experience, the possibility of the assumed period of working life being cut short by death is already allowed for to the extent of the average of the community; but probabilities peculiar to the individual plaintiff have not. If before the injury he in fact had some frailty or disease likely to result in early death or incapacity for work, some further allowance for that may seem to a jury proper**.'

In my view, the learned master did not adequately take into account the contingency of premature death by use of the Tables or otherwise."

Spargo v Greatorex 25/8/92 [1992] SASC 3573 Mullighan J (Full Court) [(1992) 59 SASR 1 @ 19-20]

[Lipovac] "Given the agreement between the parties as to loss of expectation of life, there must be a consequential reduction in the calculation of the undiscounted quantum of various heads of damage. However, it is necessary to reconsider the level of discount to be applied thereto to take account of the 'vicissitudes of life'.

5. Mr Garling SC, for the third defendant, contends that the **conventional reduction of 15%** should be applied notwithstanding the reduced life expectancy assumed. Mr Donovan QC, for the plaintiff, contends that no reduction should be applied.

6. In essence, Mr Donovan QC says, the agreement as to reduction of life expectancy, renders any further reduction for contingencies otiose. For what it is worth, the assumption of further reduction of expectation of life from 67 years which could be found on the evidence to 60 years as agreed, represents a reduction of between 11 and 12%. Against the normal expectation of life it would be a 17-18% reduction, see Luntz, Australian Life Tables.

7. On the facts …, but for the injury sustained by the plaintiff, no more or less than the average contingencies of life could be assumed. Those contingencies may broadly be categorised as premature death, sickness, accident or unemployment otherwise arising, see, for example, *Broadribb v Hanna* [1969] 1 NSWLR 35. However, favourable contingencies should not be ignored.

8. Recently, in *Koeck v Persic*, [U/R ACTSC], Miles CJ, Gallop and Foster JJ, [26/3/96] , Miles CJ considered the scope of the discount for contingencies. His Honour said, at 11, Logically, vicissitudes should also include the possibility of increases in earning capacity by way of such factors as promotion, general economic prosperity and the like. These are somewhat elusive and speculative matters. As a matter of thumb, a figure of 15 per cent is usually applied by way of reduction of the arithmetical calculation of the present value of future periodic loss, see *Burnicle v Cutelli* [1982] 2 NSWLR 26, Moran v McMahon [1985] 3 NSWLR 700. The reduction by such an amount is regarded as applicable to the 'ordinary' vicissitudes, but there is nothing sacrosanct about that percentage and the calculation of the loss may be reduced or increased as it commonly is, having regard to the particular circumstances of the case, see Djapa v Comalco Aluminium Ltd (NSWCA; 3/7/87; no. CA 64 of 1986).

9. As a matter of logic, his Honour noted, such a consideration would be appropriate not only for calculation of future earnings but also in considering any aspect of damages where there has been an appreciable time between the injury and the hearing or end of working life or of life as the case may be.

10. In the present case, **there is force in Mr Donovan's submission that the contingency of early death has already been acknowledged and allowed for. Thus it would unduly favour the third defendant to allow fully the usual percentage reduction**. Indeed, Mr Garling SC acknowledged as much. Other unfavourable contingencies will usually impact differently on, say, future earning capacity as opposed to future additional medical and whole of life costs. Contingencies which might reduce earning capacity would not necessarily impact on the need for future medical and other expenses.

11. The assumption agreed between the parties removes the unfavourable contingency which otherwise would follow from the chance of death but for the injury between age 60 and age 72. It does not remove the contingency of death before age 60, but the impact of that contingency is very much reduced.

12. Taking account as best I can of these various considerations, it seems to me that only a 5% reduction should be applied to calculations terminating at age 60, the assumed end of life. That does not apply to calculations relating to earning capacity beyond that age. Although the plaintiff is assumed to have a life expectancy to age 60 only, there is an allowance to be made for earnings for the 'lost years'. That is subject to the usual contingencies." **Lipovac v Hamilton Holdings P/L & Ors and ACT** 17/1/97 [1997] ACTSC 3 Higgins J

Recurrent depressive illness from unconnected accident

Evidence was given that "once a person has suffered a major depressive illness … there is a 70 per cent likelihood of that person suffering a recurrence within a period of the next ten years. The defendant did not claim that it had discharged the evidential onus and established that the plaintiff would have suffered a major depressive illness in any event Watts v Rake (1960) 108 CLR 158. The Judge, however, indicated that he would take into account the contingency that the plaintiff may have suffered a recurrent episode of major depressive illness for reasons unconnected with the accident. There is no complaint by either party about that finding". **Cahill v Saunders** 9/11/01 [2001] SASC 361 @ 405 Lander J (Full Court)

Residual earning capacity

See *Potts* at Residual earning capacity – Contingencies

Risk of relapse into addiction

See *Covington-Thomas v Commonwealth of Australia* 2/8/07 [2007] NSWSC 779 Kirby J from para. 703.

Scope of discount for

[See *Lipovac* at Premature death/life expectancy sub-heading above]

See *Transfield Services (Australia) Pty Ltd v Wieland* 21/2/14 [2014] WASCA 41 where an **extraordinary discount of 50% for the ordinary adverse vicissitudes of life was disapproved**. "The trial judge referred to the respondent's pre-existing condition which may have caused early retirement, but that had already been addressed by a reduction in the respondent's anticipated working life. The main contingencies to be allowed for were the possibilities of sickness, some other accident, unemployment or industrial dispute. There was no evidence that the appellant's job was at risk" @26-27. A discount in the order of 10% would have been appropriate. The **usual discount for ordinary adverse vicissitudes of life is between 2% and 10%**.

Sickness

See *Jones v Bradley* 16/4/03 [2003] NSWCA 81 para 199-202 where Santow JA discusses the possibility of P's **pre-injury hepatitis C** becoming active and whether the trial judge should have discounted a percentage from all awards for vicissitudes of life because of this. No discount made due to lack of evidence about the likely impact of P's hepatitis.

Short period of FEL

[O'Gorman] "175 There is another matter which also needs to be taken into account when calculating the plaintiff's loss of future earning capacity. Normally, one would apply a discount for vicissitudes. **Since the period of time is relatively short, i.e. 7¼ years, it would, in my opinion, be unfair to apply the conventional 15% for vicissitudes**. **Something less than that should be applied**. On the other hand, the evidence of Professor Tattersall in his report of 11 September 2008 … , was that taking into account her breast cancer alone, the plaintiff would have had an 81% chance of achieving a 10 year survival rate. In other words, there was a very real vicissitude which ought be taken into account when calculating the plaintiff's future loss of earning capacity. 176 Given the relatively short period of time, i.e. 7¼ years when taking into account the actual vicissitude identified by Professor Tattersall and the possibility of **other unknown vicissitudes** occurring, I propose to apply a **discount of 20%** to this head of damage." [see precis at Cancer – Breast]

O'Gorman v Sydney South West Area Health Service 29/10/08 [2008] NSWSC 1127 Hoeben J

Unemployment

In *Perry & Bell v Australian Rail Track Corporation Ltd & Ors* 7/6/13 [2013] NSWSC 714 Campbell J, in assessing P's economic loss as a train driver, took into account the fact that not long after P's accident many train drivers were retrenched by P's employer.

Sympathetic employer

In *Brown v Dato Pty Ltd* 24/8/06 [2006] WASCA 170 @ para 53 the Full Court per McLure J made **a modest positive allowance** for the injured person (who was well qualified and not likely to be greatly disadvantaged in the open labour market) having the benefit of a sympathetic employer. *Wright v Shire of Albany* (1993) A Tort Rep 81-239 also quoted in this regard.

Contractors

See *Wooby v Australian Postal Corporation* 19/6/13 [2013] NSWCA 183 where a contractor of the R who worked solely for R was injured lifting a heavy parcel on R's premises. R owed A a duty of care and breached it.

Contribution

See *Ahrens Engineering Pty Ltd v Leroy Palmer & Associates & Ors* 25/2/10 [2010] SASC 36 where Duggan J considered the meaning of the word **'liable'** in s 6(1) of the *Law Reform (Contributory Negligence & Apportionment of Liability) Act 2001* (SA).

See *JK v State of New South Wales* 14/8/14 [2014] NSWSC 1084 where Harrison AsJ ordered a **teacher who sexually assaulted a student (JK) to contribute 90% of the consent judgment sum that the State of NSW and other defendants had agreed with JK**. Non-delegable duty and vicarious liability considered.

Coronial inquest (costs associated with)

See *Chaina v Presbyterian Church (NSW) Property Trust (No. 25)* 23/5/14 [2014] NSWSC 518 where Davies J considered that such costs were recoverable and awarded $75,000. See from paragraph 777.

Cosmetic Surgery

R underwent face-lift surgery. There was no negligence in the performance of the surgery, but it was found that the **A failed to fully advise R of the risks** and that R would not have had the operation if she was fully informed. R was unhappy with **tightness, asymmetry and lines on her lips**. A did eventually perform revision surgery, but R remained **very self conscious** about her appearance. On appeal **compensatory damages of $30,000** affirmed, but aggravated and exemplary damages were overturned due to pleading failures and there being no contumelious disregard of the R's rights by the A in enticing her to proceed with the operation. See commentary below re **damages for disappointment**.
Tan v Benkovic 26/10/00 [2000] NSWCA 295 Full Court

In *Machado v Advanced Dermatology Group Pty Ltd* 7/6/13 [2013] NSWDC 85 P underwent cosmetic laser treatment and "has been left with **significantly disfiguring facial scarring**. This causes her considerable upset on a daily basis. She presently applies makeup in an endeavour to conceal the scarring. Those efforts are not entirely successful. She has been left to suffer embarrassment and resultant psychological difficulties, including depression, and a feeling of social isolation. The plaintiff has partial thickness permanent dermal scarring to her right cheek, her left cheek, the margin of her lips, the root of her nose, and the glabellar region. The scarring is pigmented and depressed in its appearance. She has an area of altered pigmentation in the skin of her forehead. These have been attributed to a severe reaction to the laser therapy treatment she received. She finds the scarring embarrassing, particularly when she meets people for the first time, and in connection with her work as a parole officer in the community … Her self-confidence has been adversely affected, and she is emotionally fragile. She has a diagnosis of **Adjustment Disorder with Mixed Anxiety and Depressed Mood**. The prognosis for this condition is uncertain, as her scarring is permanent, and surgery will not be entirely corrective of the scarring" @67-69. **Negligence not established**. P was 38 when she suffered her facial injuries. Levy SC DCJ notionally assessed her at **28% of a most extreme case** which corresponded to $73,000 damages for NEL. Other heads assessed.

> [Tan] "22 The trial judge held that the appellant's 'blandishments' had contributed to the respondent's willingness to undergo surgery. Indeed, at one stage in the judgment, he referred to the respondent's distress as having arisen *'because of disillusionment over the unfulfilled promises made to her'* (presumably a reference to the statements that the respondent would be made to look 20 years younger, feel a different person and not be left looking like a mummy). However, the case was never fought in contract. I do not understand the respondent to suggest that she is entitled to be compensated for more than the consequences of surgery to the extent to which her condition after the medical procedures was worse than it was before they were embarked upon.
>
> 23 There is no doubt that a good deal of the respondent's disappointment stemmed from her **unfulfilled expectations for improvement**, but **Rogers v Whitaker does not offer a basis for recovering damages for such disappointments**. After all, the negligent failure to disclose certain risks is only compensable if a plaintiff undergoes a procedure which he or she would not have undergone had such risks been disclosed. The **plaintiff cannot seek tortious compensation for something that would have happened anyway had there been no operation (in this case the aging process)**.
>
> **Tan v Benkovic** 26/10/00 [2000] NSWCA 295 Mason P (Full Court)
>
> …

Dust Diseases

[See also Life Expectancy]

Amaca/James Hardie's knowledge from 1960s

See *Lowes v Amaca Pty Ltd* 26/10/11 [2011] WASC 287 from paragraph 423 where the D's knowledge in respect to the harmful effects of exposure to asbestos from the 1960s considered.

Appeals

See *Amaca Pty Ltd v Tullipan* 6/8/14 [2014] NSWCA 269 where Basten JA stated that "There are of course principles of certainty and transparency which militate in favour of appellate intervention where what might be normally accepted as a proper range for an award of general damages appears to have been contravened. However, such considerations have more traction in relation to an appeal by way of rehearing than one limited to the correction of decisions in point of law" @44. Trial judge's award of general damages found to involve no error of law.

Apportionment

See *Jones v Southern Grampians Shire Council & Amaca …* 24/10/12 [2012] VSC 485 where Debra Jones died from mesothelioma which she contracted as a result of washing her husband's clothes. Forrest J apportioned liability 65% against James Hardie and 35% against the shire who employed P's husband.

Benefits from Dust Diseases Board

See *Parkinson v Lendlease Securities and Investments P/L* 4/6/10 [2010] ACTSC 49
Higgins CJ from paragraph 46.

Causation

In *Evans v Queanbeyan City Council* 5/8/11 [2011] NSWCA 230 the COA considered a case where a **P who was a heavy smoker was exposed to asbestos** and held that the "primary judge was entitled to accept Dr Berry's evidence and hence reject, as inconsistent with the epidemiology, the hypothesis that smoking and asbestos work together in all (or more than 50% of) cases. That is not to say that the hypothesis is erroneous: rather, it is to say that the trial judge was not satisfied that it was probably correct" @83 per Basten JA. The **'synergistic effect'** considered. Allsop P also stated that "At common law, as a general proposition, the increasing of risk of harm by a tortious act is, alone, insufficient for a conclusion of causation by material contribution to that harm or for a conclusion of responsibility in law for that harm" @22.

See *Amaca Pty Ltd v Booth; Amaba Pty Ltd v Booth* 14/12/11 [2011] HCA 53 where the High Court considered the issue of **causation of mesothelioma** in a case where Mr Booth was **exposed to chrysotile asbestos in brake linings** manufactured by Amaca and Amaba @53. Uses of epidemiological evidence also considered. A majority of the High Court was satisfied that findings re the cumulative effect of exposure to asbestos were open despite epidemiological studies suggesting there was no increased risk in the case of brake mechanics. Causation findings confirmed.

See *Lowes v Amaca Pty Ltd* 26/10/11 [2011] WASC 287 from paragraph 617 where the principles and difficulties re-establishing causation in mesothelioma cases discussed. Causation and breach of duty established here where P as a child in the early 1970s played in lose asbestos cement dust at a site where D dumped its waste.

See *Reilly v Malabar Electric Pty Limited & Ors* 10/11/11 [2012] NSWDDT 9 where Kearns J considered whether the diagnosis should have been asbestosis or interstitial pulmonary fibrosis. **Divisibility of asbestosis between tortfeasors** discussed.

See *Van Soest v BHP Billiton Limited* 17/6/13 [2013] SADC 81 where Parsons J found foreseeability and causation established where P, who worked as a **painter and docker in the Whyalla ship yards for 12 weeks in 1962, inhaled asbestos dust** and was diagnosed with mesothelioma in 2011. "The risks of asbestos were known, there were practicable means available to BHP to control the hazard presented by asbestos dust, their use would have minimized the risk to the plaintiff and therefore the resultant negligent exposure to asbestos dust caused or contributed to the plaintiff contracting mesothelioma" @722. The statutory presumptions contained in s 8 of the Dust Diseases Act 2005 applied.

See *BHP Billiton v Hamilton & Anor* 15/8/13 [2013] SASCFC 75 where claimant widow's husband died of mesothelioma after **exposure to asbestos working at the BHP shipyards in Whyalla between 1964 and 1965**. From 1954-1964 he worked at shipyards in Scotland where

he was also exposed to asbestos. In construing s8(1) of the *Dust Diseases Act 2005 (SA)* the F/C stated :"Three matters can be observed about the structure and context of the subsection. The subsection uses the definite article and the same phrase **'*the exposure*'** in both the formulation of the second pre-condition for the creation of the presumption and in the subject matter of the operative presumption itself. To establish the second pre-condition for the presumption, it is **necessary to establish that the plaintiff's exposure might have caused or contributed to the dust disease suffered by the plaintiff, not just any dust disease**. The subsection operates against the background of the common law of causation which requires that ordinarily the **plaintiff must prove on the balance of probabilities that the defendant's conduct was a cause of or materially contributed to the injury** … The effect of the statutory presumption is to translate a mere possibility (that the exposure might have caused or contributed to the plaintiff's dust disease) into an actuality or finding (that the exposure did cause or contribute to the plaintiff's dust disease)." @63-64 per Blue J. "**If on the evidence it is only established that the total exposure (as opposed to the negligent exposure) to asbestos dust might have caused or contributed to the disease, the presumption created by the subsection will not assist** in establishing the vital causative link between negligence and the plaintiff's contraction of the disease. However, if on the evidence it is established that the exposure which resulted from the negligence might have caused or contributed to the disease, the statutory presumption will establish (in the absence of proof to the contrary) the essential causative link" @66 per Blue J. **Mesothelioma is a cumulative dose indivisible disease**. BHP failed to rebut presumption in s8(1). Widow's claim upheld.

Comparative local and interstate awards

See *BHP Billiton v Hamilton & Anor* 15/8/13 [2013] SASCFC 75 where F/C considered "**whether regard can be had to comparable first instance awards in courts and tribunals of this State and comparable first instance and appellate awards in other jurisdictions** in assessing the adequacy of awards for pain, suffering and loss of amenities of life" @96 per Blue J. No reason found why regard should not be had to such awards.

See *Amaca Pty Ltd v Tullipan* 6/8/14 [2014] NSWCA 269 where **limited relevance of comparative awards** discussed from paragraph 39.

Diagnosis

See *Reilly v Malabar Electric Pty Limited & Ors* 10/11/11 [2012] NSWDDT 9 where Kearns J considered whether the diagnosis should have been **asbestosis or interstitial pulmonary fibrosis**.

In *Geyer v Resi Corporation* 30/8/13 [2013] SADC 122 Jennings J found it more probable than not that P's tumour was within his pleural cavity and stated that "[h]aving made that finding, in combination with my finding that the plaintiff has had extensive exposure to asbestos over a long period, being a substance readily associated with the contraction of mesothelioma; and taking into account expert evidence suggesting, with varying degrees of certainty, a belief that this is the medical condition from which the plaintiff suffers, leads me to conclude that it is **more probable than not that he suffers from mesothelioma**" @341.

Duty and breach

See *Lowes v Amaca Pty Ltd* 26/10/11 [2011] WASC 287 from paragraph 316 where the leading authorities concerning the conceptualization of duty and breach in cases involving exposure to asbestos are referred to.

Exemplary damages

See *Geyer* below at sub-heading General assessments.

General assessments

See *McGilvray v Amaca P/L (formerly James Hardie & Co P/L)* 14/12/01 [2001] WASC 345 Pullin J where 54 y.o. male had contracted mesothelioma at work and was expected to have a painful end to his life after a short and painful illness of about 9 months. $160,000 awarded for NEL and $15,000 for loss of life expectancy. See also *Easther v Amaca P/L* 30/11/01 [2001] WASC 328 Scott J where similar case and award.

Ewins v BHP Billiton Ltd & Wallaby Grip Ltd 17/3/05 [2005] SASC 95 Doyle CJ P(m), who **retired** in 1995, **exposed to asbestos** working for BHP between 1949 and 1963. P when **71** (72 at judgment), diagnosed in Nov 2004 with **malignant epithelial mesothelioma of the right pleural space**. **Short life expectancy** at time of diagnosis. Fit and active until early 2003 when he experienced his first symptoms of **shortness of breath** and **pain in the chest**. Absent mesothelioma P probably would have lived quite healthily until about 2013. P moved to Adelaide from Tasmania where he was happy in Sept 2003 because the drier air in Adelaide more conducive. Suffered **significant pain and inconvenience due to investigative procedures (medical)**. Chest pain fairly constant by late 2004 causing significant restrictions to his activities. Suffered **considerable distress** after tumor diagnosis Nov 2004. Underwent 2 cycles of chemotherapy. Two more planned. First cycle particularly unpleasant for him. Life expectancy from Dec 2004 about 6 months. A drug named **Alimta**, which had showed some positive results for prolonging life by a few months and improving quality of life allowed for in award, (should P be recommended to use it) despite there being limited evidence re its effectiveness. P **will experience severe pain in closing stages** and there will be unpleasant medical treatment and expenses associated with this. **Family to care for him at home probably till** end.

> NEL $100,000 (p $35,000, f $65,000); loss of life expectancy $10,000; interest $1,400; past meds $2,887.85; future meds $39,000; grat serv $44,000; **Total $197,287.85**

Reynolds v Comcare 15/12/06 [2006] SADC 136 Soulio J - P(m) **tow truck operator**, **66** years at judgment, was exposed to asbestos working for the SA Railways Commissioner at Islington Railway Workshops between 1956 and 1961. P had **reasonably good health until September-November 2005** when **shortness of breath and severe chest pain developed**. Mesothelioma diagnosed January 2006. He **deteriorated rapidly despite radiotherapy and chemotherapy** and since June 2006 "has had reduced mobility … [and has] required oxygen equipment to assist him breathing. It was common ground **at trial that the [P] had a life expectancy of 10 weeks**" @ paras 21-23. P suffers **significant pain**, is confined to his bed or a recliner chair, has lost his appetite and is fed only liquid food prepared by his wife. P **to be cared for at home until his death**. He **probably would have worked until he was 70** as a tow truck operator as the principal of his own company, sub-contracted to Dial-a-Tow. His **life expectancy shortened by approx 17 years and his working life by 4**. See *Sullivan v Gordon damages*.

> NEL $100,000; PEL $25,000; FLOEC $78,402.90; loss of expect. of life $15,000; past specials $6,970.93; fut. med & equip exp $6,365; care & serv. $85,000; *Sullivan v Gordon* $15,000; interest $4,300; **Total $326,048.83**

'***UK Court of Appeal Holds that Pleural Plaques are not Compensable*'** Freeman R & Nicholson E (2006) 17 (7&8) Australian Product Liability Reporter 112

In *Christou v King Edward Memorial & Princess Margaret Hospitals Board of Management* 4/4/07 [2007] WADC 44 Eaton DCJ, whilst **comparing awards of general damages at the high end of the spectrum**, touched upon the following cases involving mesothelioma stating at para 204: "In *Hannell v Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd)* [2006] WASC 310 Le Miere J observed that there had been a number of awards delivered in mesothelioma cases in recent years for general damages in excess $180,000. He mentioned several, the highest being an award in the matter of *Gaunt v Amaca Pty Ltd*, unreported; DCt of NSW; Library No 151; 28 August 2003 in the sum of $220,000. In the matter before Le Miere J the plaintiff was aged 63 years and had been informed in November 2005 that he had a life expectancy to 6-12 months. He had undergone two surgical procedures both of which were very painful. He had, since the removal of a lung, undergone three cycles of chemotherapy which made him feel sick and caused some constipation, diarrhoea and an upset stomach. He had difficulty breathing and experienced pain in the chest. He had quite severe and physical limitations in terms of his ability to walk. There was another expert opinion as to life expectancy of around three or four years. Le Miere J gave an award of general damages in the sum of $180,000."

The *Hannell* decision mentioned above was successfully appealed in *Amaca Pty Ltd (Formerly James Hardie & Co Pty Ltd) -v- Hannell* 2/8/07 [2007] WASCA 158, the Full Court overturning Le Miere J's findings on liability.

P "suffers from moderate to severe pain caused by **pleural plaques and mild breathlessness caused by extensive diffuse pleural thickening**. He probably does have some of the **first signs of developing asbestosis**. He is not at the present time greatly disabled, although his lung function continues to deteriorate and … his symptoms and disabilities will increase … Because … [P] will relatively soon experience increasing breathlessness and disability caused by the inevitable progression of his disease, this is not a case for modest damages. Pervasive breathlessness is debilitating and often very disturbing … [P] will continue to suffer from the plaque pain, which at times requires strong analgesia. These afflictions will darken each day of the remaining 14 years of his predicted existence. An appropriate amount of general damages is $100,000 … [P] may develop severe asbestosis which will greatly aggravate his sufferings and then kill him … I am **not persuaded that rapid development of asbestosis is probable**. I propose to apply a *Malec v JC Hutton* calculus of 50 per cent. If the contingency were to eventuate, an appropriate amount of general damages would be $200,000. This is $100,000 more than appropriate if it does not. Half of $100,000, $50,000, should be added to $100,000 and **general damages assessed in the sum of $150,000.**" @ para. 4-8. Other heads of damage included interest on general damages $1800, loss of expectation of life $3500, past out-of-pocket expenses $17,405.05, future medical expenses $57,885, future care and services $81,153 coming to a total of $311,743.05. *Downes v Amaca Pty Ltd* 1/10/08 [2008] NSWDDT 25 Curtis J. **Appeal allowed** in part in [2010] NSWCA 76 "and the proceedings **remitted to the Tribunal to determine whether the amount assessed for past and future expenses or some other amount should be deducted from the damages assessed** (1) per Basten JA ([54]-[55]) because the Tribunal had not considered whether, if the plaintiff did not reapply to the Board, his failure to do so would be an unreasonable failure to mitigate his loss, and in assessing the amount to be deducted it had not properly considered the contingencies involved; (2) per Campbell JA because ([116]-[117]) the expenses could only be deducted if the plaintiff was likely to apply to the Board and would obtain them or if his failure to do so would be an unreasonable failure to mitigate his damages; (3) per Handley AJA because the Judge had not fully exposed his findings of fact and his reasons for deducting the expenses ([151]-[154])" per headnote.

See *McNamara v Amaca Pty Ltd* 5/12/08 [2008] NSWDDT 36 where Curtis J awarded $250,000 in general damages and $17,500 re loss of expectation of life (agreed), among other heads, in the case of a **71y.o. woman with mesothelioma who was suffering severe shortness of breath due to pleural effusion, who had to undertake chemotherapy and who had witnessed the terrible affects of such therapy on her brother** consequently leading to her having 'significant and extreme emotional anxiety' about it.

See *Bakker v WorkCover Qld & Ors* 5/12/08 [2008] NSWDTT 37 where Curtis J made an assessment re a 73y.o. man suffering from severe asbestos related pleural disease where the **assessment was complicated by the fact that he had two subsequent strokes which severely disabled him**. The asbestos related disease accounted for about one third of his illness. He was, among other heads, awarded general damages of $115,000.

See *Brooks v Trend Roofing Pty Ltd & Anor* 8/5/09 [2009] NSWDDT 11 where Kearns J assessed damages in the case of a **66y.o.** who had been exposed to asbestos and who had mixed obstructive (in the form of **emphysema and asthma**) and restrictive respiratory deficits (in the form of **diffuse pleural thickening and rounded atelectasis**). The latter are secondary to his exposure to asbestos. P **had been a heavy smoker**, but stopped smoking in 2000. P suffers significant breathlessness and can do only limited physical activities. He can care for himself. "He does have pain ... His life expectancy would be about another 17 years approximately. I allow for the possibility that the plaintiff's condition will deteriorate in time. I think a reasonable allowance for general damages is **$80,000**"@45. $5,000 awarded re *Griffiths v Kerkemeyer* damages.

In *Mooney v Amaca Pty Ltd* 24/9/09 [2009] NSWDDT 23 P, a senior executive with Nestle, contracted **malignant mesothieloma of the pleura** through inhaling asbestos dust and fibres provided by Hardies to his work place between 1964 & 1967. P is **59 y.o.** and had led a very fit and active lifestyle. P has suffered and will suffer miserable pain until his death. **Such pain will be over a longer period than most people who contract this disease**. His **life has been**

cut short by 26 years. Curtis J awarded **general damages of $290,000 and $26,000 for loss of expectation of life**. Taxation aspects, including **tax rates, considered re calculating his considerable superannuation and losses associated with such**.

See *Parkinson v Lendlease Securities and Investments P/L* 4/6/10 [2010] ACTSC 49
Higgins CJ where P, who was 72, and a **life-long smoker, contracted mesothelioma as a result of exposure to asbestos fibres** between 1969 and 1976. P's **life expectancy reduced by about eight years**. P's suffering to be great. He faces a horrible death. The following heads of damage were assessed. **General damages $300,000**; Interest thereon $26,531; Loss of expectation of life $8,000; Past voluntary services $20,915; Interest $6,464; Future voluntary care $148,750; Dietary supplements $478; Assistance to disabled son $10,000; **Total $521,138**

In *Abel v Amaca P/L … (formerly James Hardie & Coy P/L)* 23/7/10 [2010] SADC 98 the P was 72 in 2005 when he first noticed symptoms from **right pleural effusion**. He'd left ATCO in 1972. In the 60's and 70's he had come into contact with asbestos in this employment. Barrett J found D liable and assessed damages. P also had **pleural plaques**. P's **breathlessness and adjustment disorder with depressed mood** found to be related to asbestos exposure, pleurodesis, and misdiagnosis of mesothelioma. P's **psychiatric condition is mild and is likely to improve**. P has a 20-25% risk of a left-sided pleural effusion occurring. He no longer enjoys a very active and happy retirement or sexual relations with his wife. P's life expectancy not affected. General damages, among other heads, of **$80,000** awarded.

In *Obst v Adelaide Brighton Cement P/L* 23/8/10 [2010] SADC 112 the plaintiff was "a 76 year old man (born 23 April 1934) … seeking damages for dust diseases he contracted when employed for some 35 years by the defendant as a fitter and rigger. He retired aged 61 in about 1995. He was asymptomatic until 2002 when he experienced breathlessness" @1. The "**plaintiff had exposure to asbestos dust at least twice a year for 38 years**. Further, he had exposure on one other occasion for a period amounting to a few days when he helped dismantle a kiln which was lagged with asbestos" @13. P has interstitial lung disease, pleural plaques (which are asymptomatic), a back injury affecting his mobility, and suffers from asbestosis. P also has obstructive airways disease caused by asthma and emphysema (caused by his smoking). P's weight a factor in his breathlessness. **50% of P's respiratory disability due to asbestosis**. P has a **30-40% loss of respiratory function**. P now suffers **significant limitation re house work and recreational activities**. P's life expectancy not affected. Apart from non-asbestosis contributors Judge Barrett would have awarded P $90,000 in general damages. **$60,000 awarded**.

Doughan v Amaca P/L 3/9/10 [2010] NSWDDT 13 involved a retired builder who was **80 y.o**. He contracted **asbestosis** as a result of exposure to asbestos cement products. He first experienced breathlessness in 2007. P will only be **moderately dependent** on others and **will not experience significant pain** associated with his illness. He **will probably live another six years**, but asbestosis will cause him a premature death. Curtis J awarded **general damages of $150,000 and $3,500 for loss of expectation of life,** among other heads.

Hicks v Amaca P/L 30/11/10 [2010] NSWDDT 16 involved a **P born in 1944 who has relatively mild asbestosis which will progress slowly**. From 2001 P has experienced coughing and breathlessness. P will need personal care for the last five years of his life. P's **life expectancy will be reduced by about four years**. "[I]n 2005 and 2006, the plaintiff was undertaking activities such as walking, gardening and being active around the house. From 2007, the only physical activity noted was walking. It is worth noting that in 2009 the plaintiff was noted to be able to walk at least one kilometre on the flat at his own pace. It was also noted that he had to stop for breath after walking 100 yards or for a few minutes on the flat" @38. P's inability to do household chores commenced in 2007, but he could still do some. P will be confined to a bed or a chair for the last six months of his life. Kearns J awarded **$150,000 for general damages and $4,000 for loss of life expectancy** among other heads.

McGrath v Allianz Australia Insurance Ltd 15/3/11 [2011] NSWDDT 1 involved a P born in 1944. He received $91,000 in provisional damages for ARPD (which caused him shortness of breath from 2000) but sought further assessment for mesothelioma. P was diagnosed with malignant mesothelioma in September 2010 when he started experiencing symptoms. P has

begun to experience the uncomfortable and debilitating side effects of chemotherapy. O'Meally P awarded P an additional **$215,000 in general damages for mesothelioma**, among other heads. **Appeal and cross appeal dismissed** in *Allianz … v McGrath* 20/6/11 [2011] NSWCA 153.

In *Amaca Pty Ltd (under NSW administered winding up) v King* 22/12/11 [2011] VSCA 447 the COA considered "**whether it could reasonably have been foreseen in 1972 that an occasional visitor to the appellant's plant would be so exposed to the risk of mesothelioma or other lung disease as a consequence of asbestos dust as to require that the appellant take reasonable care to guard against the risk**" @72. Jury's affirmative finding on this question upheld. R was 62 at the time of his short exposure in 1972 and was first diagnosed with mesothelioma in November 2010. R has not worked since and has greatly reduced his physical activity. R's **prognosis was that he would only survive until about May 2012**. See paragraph 176 for a useful summary of various mesothelioma general damages decisions. **General damages award of $730,000** confirmed.

See *Lowes v Amaca Pty Ltd* 26/10/11 [2011] WASC 287 where causation and breach of duty established where **P as a four to five year old in the early 1970s played in lose asbestos cement dust at a site where D dumped its waste**. Corboy J stated that "The plaintiff is **unusually young to have contracted mesothelioma having regard to the long latency period for the disease**. That, and the fact that the plaintiff's condition was only diagnosed after a long period of illness during which he underwent various investigative procedures, are obviously significant matters in assessing damages" @814. P first fell ill in 2006 and was diagnosed with mesothelioma in 2009. The possible effects of a peritonectomy performed on P factored in. P suffered anxiety, tiredness and nausea from 2006. The medical aspects associated with **peritoneal mesothelioma**, its causes and consequences discussed in depth. D's "breach of duty in deciding to dispose of asbestos waste at Castledare caused or materially contributed to the development of his mesothelioma" @780. P's "intense, specific exposures while visiting Castledare were, on the balance of probabilities, the cause of the plaintiff's mesothelioma rather than low levels of exposure to ambient asbestos in the first ten or so years of his life" @789. He lives with his parents and receives the disability pension. P not expected to live more than another two years. P awarded **$250,000 general damages** and $15,000 for loss of expectation of life among other heads.

See *Reilly v Malabar Electric Pty Limited & Ors* 10/11/11 [2012] NSWDDT 9 where Kearns J awarded **$200,000 in general damages** and $20,000 for loss of expectation of life, among other heads, to the widow of the deceased who died from **asbestosis**. From 2002 the deceased suffered shortness of breath, sleep disturbance, coughing, walking restrictions and general restrictions to his whole mode of living.

In *BHP Billiton Ltd v Parker* 18/6/12 [2012] SASCFC 73 P was exposed to dust particles containing asbestos at the D's ship building yards in 1971/72 and developed an asbestos-related disease. The risk was a known one in 1971. The trial judge's decision re liability and damages confirmed by majority. "BHP should have carried out sampling, or should have arranged for it to be carried out" @30. No masks or respirators were provided. D found liable. The "presumption of causative effect created by s 8(2) of the *Dust Diseases Act 2005* (SA) … arose and … BHP had not established '... proof to the contrary'" @7. BHP's submission that to establish breach of duty P had to establish that the level of dust and fibres in the atmosphere at work in fact exceeded the **NHMRC Standard** rejected. P was 85 at judgment. P "suffered **symptoms of breathlessness attributable to asbestosis for about 10 years**. … [H]e had a life expectancy of five to six years and … his asbestos-caused breathlessness is likely to deteriorate over that time" @165. On the basis that asbestos exposure had caused one third of P's overall disability, the assessment of damages notionally included, among other heads, general damages of $36,660, loss of expectation of life $1,330, past grat. services $10,000, future care $43,330 plus interest, and exemplary damages of $20,000. **Exemplary damages and section 9(2) of Dust Diseases Act considered at length**. There was a 50% reduction of general damages due to P's UK exposure to asbestos so that total award was $52,125.

In *Van Soest v BHP Billiton Ltd (No. 2)* 28/6/13 [2013] SADC 95 Parsons J assessed damages in the case of **P who was 73** and suffered from **mesothelioma** as a result of inhaling asbestos

dust and fibre while working in the Whyalla shipyards for 11 weeks in 1962. P is divorced and lives alone, but his **ex-wife has taken responsibility for his care**. **In February 2011 P started to experience shortness of breath and lightheadednes**s, followed in late August 2011 by chest pain, fatigue, decreased appetite and weight loss. P's **condition is progressively worsening and it has required chemotherapy and other uncomfortable and painful treatments**. "He has lost his independence. He is becoming increasingly disabled and will eventually be totally dependent on Mrs van Soest for assistance with even the most basic aspects of daily living. He cannot socialise with his friends and he is anxious and distressed about the future and his impending death. He is anxious that Mrs van Soest may not be able to care for him until his death. During the remaining period of his life, which based on Prof Musk's prognosis may extend to about December 2013, he will become increasingly debilitated until in the final stages of the disease he will be bedridden, will suffer double incontinence, will have difficulty breathing and will be totally dependent on the care of others. He will require additional narcotic analgesia to control severe and unremitting pain. He is likely to suffer a diminution of cognitive function as time progresses and he will require oxygen to assist with breathing" @90. **P's life expectancy is 12-18 months** compared to 14.03 years on current life tables for a man of his age.

NEL $120,000; int. on PNEL $2,400; loss of expectation of life $12,000; past medicals $56,044.30; future medicals $62,000; aids,equipment & home modification $8,390; grat. serv. incl. int (p) $22,317; grat. serv (f) $55,000; exemplary damages $20,000 **Total: $358,151.30**

See *Geyer v Resi Corporation* 30/8/13 [2013] SADC 122 where Jennings J assessed damages in the case of an **85 y.o. ex-boilermaker who had contracted mesothelioma**. "The plaintiff here enjoyed **reasonably good health until 2008**. Since then he has experienced increasing tiredness and pain in his chest. By April 2010 his condition had deteriorated to the point where he required the extraction of fluid from his pleural cavity, a procedure that he found difficult. More recently he has experienced very strong pain in his chest, which is likely to increase as the tumour invades adjacent structures. Over time the disease process will result in him becoming increasingly debilitated and his quality of life will become increasingly impoverished. … [T]he **invariable course of the disease will be an increase in the size of the tumour, increasing shortness of breath, weight loss and depression, increasing pain and the commensurate need for increasing pain relief and a progressive loss of mobility and ultimately death**. [P] is suffering from a **number of other medical conditions** that will independently compromise his quality of life and which have the potential to lead to his death before he succumbs to mesothelioma" @347-349. D "admitted that by the early 1970s it was aware of the risks of asbestos. Well before 1973 ETSA had started to remove asbestos from its power station and was having suppliers tender for work with thermal insulation that was free of asbestos … Whilst the defendant is to be given some credit for taking measures to attempt to ameliorate the potential dangers to the plaintiff it plainly did not go far enough. They were certainly not enough to militate against an award of exemplary damages" @358-360.

NEL $175,000; loss of expectation of life $5,000; past medicals $10,474; future medicals $55,000; Griffiths v Kerkemeyer $50,000; exemplary damages $20,000; Interest $2,000 **Total: $327,474**

See *BHP Billiton v Hamilton & Anor* 15/8/13 [2013] SASCFC 75 where widow cross appealed the quantum awarded for NEL in the case of her deceased husband who died of mesothelioma after exposure to asbestos working at the BHP shipyards in Whyalla between 1964 and 1965. From 1954-1964 he worked at shipyards in Scotland where he was also exposed to asbestos. F/C considered various comparable local and interstate awards for NEL. "[T]he deceased was born in 1940. He was **diagnosed with mild asbestosis in 2005. In October 2006 he commenced to suffer from breathlessness**. The judge found that Christmas 2006 was a bad time. His general activities and regimes came to an end. The diagnosis of mesothelioma was made in February 2007. This was distressing. He was in **great pain for the last months of his life**. He endured these afflictions stoically. He **died in August 2007**"@329 per Stanley J. Award for **NEL increased from $115,000 to $190,000**. SA awards brought in line with other jurisdictions.

See *Dean v Tower Insurance Limited (for Rogers Meat Co P/L)* 30/7/13 [2013] NSWDDT 9 where P, who "**in July 2012 [when he was 60] was diagnosed with mesothelioma**. Fluid

was drained from his lungs and the diagnosis … was **epithelial mesothelioma**. He has since … had a large number of treatments with chemotherapy. That chemotherapy has abated the spread of the mesothelioma … [H]e **might well last until Christmas [2013]** … [I]t is possible he could last longer … He has a **loss of the sensation of taste, frequently has diarrhoea, pains in his joints, pains in his chest**. He has to sleep on a bed in the same room as his wife, but separate from her because **at night he becomes very hot and sweats a lot** … Since the date he was diagnosed, he has continued to try and provide help to his family but that help now is extremely limited. He can still drive his wife. He cannot do the heavy housework. He finds himself with a lack of energy and finds it difficult indeed to do anything very much at all" @14-16. P has **a wife who is 43 and four children ranging from 7-12** years old. He spends a great deal of his time caring for them, including driving them to places, since his wife does not currently drive. See in depth discussion of the **appropriate method of assessment for loss of his capacity to provide gratuitous domestic service to his dependants** pursuant to 15B of CLA. Finnane J's tentative assessment was "s 15B damages, $420,032, general damages $292,900, past and future gratuitous care $80,000, agreed loss of life $25,000" @37. See *Rodgers* below where Finnane J considered that he had erred by restricting general damages to @292,900.

In *Rodgers v Amaca Pty Limited (formerly James Hardie & Co Pty Ltd) t/as Amaca* 21/1/14 [2014] NSWDDT 1 the P, who was a part-time **contract manager and organizer in the construction industry**, began to suffer from the effects of mesothelioma in 2010 when he was about 70. "He has been on a number of chemotherapy treatments, each one of which caused him very significant health problems, such as nausea, eye problems, lethargy, fatigue and a metallic taste that he had in his mouth. He lost the caps on his teeth as a result of this disease. … He has a loss of balance, smell and appetite. He suffers from tinnitus. He frequently dry retches" @19. P has been told he is **likely to die in July 2014**. "He has been reduced then from a large strong healthy extremely physically and mentally active man to a man who finds it very difficult to function but nevertheless, he does attempt to continue to function" @20. "He is a stoic type of individual not given to complaining very much, but it is obvious … that he has suffered an enormous amount of pain and discomfort and that has required him to take, with the assistance of his wife who is a trained nurse, increasing amounts of medication to relieve the pain. The consequences of his taking medication to relieve pain and the consequences of his chemotherapy have been at times to give him extreme discomfort of diarrhoea at times, constipation at times, and general pain and discomfort and breathlessness" @25-26. P has lost his enjoyment of travelling overseas. Finnane J **awarded P $350,000 in general damages, above what was previously considered the maximum allowable amount**. P also **awarded $200,000, among other heads for loss of earning capacity**, given his established propensity to work intermittently on construction projects and desire to continue to do so until he was 80.

See *Dunning v BHP Billiton Limited* 31/7/14 [2014] NSWDDT 3 where Kearns J awarded the **largest sum by far for general damages awarded in Australia for mesothelioma, namely $500,000**. P was **only 50 when his disease manifested and is now 54**. He had been very fit and working as a coal miner. P may live another 7 years. "This is not any ordinary mesothelioma case. Features of it that have impressed me in the making of this assessment include: the plaintiff's young age in contracting the disease; the torrid surgical treatment the plaintiff underwent; the torrid time the plaintiff had with his chemotherapy and subsequent radiotherapy; the prolonged (for a mesothelioma victim) physical disability the plaintiff has had and will have. Most mesothelioma victims die within about 18 months of contracting the disease and, for a lot of that period, not all have intense, ongoing suffering; the impact this illness has had and will have on the plaintiff including the miserable situation in which he now finds himself" @823. P also suffers from major depression which has had a devastating effect on his personality and relationships with wife, children and others. P also awarded $30,000 for loss of expectation of life, among other heads.

Medical and scientific knowledge

See *Lowes v Amaca Pty Ltd* 26/10/11 [2011] WASC 287 from paragraph 370 where the state of medical and scientific knowledge about exposure to asbestos from the 1960s to the mid-1970s considered. The D's knowledge in respect to the harmful effects of exposure to asbestos from the 1960s considered from paragraph 423.

Medical & other expenses payable by Board
See *Downes v Amaca …* above

Nervous shock claim
In *Trustees of the Sydney Grammar School v Winch* 27/2/13 [2013] NSWCA 37 the COA decided that the Dust Diseases Tribunal did not have jurisdiction pursuant to s11(1) of the Dust Diseases Tribunal Act 1989 (NSW) to consider a nervous shock claim brought by the deceased's daughter. The R could not be said to be **'claiming through'** her Father. Nor could her proceedings be described as 'proceedings for damages in respect of that dust-related condition or death'.

Presumptions
See *BHP Billiton v Hamilton & Anor* 15/8/13 [2013] SASCFC 75 where F/C confirmed trial judge's construction of **s8(2) of Dust Diseases Act 2005 (SA)** "such that, when the presumption is engaged, the defendant is presumed to have actual (subjective) knowledge, not that a reasonable person in the defendant's position would foresee the risk of a dust disease resulting (constructive knowledge)" @12. According to s8(2) "[t]he knowledge which is presumed is that exposure to asbestos dust could result in a dust disease, which refers to a possibility rather than a probability or certainty … The literal meaning of the words 'known ... that exposure to asbestos dust could result in a dust disease' is that **the presumed knowledge is that some exposure to asbestos dust (with no requisite quantity) could result in a dust disease**" @14-16. "It follows that BHP was presumed to have known in 1964/65 that some (ie any) exposure of Mr Hamilton and his fellow workers to asbestos dust could result in, *inter alia,* mesothelioma" @27. BHP did not discharge onus of rebutting presumption. There were simple precautions and protections that BHP could have taken to minimize the inhalation of asbestos dust by Mr Hamilton and BHP was negligent in not taking them.

Time limitations
See *Van Gerven v Amaca Pty Ltd* 13/4/12 [2012] VSC 131 where Beach J considered extension of time issues in the case of a widow bringing an action on behalf of the estate of her husband who died from mesothelioma. The action was nine years out of time. The exposure to asbestos occurred in 1959-1960. The critical fact was the discovery in 2008 of witnesses who could give evidence that James Hardie supplied the asbestos that the deceased was exposed to. Extension granted.

Transfer of proceedings
In *Arentz v Amaca* 7/3/13 [2013] VSC 94 due to personal hardship for the P and the majority of witnesses residing in Melbourne, Hollingworth J held that it was not in the interests of justice for the matter to be transferred to NSW.

…

New South Wales
[See 'Most Extreme Case']

Please note that general damages assessments of the NSW Supreme and District Courts post August 2008 will be noted here in brief for reference purposes. So too will references to relevant legislation.

Annotations and links to relevant assessment legislation
The full and up-to-date text of NSW Acts and Regulations can be found at www.legislation.nsw.gov.au .

Civil Liability Act 2002
See Civil Liability Acts of other states/territories for cases on comparable provisions. These are indexed in this book under each state/territory heading e.g. 'Queensland'.

s3B – Civil liability excluded from Act
See *Corby v State of NSW* 5/6/09 [2009] NSWDC 117 where Murrell SC DCJ considered this section and the issue of entitlement to aggravated and exemplary damages in the context of a

P being allegedly assaulted by a police officer at a police station. Appeal allowed in part in *State of NSW v Corby* 3/3/10 [2010] NSWCA 27. Relevant legislative regime carefully analysed. Section 26C found to operate with respect to aggravated damages, but not exemplary damages.

In *Kassam v ACN 075092232 Pty Limited (in liquidation)* 17/8/09 [2009] NSWDC 262 Hungerford ADCJ stated, in agreement with *Zorom*, that "s 3B(1) of the *Civil Liability Act* suggested **no different approach should be taken to the civil liability for an intentional tort of an employee compared with that vicariously of the employer**: see also *Presidential Security Services of Australia Pty Ltd v Brilley* [2008] NSWCA 204 at [79]-[82] per Ipp JA, with whom Allsop P and Beazley JA agreed" @98.

s3B(1)(a) – Civil Liability excluded from Act

In *Lee v Fairbrother* 10/7/09 [2009] NSWDC 192 Johnstone DCJ considered that unprofessional conduct by a medical practitioner, namely having a sexual relationship with a client, fell into the category of **'other sexual misconduct'**.

See Maddern & Cockburn, 'Sexual Misconduct Exception to Civil Liability Legislation (2009) 47(10) LSJ 62

In *Hage-Ali v State of NSW* 14/10/09 [2009] NSWDC 266 Elkaim SC DCJ considered the meaning of **'intent to cause injury'** and stated that "**an intent to wrongfully arrest must carry with it an intention to effect the natural consequences of an arrest**. These consequences will include the damage which will inevitably flow from a wrongful arrest. I am therefore of the view that the CLA damages regime does not apply here because the circumstances of this case fall within the exclusion provided by Section 3B(a)" @230.

In *Sneddon v The Speaker of the Legislative Assembly* 2/6/11 [2011] NSWSC 508 Price J did not consider that P had established that an MP's conduct of **bullying, harassment, and victimization** constituted an intentional tort against her. See from paragraph 179. **Appeal allowed** in some respects in *Sneddon v State of NSW* 1/11/12 [2012] NSWCA 351, but decision that there was no intentional tort affirmed.

In *Dean v Phung* 30/6/11 [2011] NSWSC 653 Hislop J considered whether damages should be assessed at common law or under the Act. It was **not established on the balance of probabilities that the D dentist's conduct was dishonest or fraudulent as opposed to incompetent**. Section 3B(1)(a) therefore did not apply and damages were assessed pursuant to the Act. **Appeal allowed** in *Dean v Phung* 25/7/12 [2012] NSWCA 223. "So far as the operation of s 3B is concerned, it would have been sufficient for the appellant's purposes to establish that the dentist knew at the time of giving the relevant advice that the treatment was not reasonably necessary" @30. D found to be at least reckless as to whether the treatment proposed was either appropriate or necessary. P "did not consent to the proposed treatment, because it was not in fact treatment necessary for his condition. As a result, the treatment constituted a trespass to the person" @66. Damages reassessed at common law. Exemplary damages and interest on NEL allowed.

See *Hayer v Kam & Ors* 27/2/14 [2014] NSWSC 126 where Hoeben CJ considered that the law in relation to s3B(1)(a) was not certain enough for him to strike out intentional tort claim involving possible **medical negligence in the form of omissions or recklessness**.

> "58 In *Zoran Enterprises v Zabow* (2007) 71 NSWLR 354, referring to the head note, the Court of Appeal said in that case that s 3B(1a) of the *Civil Liability Act* 2002 does not differentiate in its operation between direct and vicarious liability in respect of an intentional tort. Under the general law an employer does not escape liability by demonstrating that it did not have the intention of its employee. For the purposes of s 3B (1a), the employee's act is that of the employer. So is the intention. To my way of thinking, that is a significant matter. 59 Moreover, having regard to what the High Court said in *Excel Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, in my opinion it follows (although the Court was there dealing with a slightly different set of circumstances) that in this day and age there is no reason why, in a case of vicarious liability, the Court cannot enter a

judgment against an employer for a larger amount than is entered against the employee." **Smith v Cheeky Monkeys Restaurant** 18/8/09 [2009] NSWDC 257 Rolfe DCJ

s3B(1)(f) – Civil Liability excluded from Act

In *McDonald v Shoalhaven City Council* 18/4/13 [2013] NSWCA 81 an appeal was allowed and the matter was remitted for further hearing in a case where a **volunteer was injured helping an employee of R out of a trench**. The case was found to be governed by the NSW Civil Liability Act despite the need for an anomalous construction of s3B(1)(f). A duty of care was found.

s5 – General factual situations necessitating consideration of various s5 provisions

Aircraft

See AV8 Air below at s5O.

See Campbell at s5L. Section 5F also considered.

See *Echin v Southern Tablelands Gliding Club* 28/5/13 [2013] NSWSC 516 where Davies J found that **gliding was a dangerous recreational activity.**

Balcony balustrade

See *Wearing-Smith v Swift* 9/10/14 [2014] NSWDC 159 where Levy SC DCJ found D liable when balcony balustrade at his house gave way causing P injury. D was aware of defects of balustrade.

Bald tyres

In *Harmer v Hare* 11/8/11 [2011] NSWCA 229 **D allowed P to drive his car** due to his intoxication. **P was not aware of the car's bald tyres** and lost control of the car on a wet road at a roundabout through no fault of his own. D was liable for P's injuries, but P was found 25% negligent due to the fact he was aware that D's car had been off the road for some time. P should have checked the car's condition. Various s5 provisions considered.

Bullying

See *Oyston v St Patrick's College* 13/4/11 [2011] NSWSC 269 where various provisions of the CLA were considered by Schmidt J in relation to liability and apportionment where a student was the victim of bullying. Appeal as to liability failed 27/5/13 [2013] NSWCA 135. Breach of duty established. Appeal allowed only on the issue of NEL in *Oyston v St Patrick's College (No 2)* 23/9/13 [2013] NSWCA 310.

In *Sneddon v The Speaker of the Legislative Assembly* 2/6/11 [2011] NSWSC 508 Price J found that P "**suffered Major Depression, Panic Disorder with Agoraphobia and Generalised Anxiety Disorder**. … [T]he third defendant's bullying and harassment [between 1999 and 2008 while she worked in his electoral office] was a necessary condition of the occurrence of her psychiatric injury: s 5D(1)(a) CLA. … [I]t is appropriate for the scope of the Member for Swansea's liability to extend to the psychiatric injury: s 5D(1)(b) CLA. … [T]he first defendant's [Speaker's] negligence (see [202] above) exacerbated the psychiatric injury and materially contributed to the harm that the plaintiff ultimately suffered" @259-260. "[T]he plaintiff's claim for the first defendant's negligence is confined to past and future economic loss, loss of superannuation, a component for *Fox v Wood* and interest on past loss of income. As against the second and third defendants, damages are to be assessed in accordance with the provisions of Part 2 CLA" @264. "Amongst the matters that bear upon the assessment of non-economic loss are; the plaintiff's hospitalisation for about a month in 2007 and that she **has not fully recovered after some five years of illness**. She is 54 years old. However, her **recovery has been substantial and full recovery is, on the balance of probabilities, not too far away**. …I assess the severity of her non-economic loss to be **16 per cent of a most extreme case** and award damages in the sum of $7,500.00 under this head" @270. Other heads of damages also awarded. **Appeal allowed** in some respects in *Sneddon v State of NSW* 1/11/12 [2012] NSWCA 351, but P's assessment at 16% of a most extreme case affirmed.

Bunk bed

See *Thomas* at s5B(1)(b).

Ceilings
See *Al Mousawy* at s5B(1)(b).

Collapse of structure
See *Gangi v Boral Resources (NSW) Pty Limited (No 2)* 17/5/13 [2013] NSWSC 569 where P suffered a psychological injury when **concrete batching plant collapsed**. "The collapse was catastrophic. It resulted in the bins which were carrying hundreds of tonnes of sand and aggregate high above Mr Gangi's truck collapsing onto the ground and the back of the truck" @41. Schmidt J found that "it was **more probable than not that, but for its [D's] failure to inspect and maintain the bin support structure, the collapse would not have occurred**" @166. Appeal dismissed and cross appeal re costs partly allowed 28/8/14 in [2014] NSWCA 287.

Common areas
See *Woolworths Ltd v Ryder* 16/7/14 [2014] NSWCA 223 were **A's checkout operator opened a soapy product at a check-out for a child. The child spilled the product in the common area adjacent to A's premises in a shopping centre and the R slipped on it**. Finding of duty of care overturned on appeal. It "is difficult to see why the operator of a supermarket should be subjected to a further duty to take reasonable care to prevent products it sells or simply opens for a customer being used by persons over whom it has no control, in a manner that creates hazards to persons in areas outside its direct control or sphere of responsibility" @56 *per Sackville AJA*.

Contractors
See *Wooby v Australian Postal Corporation* 19/6/13 [2013] NSWCA 183 where a contractor of the R who worked solely for R was injured lifting a heavy parcel on R's premises. R owed A a duty of care and breached it.

Cosmetic surgery
See *Machado* at Cosmetic surgery

Crane collapse
In *Smith v Brambles Australia Ltd* 26/8/11 [2011] NSWSC 963 a crane, which had been modified, collapsed "as the result of the shearing of two dowel rods which were part of a quick release mechanism. That occurred when Mr Smith first drove the crane early on the morning of the collapse, for a short distance, without first releasing a brake by activating a dolly switch in the cabin of the crane" @4. P was seriously injured. R owed him a duty of care and could easily have taken precautions to prevent such an incident. P was not aware of the modifications to the crane and the arising implications of such. P should have been warned. Due to P's lack of knowledge, no contributory negligence found on his part. See *Baden Cranes Pty Ltd v Smith; Brambles Australia Ltd v Smith* 27/5/13 [2013] NSWCA 136 where liability of, and apportionment between, manufacturers, owners and operators of crane considered in context of three consecutive and related acts of negligence.

Crime scene investigator
See *Doherty* at s5B(1)(b)

Criminal actions of third parties
See *Lesandu Blacktown Pty Ltd v Gonzalez* 8/2/13 [2013] NSWCA 8 where COA considered s5 in circumstances where **fraudsters were detected in a department store. Such made a dash for the door and knocked a customer (R) over**. No duty of care found. Appeal allowed from District Court decision against A.

Cyclists
In *James v Whiteman* 21/11/11 [2011] NSWDC 178 a **pedestrian walking on the Bathurst race track**, which was a public road which effectively had been given over as a public walkway at the time, was **struck from behind by a cyclist travelling at speed**. The cyclist was wholly negligent as he should have been taking more care in light of their being hundreds of people walking on the road in dim conditions.

Culverts

In *Williams v Twynam Agricultural Group Pty Ltd & Anor* 16/9/11 [2011] NSWSC 1098 Hoeben J found farm owner (1st D) and P's employer (2nd D), a contractor to the farm owner, liable for P's injuries caused by an **accident on an internal road on the farm in 2006**. **P hit a culvert and his vehicle overturned causing injury to his neck and right arm. P was given insufficient warning of the hazard**. Liability apportioned 75% to 1st D and 25% to 2nd D. P was 35 and working as an irrigator checking and maintaining water levels. P will suffer pain in his neck and right arm for the rest of his life. It is also likely that he will be dependent on social services and very limited in the types of employment he can do for the rest of his life. P assessed at **45% of a most extreme case** and awarded $225,000 in general damages among other heads.

Disrepair of bridge

See *Collins v Clarence Valley Council (No. 3)* 15/11/13 [2013] NSWSC 1682 where Beech-Jones J considered various provisions of the CLA in a case where the **wheel of a cyclist's bike was caught in the planks of a bridge which D had responsibility for**. P was involved in a charity ride at the time. Beech-Jones J made the following findings: "the relevant risk of harm … was the risk of injury to a cyclist if their wheels became stuck in the gaps between planks (and the holes in degraded planks). … [T]his risk was foreseeable and not insignificant. However … **this risk was an 'obvious risk' to a reasonable person in Dr Collins' position and thus the Council did not have a duty to warn Dr Collins of that risk** by, inter alia, the erection of a sign. This is so even though I conclude that was a reasonable precaution for the Council to undertake (CLA, s 5B(1)(c) and in fact it was unreasonable for it not to (s 43A). … [T]he Council is not liable for any failure to take any step to repair or inspect the Bluff Bridge because it **has not been shown that the Council had actual knowledge of the particular risk the materialisation of which resulted in harm to Dr Collins** (CLA, s 45). … [G]iven the Council's limited resources and other responsibilities including in respect of similar wooden bridges (CLA, s 42 and s 5C(a)), a reasonable person in the position of the Council would not have undertaken the precaution of repairing the bridge by the various means suggested by Dr Collins" @4-5. P was not involved in a 'dangerous recreational activity' and there was no contributory negligence on her part. Claim failed.

Diving injuries

In *Laoulach v El Khoury* 16/9/10 [2010] NSWSC 1009 P dived from the bow of a vessel and struck his head on the shallow sandy bottom of the bay. No breach of duty. Further, an **obvious risk found** . "Whilst his first dive from the bow at the second anchor point and the observations that he made of the other persons who had dived in, may have led him to believe that the risk of harm was low, that does not mean that on the objective facts that there was not an 'obvious risk' that would be readily apparent to a reasonable person in the plaintiff's position. It **does not matter that there was a low probability of the risk occurring**: s 5F(3) *Civil Liability Act*. Nor does it matter that the movement of the vessel and the existence of the shallow bank were inconspicuous or not physically observable: s 5F(4) *Civil Liability Act"* @ 176. "Objectively considered, the risk of the plaintiff suffering serious injury by diving from the vessel's bow into the uncertain depth of Botany Bay could not be regarded as trivial or very slight. Although the risk of harm was low, the potential harm was catastrophic: *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17 at [31]. … [T]he plaintiff was engaged in a 'dangerous recreational activity' within the meaning of s 5K CLA" @ 183. **Appeal dismissed** in *Laoulach v Ibrahim* 16/12/11 [2011] NSWCA 402. However COA held that the trial judge **erred by finding that P was engaged in a 'dangerous recreational activity'**.

In *Felhaber v Rockhampton City Council* 24/2/11 [2011] QSC 23 P became a quadriplegic when he hit his head whilst **swinging from a bough of a tree into the Fitzroy river**. His head hit the river bed. Various provisions of the CLA considered. D had control of the area, but was not found liable in the circumstances, despite it not erecting signs warning against diving activities. McMeekin J found that **P knew his activity was dangerous and that he did not need a warning**.

In *Streller v Albury City Council* 28/5/12 [2012] NSWSC 729 a young, but experienced diver, suffered C7 quadriplegia when he did a **back flip from a rope attached to a tree next to the**

Murray river. D had management and control of a sizable stretch of the river on the day in question when it was holding Australia Day celebrations. D had warning signs and a system of inspection in place whereby it removed ropes from trees on the Murray as soon as reasonably practicable. D aware of particular rope, but contractors could not remove it until after Australia Day. The **risk of harm was obvious** given the river's fluctuating depth, but D not required to take the precaution of putting a security guard at the tree. Latham J found P to be engaged in a **dangerous recreational activity**. D not liable. Appeal dismissed 23/10/13 in [2013] NSWCA 348.

See *Kelly* at Slips/Trips below.

Dog attack
See *Kuehne* at NSW CLA s44 and Dog attack

Electrocution
See *Giovenco* at s5B(1)(b)

Failure to service equipment
See *Carpenter* at s5D

Falling objects
See *Chaseling v TVH Australasia P/L* 15/4/11 [2011] NSWDC 24 where **load fell from forklift** reversing down ramp causing injury to P's right leg. Levy SC DCJ found D negligent and no contributory negligence on P's part. Appeal dismissed in *TVH Australasia Pty Ltd v Chaseling* 22/5/12 [2012] NSWCA 149 [60 MVR 535].

Falls
See also Slips
See *Freudenstein v Marhop P/L & Ors* 8/7/10 [2010] NSWSC 724 where Kirby J considered and found liability in the case of a hotel that was undergoing renovations when an **intoxicated patron strayed into the area under renovation onto a roof and fell.** Contributory negligence of 50%.

See *Laresu P/L v Clark* 4/8/10 [2010] NSWCA 180 where COA considered s5B(1)(a),(b)(c), & (d) in the case of a fall on unlit stairs.

In *Richardson v Mt Druitt Worker's Club* 10/2/11 [2011] NSWSC 31 Adams J dismissed P's claim as untenable when he **injured himself after falling from a locked gate which he was attempting to climb**. It was dark and it was raining. P could have walked a short distance to get the key. P's conduct was not reasonably forseeable. D was not required to warn persons that the gate was locked.

See *Burton v Brooks* 1/7/11 [2011] NSWCA 175 where occupier found negligent when lopping tree with P relative. **P pulled on branch, lost balance, and fell back into empty swimming pool**. The risk was not insignificant and was an obvious danger.

See *Upper Lachlan Shire Council v Rodgers* 23/8/12 [2012] NSWCA 259 where Allsop P stated that "**The risk of someone tripping or falling over the log in complete darkness was plainly foreseeable. This was a public carpark** into which people were invited to place their cars. If returning after dark, a person who had parked where Mr Rodgers had would be required to navigate a distance without any light at all in an area where there was a low hazard over which one could easily trip and fall. There was a reasonable probability that harm would occur. The risk was plainly not insignificant. People can be injured badly in falls on to hard surfaces. A reasonable person would have taken precautions, either of lighting or blocking access to where the pole would have been in darkness. The burden of taking the precaution of some lighting or a barrier was not great. No case was made that it was. Reliance on the CLA, s 42, was expressly abandoned. The obstruction had been created by the appellant and allowed to remain in darkness. There was no social utility in leaving a hazard such as the pole in darkness" @17.

Fires
See *Reed v Warburton* 20/4/11 [2011] NSWCA 98 where COA found that R did not take reasonable precautions when **soldering near wall made up of compressed and loose bales of hay**. Fire broke out.The A was also negligent. Section 5B(1) &(2) and s5R considered.

See *Warragamba Winery Pty Ltd v State of NSW (No. 9)* 26/6/12 [2012] NSWSC 701 where Walmsley AJ considered s43A in a case where a **lightning strike caused a fire which caused damage to factories and houses near national park**. Liability of public authority not established.

See *Electro Optic Systems Pty Ltd v The State of New South Wales; West & West v The State of New South Wales* 17/12/12 [2012] ACTSC 184 where Higgins CJ considered common law and statutory duties in determining **whether public authorities liable for ACT/NSW fires**. Whilst deficiencies in fire-fighting strategy found, no liability established. Issue of statutory immunity considered.

See *Tocker v Moran* 14/12/12 [2013] NSWSC 248 where **P was at a party and dancing around a bonfire. He tripped and fell into the fire and suffered burns**. Various provisions of s5 considered, including s50 and contributory negligence through intoxication. Mahony SC DCJ "satisfied that, at the time of his injury, the **plaintiff was intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired**. Therefore, pursuant to s 50 (2) CLA there should be no award of damages in respect of any liability that would otherwise be sheeted home to the defendant" @52.

See *M & A Wood v C & R Christopherson* 28/11/13 [2013] NSWDC 233 where a **fire lit on a rural property escaped and caused damage to a neighbour's property**. Judge Haesler stated it was "beyond doubt that whoever lit the fire, or was responsible for its lighting, was under a duty to use reasonable care to prevent that fire causing damage to his neighbours and the countryside. Similarly, it is beyond doubt that if the fire was lit at the behest of the occupier he too was under a duty to use reasonable care to prevent it causing damage to his neighbours. The existence of those duties is based upon knowledge of the hazard and a capacity to foresee the consequences of preventing it or abating it" @16. The 2nd D's (occupier's father) measures taken in an emergency to put out the fire not considered to be negligent. Second D, however, found negligent for not taking proper precautions with the fire.

Glass (use of non-safety glass)
See *Hunt v RTA of NSW & Anor* 25/5/10 [2010] NSWDC 88 where Levy SC DCJ considered occupier's liability in the case of landlord and agent where non-safety glass had been used in repairs and it lacerated the P when he fell and came into contact with the glass. Both landlord and managing agent liable.

See *Bader* at sub-heading below 'Residential premises …'.

Gravel – Loose
In *Pettigrew v Wentworth Shire Council* 12/6/12 [2012] NSWSC 624 P lost control of his motor vehicle on a substantial amount of **loose gravel** when travelling around a left hand corner at about 53 kph, 13 kph above the advisory speed sign. P was familiar with the corner and knew it was a difficult one. In normal circumstances he was comfortable travelling at the speed he was. It was nearing dusk. Due to the significant amount of gravel and hence P's inadequate look out, P's contributory negligence found to be 15%. **Council primarily liable as it could have cleaned up the gravel and/or erected a warning sign**. Various aspects of s5 considered.

Gym injuries
See *Wilson* at s5B(1)(b).

Hazardous substances
In *Thompson v NSW Land & Housing Corporation* 31/8/11 [2011] NSWCA 941 Hislop J found that there "was **no evidence that the defendant knew or ought to have known of any preceding vulnerability to alleged psychiatric illness on the part of the plaintiff**. In the absence of such knowledge, the psychiatric illness was not foreseeable" @67. P alleged he

suffered injury as a result of termiticide treatment to the block of units he lived in. D not found liable.

Holes & Pits
See *Hamilton* at s5B(1)(b)

See *Addison* at s5F

See *Wurth* at References to recent damages assessments – Foot

See *McDonald* at Knee

Horses (incidents with)
See *Watson v Meyer* 16/4/12 [2012] NSWDC 36 where the P was bitten by D's horse while they were riding together. D was more experienced with horses than P, but P had a fair degree of experience. D did not know that the horse was on heat, but P did. Sections 5F, 5G, 5L, 5R & 5S considered. Gibson DCJ found that D was not negligent. P voluntarily assumed risk. Matter remitted for retrial 2/8/13 on all issues in *Watson v Meyer* [2013] NSWCA 243.

Hotel's liability for assault on ejected patron
See *Hadaway v Robinson & Ors* 3/9/10 [2010] NSWDC 188. In applying various provisions of s5B Levy SC DCJ stated that "**at the time the [intoxicated] plaintiff was ejected from the hotel, a reasonable person in the position of the responsible hotel staff would have known, or ought to be taken to have known, that there was a foreseeable risk of the plaintiff suffering harm from an assault by the first defendant** after he had been required to leave the hotel premises, if basic and prudent measures … were not taken. [T]his was especially so when it was apparent that the first defendant's departure and route from the premises was in juxtaposition with that of the plaintiff : s 5B(1)(a) of the *CL Act*. … [T]he risk of injury to the plaintiff from an assault by the first defendant was not insignificant where previous threats of the kind already identified had been made by the first defendant and where it was necessary for Mr Miller, on behalf of the hotel, to pull the parties apart and to ensure they stayed apart : s 5B(1)(b) of the *CL Act*. … [A] reasonable person in the position of the hotel staff would have taken … precautions ... s 5B(1)(c) of the *CL Act*. … [I]f they were not taken, there was a high probability that the plaintiff would be targeted by the first defendant for an aggressive encounter, including for the fulfilment of threats the first defendant had earlier expressed towards him when offering him physical violence: s 5B(2)(a) of the *CL Act*. In such circumstances, where precautions were not taken, I consider that the likely result would have been serious physical injury and lasting impairment, of the kind experienced by the plaintiff : s 5B(2)(b) of the *CL Act*" @466-469. Sections 5D, 49 & 50 also considered. **Appeal allowed** in *Cregan Hotel Management Pty Ltd & Anor v Hadaway* 8/11/11 [2011] NSWCA 238. Levy SC DCJ **erred in finding that R had been ejected** from the hotel. **No breach of duty in failing to eject**.

Hotel's liability for assault on premises
In *Lewis v Clifton & Ors* 29/7/11 [2011] NSWDC 79 Elkaim SC DCJ found hotel liable for not ejecting patron who had previously caused fight and who later injured P the same night in another fight. There was an obvious danger and a risk of serious injury. **Appeal dismissed** at *Clifton & Ors v Lewis* 30/7/12 [2012] NSWCA 229 although NEL award considered to be at high end of range.

Ice skating
In *Moor v Liverpool Catholic Club Ltd* 25/6/13 [2013] NSWDC 93 Levy SC DCJ found that the D breached its duty of care to the P who fell and injured his ankle while descending stairs wearing ice skates whilst on his way to the ice arena. The stairs were uneven in width. They were wet. D could have told skaters to put their skates on after descending the stairs. P was not contributorily negligent.

Killing committed by psychiatric patient
See *Simon & Anor v Hunter & New England Local Health District. McKenna v Hunter & New England Local Health District* 2/3/12 [2012] NSWDC 19 where Elkaim SC DCJ held that **the**

risk of a psychiatric patient killing the person who was to take him on a long drive to Victoria after discharge "was not foreseeable and was not so significant that a reasonable person would have taken precautions against it. … [I]t was not probable that harm would occur if care was not taken" @85. This was despite the patient's doctor having erred in releasing him. Doctor's conduct was not found to be irrational though. Section 5O considered. It was not established pursuant to s5D that any act or omission of doctor or hospital caused the death. **Appeal allowed** by majority 3/12/13 in [2013] NSWCA 476. R "owed a duty of care to take reasonable care to avoid foreseeable harm to the deceased, Mr Rose. … For my part, I would describe the content of that duty of care more narrowly than Macfarlan JA. … [I]n the particular circumstances of this case, the respondent owed Mr Rose a duty of care not to release Mr Pettigrew, who was a mentally ill person, into Mr Rose's care, or at least his sole care, for the purposes of conveying him to Victoria where it was intended or, at least, expected that he would undergo further psychiatric treatment. The relevant duty of care in this case is, of course, that owed to the appellants, the mother and sister of Mr Rose, who came within the provisions of … s 30(2)(b). … [I]n the normal course, the duty of care owed to a person whose entitlement to recover damages derives from
s 30(2)(b), is of the same scope and content as that owed to the victim" @2-3 per Beazley P. Macfarlan JA concluded "The Hospital owed Mr Rose a common law duty to take reasonable care to prevent Mr Pettigrove causing physical harm to Mr Rose. The plaintiffs established negligence on the part of Dr Coombes, and therefore on the part of the Hospital, in discharging Mr Pettigrove from the Hospital ... The Health Service is not entitled to the protection of s 5O, s 43 or s 43A of the … Act. The plaintiffs established that the injuries that Mr Rose, and therefore they, suffered were causally related to Dr Coombes' negligence" @10.

Legal advice
See *Mills v Bale & Anor* 4/8/10 [2010] NSWDC 162 where Levy SC DCJ found that a solicitor **gave misleading advice that there was damning video evidence against P and that he might get nothing** if he proceeded with his damages claim. P therefore agreed to settle his claim for much less than he probably would have got. Sections **5B, 5D & 5E** satisfied.

See *DJZ Constructions Ltd v Pritchard …* 10/9/10 [2010] NSWSC 1024 where Schmidt J considered sections **5D, 5I, 5O & 5R** where some negligence established re solicitor advising re guarantee, deed and sale of business.

In *Bird v Ford* 28/3/13 [2013] NSWSC 264 P, who had serious depression, **argued that D "had been negligent in the advice which he gave … that the school was obliged to afford their son procedural fairness, before expelling him**" @14. Claim failed but P notionally assessed at 19% of a most extreme case. Appeal dismissed 28/7/14 in [2014] NSWCA 242. "General law principles are to the effect that a **lawyer may with impunity act for a client in proceedings which are apparently hopeless**, provided that the lawyer is not aware that the proceedings might amount to an abuse of process; and that a client has a right to have his or her case conducted in court irrespective of the view that his or her lawyer has formed about the case and the prospects of success" @25.

Lifts
In *Miskovic v Stryke Corporation t/as KSS Security* 30/11/11 [2011] NSWCA 369 s5C & 5D considered in case where A had been **trapped in a lift** for several hours at work and where A had pre-existing psychiatric issues. Causation considered. Any "breach of duty … was irrelevant to the psychiatric injury, first because his Honour found that the psychiatric injury for which the appellant claimed damages had 'already been precipitated' (although unknown to the respondent) prior to the lift incident material to the breach of duty; and secondly because his Honour found that the system, if in place, would not have 'ameliorated' any contribution made by that incident to the appellant's psychiatric condition: that is, that his condition would have developed as it did in any event" @3 per Giles JA.

Lighting
See *Penrith* at s5B(1)(c)

Loading/unloading
See *Bennett v Baiada Poultry Pty Limited* 5/9/14 [2014] NSWDC 144 where Mahony SC DCJ found D had **negligently loaded P's truck** leading to P's back injury when he had to manually move heavy items. P "had successfully moved the first three pallets, notwithstanding the problems he observed, so they could be unloaded. By attempting to utilise the same system of work to remove the fourth pallet, and in using as much physical strength as he can muster to do so, I do not find that he was guilty of contributory negligence. He was merely carrying out a system of work which had been successfully utilised many times in the past" @77.

Maintenance of plant and machinery (inadequate)
See *Foster v Tolco Pty Limited* 21/11/12 [2012] NSWSC 1395 where Adamson J found that D had not breached its duty to maintain machinery. P, who suffered injuries to his shoulder and back, failed to establish negligence or causation.

Medical negligence (failure to administer treatment)
In *King v Western Sydney Local Health Network* 7/9/11 [2011] NSWSC 1025 the P (Tamara) was born in 2002 with Congenital Varicella Syndrome (CVS) otherwise known as chicken pox. **She sued the D whom she claimed should have given her mother Phillippine an injection to prevent her catching CVS from her whilst in her womb**. P claimed that when Phillippine presented pregnant at the hospital and told them that her daughter Shania had chicken pox that they should have given Phillippine an injection to protect her in the womb. Garling J concluded that "The Hospital owed Tamara a duty of care … The Hospital was in breach of its duty of care to Tamara because it did not administer VZIG to Phillippine King on 6 May 2002, when it ought to have done so. … Tamara has proved that she suffers from CVS, which was caused by her mother being infected with chickenpox, having been exposed to Shania during the period when Shania was infectious. However … [Garling J not] satisfied on the balance of probabilities that had the VZIG been administered on 6 May 2002, it would have prevented the chickenpox infection in Phillippine King. … [It was only possible] … that VZIG would have prevented the infection, which in law, is insufficient to make the Hospital liable for Tamara's CVS" @11-12. **Section 5B, 5D & 5O considered**.

Medical negligence (failure to warn)
In *Wallace v Ramsay Health Care Ltd* 9/7/10 [2010] NSWSC 518 Harrison J considered various s5 provisions where **neurosurgeon failed to warn of risks of surgery**. Court concluded that **P would have had operation even if adequately warned**. **Appeal dismissed** by majority in *Wallace v Kam* 13/4/12 [2012] NSWCA 82. A "sought medical assistance in relation to a condition in his lumbar spine. He was offered surgery. Because he was significantly overweight, the surgery was likely to be lengthy and there was a risk that he would sustain transient local nerve damage in his thighs (described as bilateral femoral neurapraxia). The risk materialised, although the condition had entirely resolved by the time of the trial. At a consultation with the respondent, Dr Kam, before the operation, the appellant was given important information in respect of the procedure and its potential for success and the likely circumstances of rehabilitation, but was not advised of that particular risk. The primary judge … held that he should have been, but that, if he had been, he would nevertheless have proceeded with the operation. Accordingly, the judge held that the failure to warn did not constitute a relevant cause of the harm and dismissed the claim" @156 (Basten J). Basten J and Allsop P both dismissed the appeal, but for different reasons. Allsop P disagreed with trial judge's approach to **s5D(1)(a)**. See his analysis of s5D(1). **High Court appeal dismissed** on 8/5/13 in [2013] HCA 19 "The distinct nature of the risks of neurapraxia and paralysis, and the willingness of Mr Wallace to accept the risk of neurapraxia, therefore combine to support the shorthand holding of Harrison J that any failure of Dr Kam to warn Mr Wallace of the risk of paralysis could not be the 'legal cause' of the neurapraxia that materialized" @40.

Medical negligence (failure to order ultrasound)
See *Hirst v Sydney South West Area Health Service* 22/8/11 [2011] NSWSC 664 where P "was born on 24 October 2000 with gross hydrocephalus. As a result, she is grossly disabled with cerebral palsy that manifests itself in a variety of ways including cognitive impairment, spasticity, vocal and visual impairment, and epilepsy. She brings these proceedings against Dr David Browning who was her mother's obstetrician. She does not allege that Dr Browning caused the hydrocephalus. Rather, she says that at about **36 or 37 weeks into the pregnancy**

he ought to have ordered an ultrasound which would have identified that she was suffering from the hydrocephalus. In that way her birth could have been induced earlier than it occurred and the remedial operation she underwent to relieve the pressure in her brain could have been performed at an earlier time leaving her with fewer or less severe disabilities. She says that Dr Browning ought to have ordered the ultrasound because he detected, or ought to have detected, that there was what is called an unstable lie at that point in the pregnancy" @1-3. Davies J concluded that as a result of Dr Browning's breach P was 10-30% worse off in terms of her disabilities.

Nuisance
See *Gales Holdings Pty Ltd v Tweed Shire Council* 21/9/11 [2011] NSWSC 1128 where Bergin CJ discussed the relevance of the Civil Liability Act to actions in nuisance particularly Part 1A, and the statutory defences in s42, s43A & s45.

Obstacles
In *Council of the City of Greater Taree v Wells* 1/7/10 [2010] NSWCA 147 the COA considered various provisions of s5 in a case where a **cyclist did not see a silver chain the council had placed across a path** to prevent vehicle access, and was injured. It was not considered to be an 'obvious risk', and the risk of harm was 'not insignificant'. R should have taken reasonable precautions to prevent the harm.

Occupier's liability for independent contractor/employee
In *Shaw v McGee* 7/10/11 [2011] NSWDC 155 Elkaim SC DCJ found caravan park owner in breach of its duty of care as occupier of the park and hence liable for assaults and indecent conduct by his caretaker on P. Vicarious liability not established as caretaker's misconduct, though committed during his service, was removed from his duties.

Police officer's psychological reaction to threats
In *Benic v State of NSW* 30/11/10 [2010] NSWSC 1039 Garling J found that "**the conduct of the plaintiff's superiors in not referring him to the Police Psychology Unit for an expert mental health assessment or any other form of early intervention was not unreasonable**. … [A]lthough a reasonable person would have been aware of the **not insignificant risk of a psychiatric illness developing from the threat which the plaintiff received**, in light of the **plaintiff's denials that he was affected** in any way, when asked how he was, his regular attendance at work, his ability to discharge his duties without any observed inadequacy, and his ability to undertake successfully his promotion qualifications when considered without the thought of hindsight, it was reasonable to refrain from making a referral of the plaintiff to the Police Psychology Unit or other form of early intervention" @454. Section 5B, 5D and 5R considered. If D had been negligent P's **contributory negligence** would have been 50%.

Prison assaults/events
See *Jiao v State of NSW* 2/8/11 [2011] NSWCA 232 where s5B(2) considered.

See *Hall* below at References to recent damages assessments - PTSD

Professional advice (generally)
See also *Legal advice* sub-heading above.
In *Swan & Baker Pty Limited v Marando* 24/7/13 [2013] NSWCA 233 COA confirmed decision that **accountant** breached **duty to advise of freeze on redemptions from investment fund and expiry of cooling off period**.

Residential premises (accidents at)
In *Bader v Jelic* 31/8/11 [2011] NSWCA 255 a tradesman was injured while working at the D's house when he **tripped on a rug and fell into a large plate window which he thought was a door. There were no "visual cues on the plate glass window to draw attention to its presence and ensure that it was not mistaken for an open door** or other open space" @7. The judge at first instance found D liable for not taking the reasonable precaution of lowering a blind over the window. MacFarlan JA allowed the appeal stating that he did "not consider that a reasonable person in the position of the appellants would necessarily have appreciated all of these matters [i.e. the dynamics of rug and window] and put them together to reach the

conclusion that the blind should be pulled down to avoid persons such as Mr Jelic having an accident" @42. He applied Gleeson CJ's reasoning in *Jones v Bartlett*: "There is **no such thing as absolute safety. All residential premises contain hazards to their occupants and to visitors**. Most dwelling houses could be made safer, if safety were the only consideration. The fact that a house could be made safer does not mean it is dangerous or defective. Safety standards imposed by legislation or regulation recognise a need to balance safety with other factors, including cost, convenience, aesthetics and practicality. The standards in force at the time of the lease reflect this. They did not require thicker or tougher glass to be put into the door that caused the injury unless, for some reason, the glass had to be replaced. That, it is true, is merely the way the standards were framed, and it does not pre-empt the common law. But it reflects common sense" @43. Glass safety standards also considered. So too was the **need to canvass the provisions of the CLA**.

In *Hourani v Insurance Australia Group t/as NRMA* 6/11/12 [2012] NSWDC 202 the P was injured when she **slipped on a wet surface in her house which had been damaged by a storm**. P's claimed against her home and contents insurer and its contractors for **inadequate assessment and delay in repair**. Insurer found to have "acted reasonably by sending an appropriately skilled person to make an initial assessment of the nature of the damage and to then set in train the steps necessary to effect repairs in due course. Those repairs obviously involved significant expense, and justified the need for some time to be taken up with a more precise survey of the damage, the calling for quotes for repair and the arranging of the required trades to effect those repairs" @106. Levy SC DCJ found D's "argument to the effect that the plaintiff should have ensured the temporary measures undertaken by the SES were adequate, to involve an unreasonable standard of care on the plaintiff's part" @109. P failed to exercise sufficient care.

Scaffolds
See *Abrahim* at 'References to general damages assessments - Multiple injuries' below.

School (issues at)
See *State of New South Wales v Mikhael* 22/10/12 [2012] NSWCA 338 where factual causation not established in a case where **a student with a propensity for violence seriously injured another student at school**. The risk of harm was found to be 'not insignificant' though.

See *Sticker v NSW Department of Education & Communities* 17/4/14 [2014] NSWDC 37 where Levy SC DCJ found R negligent when an **unruly eight year old caused injury to a teacher**. Decided under common law.

Sea rescue
See *Blackney v Clark* 29/5/13 [2013] NSWDC 144 where D's vessel got sucked into breakers and was overturned by a wave. P, who was on a nearby vessel, entered the water to assist D and his vessel, but got washed up onto shore and was injured. D owed him a duty of care. Neilson DCJ found no contributory negligence on P's part.

Sexual misconduct
In *Withyman v State of NSW & Anor* 1/9/10 [2010] NSWDC 186 Elkaim SC DCJ considered various provisions of the CLA in a case where a **teacher had a sexual relationship with an 18 y.o. student (P) with learning difficulties**. Liability of the school and the teacher considered. School not vicariously liable. P also committed assaults against the teacher when he failed to cope with the relationship breakdown. Section 54 not applicable however. P awarded $75,000 in general damages and $20,000 in aggravated & exemplary damages (among other heads) at common law for his mental anguish and depression resulting from the relationship's breakdown. If the school had been liable under the CLA the P would have been assessed at 20% of a most extreme case. The teacher awarded $60,000 in general damages at common law for her PTSD as a result of P's assaults, threats and breach of AVOs. **Appeal allowed** in [2013] NSWCA 10 in so far as the primary judge erred in not determining Ms Blackburn's defence under the *Limitation Act*. A new trial limited to the limitations defence ordered. Leave to appeal granted on the issue of whether the State breached its non-delegable duty of care.

See *JK v State of New South Wales* 14/8/14 [2014] NSWSC 1084 where Harrison AsJ ordered a **teacher who sexually assaulted a student (JK) to contribute 90% of the consent judgment sum that the State of NSW and other defendants had agreed with JK**. Non-delegable duty and vicarious liability considered.

Skate park injuries

In *Vreman & Morris v Albury City Council* 11/2/11 [2011] NSWSC 39 Harrison J found the D not liable in negligence for harm suffered by the P's "because the harm was suffered as a result of the materialisation of an obvious risk of a **dangerous recreational activity** in which they were each separately engaged" @103. Both P's were **riding their BMX bikes at a skate park** when they were injured and where they were aware that the **recently painted surface had become more slippery**. D's **warning sign was however inadequate** as it did "not give a general warning of risks that include the particular risks" @112. Harrison J considered "that whilst the risk of falls such as those suffered by Mr Vreman and Mr Morris was not insignificant, **the additional or greater risk of falls associated only with the application of paint to the concrete surfaces was insignificant** [@134] … [and that it] is not possible … to say that either accident would not have happened if the surface of the skate park had been unpainted concrete" @143.

Skiing

In *Harris v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor* 10/11/11 [2011] NSWDC 172 Elkaim SC DCJ considered the school's and the operator of the ski resort's (2nd D) liability when the P was **injured in a beginner's ski class while on a school excursion** when he was 16. The 2nd D was found negligent. It breached its duty of care to the P by conducting ski lessons for learners in an area where there was an obstacle which learners were not equipped to deal with. There was "a dangerous ditch and mound … which a proper inspection would have identified" @131. In the circumstances P was engaged in a '**dangerous recreational activity**'. "[I]f the plaintiff had lost control and fallen over, or fallen due to an undulation in the surface, or even simply fallen over, and been injured, that would have been the materialisation of an obvious risk. But skiing into a ditch on a beginners' slope is quite different. This is the **materialisation of a risk that is far from obvious**" @145. Exemption of s5L (dangerous recreational activity) does not apply. 2nd D wholly negligent.

Slips/Trips

See also sub-heading 'Falls' above

Section 5B and 5R considered by Johnstone DCJ in *Caldwell v Coles Supermarkets P/L* 11/6/10 [2010] NSWDC 136 where **P slipped on oil or grease on D's premises**. D was in breach, and P showed no contributory negligence.

See *Mudford v Greater Lakes Council* 17/6/10 [2010] NSWDC 109 where Sidis DCJ considered various provisions of s5 where the **P slipped on wet grass on a grass bank in a caravan park**. D not in breach of duty.

See *Arabi v Glad Cleaning Service P/L* 23/8/10 [2010] NSWCA 208 where A **slipped on ramp at shopping centre** and COA upheld decision that R had not breached its duty. Section 5B considered. The issue of the **regularity of inspection for spillages discussed**.

See *Jajieh v Woolworths Ltd* 26/10/10 [2010] NSWDC 239 where Levy SC DCJ considered s5B & s5D and found D liable for P's fall.

The COA considered the **'necessary condition' test** in *Woolworths Ltd v Strong & Anor* 2/11/10 [2010] NSWCA 282 and other aspects of **s5D** from paragraph 48 in a case where the **R slipped on a chip close to a food court**. It could not "be concluded that it was more likely than not that if there had been dedicated cleaning of the area every 15 minutes, supplemented by employees who happened to see a danger either removing it themselves, or calling a cleaner, it is more likely than not that the First Respondent would not have fallen" @69. Section **5E** also considered. **Appeal allowed** in *Strong v Woolworths Ltd* 7/3/12 [2012] HCA 5. Section 5D analysed from paragraph 17. "Reasonable care required inspection and removal of slipping hazards at intervals not greater than 20 minutes in the sidewalk sales area, which was adjacent to the food court. The evidence did not permit a finding of when, in the interval between 8.00am

and 12.30pm, the chip came to be deposited in that area. In these circumstances, it was an error for the Court of Appeal to hold that it could not be concluded that the chip had been on the ground for long enough for it to be detected and removed by the operation of a reasonable cleaning system. The probabilities favoured the conclusion that the chip was deposited in the longer period between 8.00am and 12.10pm and not the shorter period between 12.10pm and the time of the fall" @38. Heydon J dissented.

In *Garzo v Liverpool/Campbelltown Christian School Limited & Anor* 15/4/11 [2011] NSWSC 292 Garling J considered issues of causation, forseeability, significance of risk, contributory negligence etc in a case where a person visiting a school **slipped on a standard painted pedestrian crossing** which had had a **high volume of traffic over the years with no other reported slip and falls**. Liability not established. Appeal dismissed 25/5/12 [2012] NSWCA 151.

See *Sibraa v Brown* 12/10/12 [2012] NSWCA 328 where P **tripped in the dark over wire mesh on D's front lawn**. Section 5B(1)(c) not satisfied. It is not uncommon for homeowners to leave obstacles on their lawn and it is not incumbent on them to remove them.

In *Jones Lang LaSalle (NSW) Pty Ltd v Taouk* 24/10/12 [2012] NSWCA 342 liability found in case where **R slipped on grease on surface of car park**. More regular inspections should have been undertaken. There was also negligence associated with the release of the grease on the part of the property manager. Liability apportioned 70/30 between manager of car park and property manager.

See *Plaskett v Pittwater Council* 12/11/12 [2012] NSWSC 1356 where Rothman J found that the Council was not liable in the case of a P who **tripped on an uneven footpath which had not been properly repaired**. See also *Botany Bay City Council v Latham* 13/10/13 [2013] NSWCA 363 another case involving tripping on an uneven footpath.

See *Coregas Pty Limited v Penford Australia Pty Limited* 1/11/12 [2012] NSWCA 350 where worker **slipped while manoeuvring a gas cylinder down a ramp**. The task was an awkward one. Liability apportioned between employer and supplier of gas cylinder.

See *Irena Alat v Franklins Pty Ltd* 20/4/12 [2012] NSWDC 104 where Letherbarrow J considered that "that in 2008, in a supermarket like the defendant's, in an aisle such as this containing numerous liquid items, **a reasonable person would have instituted a system of cleaning and inspection of a minimum frequency of every 15 minutes**" @50. P slipped on spilt cream. Liability established. Contributory negligence of 20%.

See *Hair v Munro* 28/3/13 [2013] NSWDC 25 per Elkaim SC DCJ where liability was established re P slipping on a mat left on a polished floor. Appeal dismissed 26/3/14 in [2014] NSWCA 80.

In *Kelly v State of Queensland* 30/4/13 [2013] QSC 106 P, an Irish tourist, went to Fraser Island. Before going he saw a video warning of some dangers of the island. About 50% of tourists visiting the island would see this video. **P saw many others running down steep dunes and jumping or diving into Lake Wabby at the bottom. He himself did this about nine times before losing his footing near the bottom of the dune and stumbling head first and being rendered a partial tetraplegic**. "It would appear it was the sudden giving way of the sand, or the losing of the footing in the sand, that converted what was intended to be a jump into the water in perfect safety into an inadvertent head first plunge into the water" @34. McMeekin J stated that "I recognise that running down a steep sand dune has the potential to result in a trip or fall and that might be seen as 'obvious'. What that ignores however is the experience of the plaintiff, and apparently many others, of the firmness of the sand, the consequent lack of likelihood of the occurrence of the trip or fall, and the lack of foreseeability of serious injury from the activity. When measured against likelihood and magnitude of risk of injury **I do not see it as 'obvious'** in the relevant sense at all" @69. Not considered reasonably practicable for D to employ a ranger or to construct a fence along the dunes. D "breached its duty of care in failing to provide adequate warning of the dangers inherent in a visit to Lake Wabby by appropriate adaptation of the video, mentioning not only diving but running down the

steep dunes with express reference to the **long list of catastrophic and serious injuries sustained there over the preceding years**. It also breached its duty by failing to ensure that the **signs** leading into the lake more definitively identified the dangers by reference to the numbers of catastrophic injuries suffered and by the provision of a message that emphasised that the risks were not merely in diving into shallow water but in the running down the dunes" @144-145. D found liable and P's contributory negligence was determined to be 15%. **Appeal dismissed** 25/2/14 in [2014] QCA 27.

See *Action Paintball Games Pty Ltd (In liquidation) v Barker* 13/5/13 [2013] NSWCA 128 where it was found on appeal that there was "**no obligation on the appellant, in exercise of its duty of reasonable care, to remove the offending tree root**" @37. A ran an **outdoor 'laser tag' game in bushland** and A, who was 10, tripped over the tree root and fractured her elbow. The R did warn participants of general risks of the activity and A's father was with her when the warning was given. Various provisions of section 5 considered, including s5M.

In *Pavlis v Wetherill Park Market Town* 27/5/13 [2013] NSWDC 331 **P slipped as she was approaching an ATM in wet conditions**. Olsson SC DCJ found "the owner instructed and the agent arranged the painting of the floor with a non-slip paint. Those measures were reasonable, in my view, and adequately, at least on the face it, addressed the risk of harm" @76. Liability not established.

See *Selby v Bankstown City Council* 7/6/13 [2013] NSWDC 84 where Levy SC DCJ did not find the Council liable where an **elderly woman tripped over a raised paving block (3mm) on a footpath**. This was an obvious risk.

See *Shoalhaven City Council v Pender* 10/7/13 [2013] NSWCA 210 where liability finding overturned in case where R **slipped on dry concrete surface of boat ramp** for which council was responsible. R "did not establish as a matter of probability that he fell because the ramp was slippery, let alone that it was unreasonably so" @79.

See *Panther v Pischedda* 25/7/13 [2013] NSWCA 236 where the risk of visitors to holiday accommodation **slipping on wet steep driveway with smooth river stones** was considered 'not insignificant'. Reasonable precautions, such as installing a handrail were available to D.

In *Fitzsimmons v Coles Supermarkets Australia* 29/8/13 [2013] NSWCA 273 the COA, by majority, did not consider that **R's placing of three 'wet floor' warning signs around a spillage** in an aisle was sufficient to discharge their duty of care. **R should have left someone near the spillage** to warn customers.

See *Jackson v McDonalds Australia Ltd* 26/5/14 [2014] NSWCA 162 where A walked across a floor he knew to be wet at McDonalds and then immediately after slipped and injured himself on stairs. R **breached its duty of care as occupier by its "Failure to ensure that mopping of the floor was carried out in such a way as to ensure the continued availability of a dry section for pedestrians by mopping in sections**" @107 per Barrett JA. **R had non-slip surfaces and used non-slip detergent**. Warning signs were also used. "It was for the appellant to prove that water on his shoes, if present, would have caused, on the particular floor surfaces, slipping that would not have occurred if no water had been present … The appellant did not call any evidence from persons qualified to express an opinion on the issue of slip resistance of the particular surfaces and the effect that wetness on soles might be expected to have had … He thus chose to leave an evidentiary vacuum on the issue of, first, the extent to which soles of the particular kind, having encountered wetness on the floor surface, were likely still to be wet at the time of his fall and, second, the propensity of soles of the particular kind, if wet, to cause slipping to a greater degree than if dry when traversing surfaces of the particular kinds" @121-122. Claim **failed due to failure to establish causation**. If A had been successful, his contributory negligence would have been 70%.

See *Port Macquarie Hastings Council v Mooney* 20/5/14 [2014] NSWCA 156 where appeal allowed. **Council not liable for injury to R who in pitch dark, at the point a temporary path created by A deviated, went off path and subsequently fell into drain**. R claimed A should have provided lighting at the point the path deviated. The temporary path, which was several

hundred metres long, had been created whilst R was constructing a new footpath. The primary judge erred in identifying relevant risk of harm for the purposes of s5B.

See *Schultz v McCormack* 20/6/14 [2014] NSWDC 67 where P **slipped on wet tiles outside her friends place**. The **risk of slipping was an obvious one**.

See *McMorrow v Todarello Pty Limited trading as The Fruit House Faulconbridge* 28/4/14 [2014] NSWDC 75 where P **tripped over pallet, the base of which, protruded onto a busy walkway in a fruit shop**. The base of the pallet was not easy to see. Knox SC DCJ found D liable.

See *Jacobe v QSR Pty Ltd t/as Kentucky Fried Chicken Lakemba* 19/9/14 [2014] NSWDC 150 where P **tripped on concrete wheel stop in KFC car park**. Levy SC DCJ found the risk to be obvious and no negligence on D's part.

Sports injuries

In *Price v State of NSW* 10/11/11 [2011] NSWCA 341 the COA allowed an appeal from a decision that the R was not liable for a **serious eye injury caused to an inmate (A) whilst watching four other inmates play tennis**. A was not keeping a proper lookout and his contributory negligence was 30%. Held that "the primary judge erred in his assessment of the risk and of the matters in s 5B. The risk was foreseeable, indeed obvious: s 5B(1)(a) and (b). Precautions as to moving Mr Price were such that a reasonable person would have taken given the degree of risk and absence of improbability of being hit: s 5B(2)(a), the possible seriousness of the harm (depending where one was hit): s 5B(2)(b), the minor burden of the precaution: s 5B(2)(c) and the lack of affectation of the social utility of the game that created the risk while Mr Price was seated where he was: s 5B(2)(d)" @45.

Stairs

See *Stojan* at s5B(1)(b).

In *Marshbaum v Loose Fit Pty Ltd & Anor* 11/10/10 [2010] NSWSC 1130 Hoeben J considered a case where P was injured descending stairs and determined that "in respect of the upper flight of stairs, … there were **discrepancies in the height and size of the risers** and goings, … there was a **lack of constancy in those dimensions**, … there was an **absence of a continuous handrail**, … these issues involved **breaches of the BCA** and … the failure to address these issues rendered the flight of **stairs dangerous to those using them**" @75. Sections 5B,C, F and G considered. "Whereas a fall down the flight of stairs may have been "obvious" what was not obvious in the sense required by the section was that if a fall did occur, the stub wall would provide no assistance to a person of small stature or for a person with a small hand or someone having both attributes. Looked at in that way, the risk of the plaintiff falling in this case was not an obvious one as defined by s 5F" @85. **Appeal against P dismissed, but appeal against owners allowed** in *Loose Fit Pty Ltd & Anor v Marshbaum* 30/11/11 [2011] NSWCA 372. Found to be just and equitable that Loose Fit recover from the Owners a contribution of 50 per cent of the damages payable to the Plaintiff. "[A] reasonable person in the position of the Owners would have installed a handrail on the upper level of the staircase before entering into the 2006 lease" @100.

In *Youkhana v Di Veroli* 19/11/10 [2010] NSWCA 322 the R's, who were the occupiers of a **building with old stairs**, were not found liable for A slipping on the stairs and injurying himself. Section 5B & 5C considered.

In *Dargham v Kovacevic* 31/1/11 [2011] NSWSC 2 a 24 y.o. P fell down a stairwell in July 2005 and "suffered **soft tissue injuries to the sacro-coccygeal, lumbo sacral and neck regions**. These injuries occasioned him significant pain and marked disability for about three months. The pain and disability gradually decreased thereafter and by 23 November 2005 he was fit to resume limited part time work though he continued to have some ongoing symptoms, the effect of which was exacerbated, to some degree, by an **adjustment disorder and depressed mood**. The plaintiff has no clinical findings of major physical impediment and … would have been able to upgrade to his pre-injury level of work after three or four months of a gradual return to work. … [Hislop J stated that] he effects of the injury had largely subsided by

December 2009 and no future problems resulting from the injury are to be anticipated though the plaintiff may have some intermittent low level pain for some time to come" @94-95. P was **30% of a most extreme case** and was thereby awarded $115,000 for NEL among other heads.

In *Roche Mining P/L v Jeffs* 6/7/11 [2011] NSWCA 184 the COA upheld trial judge's decision that A breached its duty of care in circumstances where **worker fell when using ladder to access a dump truck (Cat 785B)**. The ladder did not meet Australian standards and transitioning from the ladder to the platform was risky. It would have been a reasonable precaution for A to retrofit a transverse stair access system despite the cost being about $850,000 for its fleet of trucks. Various provisions of s5 of CLA considered.

See *Indigo Mist Pty Ltd v Palmer* 9/8/12 [2012] NSWCA 239 which was a case involving smooth glass **stairs that were unsuitable in a hotel due to their slippery nature when wet**. Patron slipped on stairs and was injured. Causation established. Appropriateness of preventative measures, such as signage, considered. Liability of stair designers also considered.

In *Strike v Fiji Limited Resorts & Anor* 25/10/12 [2012] NSWSC 1271 Beech-Jones J found the first D liable as occupier for injuries suffered by P when she **slipped while descending wet stairs at D's hotel**. The **stairs were exposed to the elements** and provided a thoroughfare between guests' rooms and hotel facilities. D failed to use warning signs or mats to reduce risk. These ameliorating precautions were not considered burdensome. The **failure to provide non-slip mats was causative of P's fall and constituted a breach of care**. No contributory negligence of P. She was wearing rubber thongs, but she descended the stairs very carefully whilst holding on to the rail.

In *Bathurst Regional Council … v Thompson* 26/10/12 [2012] NSWCA 340 the liability of the A for a fall on the steps of one of its rotundas was confirmed. The **top step was narrower than the other steps**, which created a hazard for people descending the stairs.

See *Transpacific Industrial Solutions Pty Limited v Phelps* 26/2/13 [2013] NSWCA 31 where liability under CLA considered in a case where **P tripped and was injured ascending stairs whilst supporting and guiding an awkward load on a trolley**. "[I]t was not established … that there were any precautions that, in terms of s 5B … a reasonable person in Transpacific's position would have taken against the risk of harm to which the plaintiff succumbed" @55.

In *Hoffman v Boland* 6/6/13 [2013] NSWCA 158 a **grandmother (1st R) was caring for her baby grand-daughter, who was nearly six months old, when she slipped while carrying her down a staircase** causing the baby serious and permanent injuries. **The stairs at one point were too narrow for her foot**. The court was divided as to whether the 1st R owed a duty of care in the circumstances. The court agreed that the 1st R did not breach any duty, if such was owed. No breach of duty in design or construction of staircase found. "[T]here was no evidence that the **absence of … [a continuous] handrail** contravened applicable building standards or departed from standard practice in the industry" @164.

In *Moor v Liverpool Catholic Club Ltd* 25/6/13 [2013] NSWDC 93 Levy SC DCJ found that the D breached its duty of care to the P who fell and **injured his ankle while descending stairs wearing ice skates whilst on his way to the ice arena**. The stairs were uneven in width. They were wet. D could have told skaters to put their skates on after descending the stairs. P was not contributorily negligent.

See *WB Jones Staircase & Handrail Pty Ltd v Richardson & Ors* 17/4/14 [2014] NSWCA 127 where P was **injured when a balustrade gave way**. Action brought against builder and two sub-contractors. One subcontractor subcontracted work to another. **Duties to inspect work of others** considered re apportioning liability.

See *Dailhou v Kelly; State of NSW v Kelly (No 2)* 2/9/14 [2014] NSWSC 1207 where Adamson J discussed the obligations of a book shop owner to **safeguard customers from falling down stairs in his shop**. Liability not established.

Surgery
See *Peterson* at s5E.

Tipping (vehicles)
In *Cobcroft v Aggcon Pty Ltd & Anor* 3/11/11 [2011] NSWSC 1287 Fullerton J found Ds liable where unsafe work practice resulted in P being injured when he **used a front end loader (which was hired) on sloping ground whilst carrying a heavy load**. The loader was not the appropriate vehicle for the task, P was inexperienced in using it and it tipped. No contributory negligence of P.

Trains
See *Fuller-Lyons v State of NSW (No. 3)* 15/11/13 [2013] NSWSC 1672 where an **eight year old boy became trapped between the doors of a train and then fell from the train** suffering serious injury. Beech-Jones J was undecided as to how it was that P became trapped in the doors. Hence, it could not be found that P was negligent or had acted inappropriately. D was not found to be negligent for failing to commission a safety device (traction interlock) which had been installed, but its **guard was negligent for failing to see P protruding from train doors and allowing the train to leave the station**. Such negligence was causative of P's injuries.

Unguarded machinery
In *Agresta v Agresta* 7/12/10 [2010] NSWCA 330 the A was found to be negligent when R suffered injuries in unguarded machinery. No contributory negligence on R's part.

Wakeskating
See *Hume v Patterson* 30/8/13 [2013] NSWSC 1203 where Campbell J found driver of speedboat liable when he piloted vessel too close to sandbar whilst pulling P. P suffered catastrophic injury. Activity not considered to be a dangerous recreational activity.

'Use or operation of a motor vehicle'
In *Wagga Truck Towing P/L v O'Toole; NRMA v O'Toole* 15/7/11 [2011] NSWCA 191 the R was instructed by Mr Russell, who employed him through his company, to take off the front bumper bar and tail-shaft of his truck. Mr Cool, from a tow-truck company, had advised that this be done so that when the tow-truck arrived there would be no delay. Mr Cool knew that Mr Russell was part of a Holden racing team, but also that he was not familiar with removing tail shafts. The truck was parked in gear with the handbrake on, on a slight to medium incline. Mr Cool was not aware the truck was on an incline, but COA found he **should have warned of the dangers of the truck moving forward after the tail-shaft was removed**. When the R removed the tail shaft from beneath the truck it rolled forward and he was seriously injured. The simple precaution of chocking the wheels would have prevented the accident which the COA considered did **arise out of the 'use or operation of a motor vehicle'**. "Although the vehicle was parked at least half an hour before the fault occurred, the changed circumstances meant that the vehicle became inadequately parked, in the sense of being insufficiently held in its stopped position. … [T]his does mean that the fault was in the **parking of the vehicle**. Also, the arranging and preparing for the towing of the vehicle was **part of a process of effecting the maintenance of the vehicle**; and … the fault was also a fault in the maintenance of the vehicle" @46. Mr Cool and Mr Russell both found to owe R duty of care and liability was apportioned 50/50 between them. Hodgson JA, with whom the other appeal judges agreed, stated that "a reasonable person in Mr Russell's position would have appreciated that disconnecting the tail-shaft would remove any braking effect from the engagement of the gears, and (even without any actual knowledge that disconnecting the tail-shaft would disable the parking brake) would have appreciated that **to undo bolts under the truck, on an incline, without chocking the wheels, was a risky undertaking. In terms of s 5B of the *Civil Liability Act*** :
(1) Mr Russell should have appreciated that there was some risk, even without understanding precisely how that risk might eventuate.
(2) The likelihood of the risk eventuating might, to his understanding, be quite small, but the consequences if it eventuated could be horrendous, so the risk was not insignificant.

(3) **A reasonable person in Mr Russell's position would not have directed Mr O'Toole to undertake the task, at least without first taking the simple precaution of chocking the wheels**" @42.

Wakeskating
See *Hume v Patterson* 30/8/13 [2013] NSWSC 1203 where Campbell J found driver of speedboat liable when he piloted vessel too close to sandbar whilst towing P. P suffered catastrophic injury. Activity **not considered to be a dangerous recreational activity**.

s5B – Duty of care (general principles)
In *Carpenter & Anor v Hinkley* 24/10/08 [2008] WADC 161 Schoombee DCJ gave **detailed consideration of various aspects of ss5B & 5C of the Civil Liability Act (2002) WA and equivalent Civil Liability Act (2002) NSW provisions ss5B & 5D** in a case where the **failure to have a harvester serviced caused a fire**. See paragraph 75 onwards. Forseeability [**s5B(1)(b**)], the likely seriousness of harm [**s5B(2)(b)**] the burden of taking precautions and reasonable response [**s5B(2)(c)**, social utility [**s5B(2)(d)** and causation [s5C(1)] discussed. The meaning of a **'not insignificant' risk** also considered [s5B(1)(b)]. Various NSW authorities canvassed.

See *Willett v United Concrete Pty Ltd & Anor* 22/9/09 [2009] NSWSC 957 where Schmidt J stated that "[i]n considering questions of onus, note should also be taken of what was recently said in *Penrith Rugby League Club Ltd trading as Cardiff Panthers v Elliot* [2009] NSWCA 247, where *Sackville* AJ observed in relation to the provisions of the *Civil Liability* Act that … '[a]s is pointed out by D Villa*, Annotated Civil Liability Act 2002 (NSW)* … s 5B of the *Civil Liability Act* does not itself impose an obligation on a person to exercise reasonable care to avoid harm to another person. **The section sets out requirements that must be satisfied before the first person can be found to be "*negligent in failing to take precautions against a risk of harm*"** (s 5B(1)). As Villa observes, … '**satisfaction of the conditions is a necessary, but not a sufficient prerequisite for civil liability to arise**.' **"**

s5B(1)(a)
See *Chandra* at s5B(1)(b)

s5B(1)(b)
The meaning of a **'not insignificant' risk** considered [s5B(1)(b)] from paragraph 24 by Court of Appeal per Mcfarlane J in *Seage v State of NSW* 5/12/08 [2008] NSWCA 328

In *Thomas v Shaw* 26/6/09 [2009] NSWSC 510 Kirby J considered that the risk of injury where a **bunk bed did not have a ladder or a guard rail** was not insignificant where visiting ten year old child injured whilst descending bunk. **Appeal allowed** in [2010] NSWCA 169 where COA did not consider that A breached its duty in light of the facts that "Cameron was a normal, active 10 year old; the height from which he had to descend was a low one (about 1.4 metres) which was approximately equivalent to his own height; as Cameron was sitting on the side with his legs dangling down, his feet had to descend little more than a metre for him to get down from the top bunk; and the metal framework of the end of the bed which had been used by him to get up and, on previous occasions, to get up both up and down, was easily accessible to him" @8. **COA did not agree that a reasonable person in A's position would have ensured that the bunk bed had a ladder and guard-rail**.

In *Chandra v Bunnings Group Ltd* 6/11/09 [2009] NSWDC 194 Levy SC DCJ considered that the parking of a **fork lift with its tines protruding at floor level onto a pedestrian access route**, and where there was **water submerging the tines**, constituted a 'not insignificant risk' and posed a forseeable risk of injury pursuant to s5B(1)(a). D should have taken precautions. The **submerged tines did not constitute an obvious risk**.

In *Stojan (No 9) Pty Ltd v Kenway* 12/11/09 [2009] NSWCA 364 the COA considered that a council and plaza shop owner had breached their duty of care owed to a **P injured on stairs which they knew were inadequately lit**. The **risk was 'not insignificant'** and the **precautions against the risk that needed to be taken were not that great**. "The **social utility** of providing the stairs did not militate against the need to take precautions to ensure they

were as safe as reasonable care could make them: cf **s 5B(2)(d)**"@139. *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48 (at [31]) applied at 127.

In *Wilson v Nilepac Pty Ltd t/as Vision Personal Training* 10/12/09 [2009] NSWSC 1365 McCallum J found that the risk of injury to a client from **activities at a gym with a personal trainer** was forseeable and 'not insignificant'. The trainer had P working with a medicine ball. There was no breach of duty found on the facts. On **appeal** in *Wilson v Nilepac* … 24/3/11 [2011] NSWCA 63 there was no challenge to the forseeability and 'not insignificant' findings. However, the trainer's departure from the training programme that had been devised for P by D was indicative of a breach of the standard of care required of a professional fitness trainer. "The precautions that such a reasonable person or trainer would have taken would have been to desist from requiring the appellant to undertake the medicine ball exercise unless and until he had satisfied himself that the appellant was sufficiently advanced in terms of the strength of his abdominal muscles as to have the capacity to undertake the exercise without risk of harm to his lumbar spine" @125. Appeal allowed.

In *Giovenco v Dick* 4/3/10 [2010] NSWDC 4 P's partner (H), in October 2004, **died from electrocution whilst working on Mr Dick's (1st D's) roof**. **Live wires were still attached to a redundant hot water system** which H was not aware of. Previously in 2001 **the 2nd D (Stephens), an operator of a plumbing business, through his employee, had installed a new hot water system, but failed to advise H of the need to have the electricity supply to the old system disconnected**. Levy SC DC J stated that "that Mr Dick ought to have foreseen that manipulating the fixing or mounting points of the stand of the redundant solar hot water system by [H] could foreseeably lead to instability of the stand, the possible falling of the redundant storage unit, a resultant interference with the protection of any internal electrical wiring within the unit which could in turn create an electrical hazard. This in turn could foreseeably cause interference with the insulation of the electrical wiring so as to create an electrocution hazard to persons … working nearby and not just in direct physical contact. … [T]he **potential risk outlined above was not an insignificant matter**. … [I]t therefore justified a reasonable person in the position of Mr Dick to take precautions against the potential for harm to [H] by electrocution. The **relevant precaution in this instance would have been to disconnect the electricity supply to the redundant solar hot water system**. The justification for the taking of such a precaution is that if disconnection had been implemented, or indeed the lesser step of the appropriate placement of a warning sign, the serious harm of electrocution death to [H] would in all likelihood not have occurred. … The relevant precaution required of Mr Dick in the circumstances was to consult an electrician and to request him to complete the decommissioning of the redundant solar hot water system by disconnecting it from the electricity supply. In the context of a commercial residential letting, this was not a burdensome or unduly expensive task …"@203 -205. **Risk to H not found to be an obvious one**. Each of the D's negligence was a material cause of H's death. Section **5D & 5E satisfied**. **Section 5T** considered, but held that H showed no contributory negligence. **Appeal allowed** (re Stephens, but dismissed re Dick) in *Stephens v Giovenco; Dick v Giovenco* 15/3/11 [2011] NSWCA 53. Allsop P held that neither D was liable. Hodgson J found to the contrary. Tobias J resolved the deadlock finding only the first D (Dick) liable stating "I agree with Hodgson JA at [86]-[87] of his reasons that Mr Dick breached his duty of care to Mr Harley. Both the President and Hodgson JA agree that if Mr Dick was in breach of his duty of care, then the causation requirements of s 5B(1) of the Act are satisfied. I also agree that that is the case. Finally, with respect to the issue of contributory negligence as between Mr Dick and Mr Harley, I agree with the President's assessment at [34] of his reasons that Mr Harley's contributory negligence should be determined at 80%" @145-146.

In *Al Mousawy v Howitt-Stevens Constructions Pty Ltd & Ors* 8/3/10 [2010] NSWSC 122 Hoeben J considered s5B,5C & 5D in a case where a **hotel ceiling collapsed injuring patrons**. Liability of owner and lessee, who had received complaints about the ceiling/dance floor, and liability of structural engineer, who had been retained to report on the ceiling, considered.

In *Doherty v State of NSW* 20/5/10 [2010] NSWSC 450 Price J considered the risk of psychological injury 'not insignificant' in the case of a **crime scene investigator**. **Appeal and**

cross appeal in *State of NSW v Doherty* 5/8/11 [2011] NSWCA 225 dismissed except for COA finding it appropriate to increase the discount for vicissitudes to 30 percent.

In *Hamilton v Duncan* 26/5/10 [2010] NSWDC 90 Murrell SC DCJ considered a case where a P delivery driver injured his ankle when he stepped in a hole at a residential property. Held that "The location of the hole (close to the driveway and close to the route by which building materials were often delivered), the dimensions of the hole (it was large enough for someone's foot to become caught in it) and the fact that the dimensions of the hole were not readily visible (the grass growing from the hole was green but it blended into its motley surrounds) were such that **there was a significant risk that someone would step into the hole** and sustain injury"@11.

> "Section 5B relevantly picks up in statutory form the principles stated in Wyong Shire Council v Shirt: see Waverley Council v Ferreira [2005] NSWCA 418; (2005) Aust Torts Reports ¶81-818 at [45]. In terms, the section provides that a person is not negligent in failing to take precautions against a particular risk unless there was a foreseeable risk, which was not insignificant, and in the circumstances a reasonable person would have taken those precautions: s 5B(1). Section 5B(2) specifies the matters to be taken into account in determining whether a reasonable person would have taken precautions against a risk of harm. As I have already stated, those matters include the burden of taking precautions to avoid the risk of harm: s 5B(2)(c)." **Council of the City of Liverpool v Turano & Anor** 31/10/08 [2008] NSWCA 270 Beazley JA [(2008) 51 MVR 262], Full Court
> ***[**Note that High Court allowed appeal from this decision.** See *Sydney Water Corporation v Turano* 13/10/09 [2009] HCA 42]

s5B(1)(c)

In *Penrith Rugby League Club Ltd t/as Cardiff Panthers v Elliot* 18/8/09 [2009] NSWCA 247 the COA held as follows: "[T]he primary Judge erred in finding that the appellant owed the respondent a duty to provide a system of ensuring that the external floodlights operated by automatic sensors were in fact functioning by the time it was dark. The findings of primary fact and the evidence adduced at trial do not justify this Court in making a finding that a reasonable person in the position of the appellant would have taken the precaution of instituting a system of visual inspection of the floodlights at or shortly after sunset each day.
… It follows that s 5B(1)(c) of the *Civil Liability Act* was not satisfied [and that the appeal should be allowed]"@40-41. The requirements of s5B(1) & (2) were considered.

See *Botany Bay City Council v Latham* 13/10/13 [2013] NSWCA 363 where COA held that "s 5B(1)(c) obliged the primary judge to determine whether a reasonable person in the position of the Council would have undertaken regular inspections of the footpaths in its area and, if so, whether any action would have been taken to reduce unevenness. Her Honour's failure to make such a determination also amounted to a failure to give adequate reasons" @42. The **R "could not establish that there was any apparent irregularity beyond that which might be expected on an unexceptional footpath in a suburban street**. Accordingly … even had the Council inspected the area prior to the fall with a view to identifying irregularities in the surface of the footpath that could give rise to the risk of pedestrians tripping and falling, nothing would have been done in the relevant area because nothing was reasonably required to be done. The effect of s 5B(1)(c) of the Act in these circumstances is that the Council was not negligent for failing to inspect the area or eliminate unevenness in the pavers" @43.

See *Stojan* above at s5B(1)(b).

s5B(2)

In *Doherty v State of NSW* 20/5/10 [2010] NSWSC 450 Price J considered the risk of psychological injury 'not insignificant' in the case of a **crime scene investigator**. P's return to work after experiencing major depression was not appropriately handled. Social utility considered from paragraph 201. **Appeal and cross appeal** in *State of NSW v Doherty* 5/8/11 [2011] NSWCA 225 dismissed except for COA finding it appropriate to increase the discount for vicissitudes to 30 percent.

In *Hamilton v Duncan* 26/5/10 [2010] NSWDC 90 Murrell SC DCJ considered that "a vigilant pedestrian would have observed the area of green grass growing from the hole and would have identified the hole as a possible risk. Indeed, the plaintiff did observe that there was 'a bit of a hole'. However, as the depth of the hole was not obvious, the **extent of the risk was not obvious**. Having regard to the defendants' status as **ordinary householders**, the s 5B (2) circumstances and other relevant circumstances including the extent to which the risk was concealed, I am persuaded that **a reasonable person in the defendants' situation would have taken the quick and easy precaution of inspecting the area and filling in significant depressions**"@20-21.

> [Wilson] 127 At [93] of her reasons, the primary judge recorded a submission on behalf of the respondent evoking s 5B(2)(d) to the effect that the operation of personal training studios was an activity of high social utility. She then recorded the submission that gyms were meeting places, progenitors of community health, designed to keep burgeoning health costs down and similar general statements as to their general social utility.
> 128 At [94] of her reasons, her Honour remarked that those considerations were relevant to the present case. She continued:
>
> > 'The legislation appears to assume that it might be reasonable to take fewer precautions against the risk of harm created by an activity of high social utility. I accept that physical exercise is such an activity.'
>
> 129 In my respectful opinion, the Act makes no such assumption. Although it might be said that as a general proposition physical activity is of social utility, what the subsection requires to be taken into consideration is the social utility of *the activity that creates the risk of harm* '. In the present case that activity was the medicine ball exercise. Of itself it had no relevant social utility let alone a high social utility - quite the contrary, unless Mr Draffin was satisfied on reasonable grounds that the appellant had the physical strength and capacity to undertake it safely.
> 130 In any event the social utility of the relevant activity is but one factor which s 5B(2) requires to be taken into account in determining whether a reasonable person would have taken the necessary precautions against the relevant risk of harm. As the chapeau to the subsection makes clear, each of the four subparagraphs is to be considered ' *amongst other relevant things* '. **There is nothing in the Ipp Report or in the text of the legislation which recommended s 5B which suggests that the standard of reasonable care requires the taking of fewer precautions against an acknowledged risk of harm simply because the activity which creates that risk has some social utility**. There may be cases where the social utility of the activity is sufficiently high as to justify, notwithstanding other factors, a finding that a reasonable person would not have taken the necessary precautions against the identified risk of harm. Rescuing people from the impact of floods, cyclones and earthquakes were said to be examples that might attract such a finding. But in my view the present case does not fall into that or any similar category." **Wilson v Nilepac P/L t/as Vision Personal Training (Crows Nest)** 24/3/11 [2011] NSWCA 63

s5C(c) – Subsequent action

In *Elphick v Wesfield Shopping Centre Management Company Pty Ltd* 25/11/11 [2011] NSWCA 356 the COA held that the "subsequent action did not, of itself, constitute an admission of liability in connection with the risk (section 5C(c)). It did not of itself give rise to or affect liability in respect of the risk. The fact that Westfield took the initiative in quickly improving the situation in the dock area, in the circumstances of this matter, could not alter the proper assessment of where responsibility for the safety of ACS' employees lay" @81.

s5D & 5D(1) – Causation (general principles)

McKay C, '*Strong v Woolworths Ltd: The High Court Provides Some Clarity on Causation*' (2012) 20(1) Tort Law Review 6

Section **5D(3)(b)** considered by Bergin J from paragraph 241 in *A.I.Mclean P/L v Hayson* 11/9/08 [2008] NSWSC 927.

See *O'Gorman v Sydney South West Area Health Service* 29/10/08 [2008] NSWSC 1127 where from paragraph 146 Hoeben J discussed how **s5D and s5E are in accord with the common law**.

In *Carpenter & Anor v Hinkley* 24/10/08 [2008] WADC 161 Schoombee DCJ gave **detailed consideration of various aspects of ss5B & 5C of the Civil Liability Act (2002) WA and equivalent Civil Liability Act (2002) NSW provisions ss5B & 5D** in a case where the **failure to have a harvester serviced caused a fire**. See paragraph 75 onwards. Forseeability [s5B(1)(b)], the likely seriousness of harm [s5B(2)(b)] the burden of taking precautions and reasonable response [s5B(2)(c), social utility [s5B(2)(d) and causation [s5C(1)] discussed. The meaning of a 'not insignificant' risk also considered [s5B(1)(b)]. Various NSW authorities canvassed.

Section 5D(1)(b) considered from paragraph 97 in *Thomas v Shaw* 26/6/09 [2009] NSWSC 510 by Kirby J in the case of a sleepover where a **bunk bed did not have a ladder or a guard rail** and where visiting ten year old child injured whilst descending bunk. **Appeal allowed** in [2010] NSWCA 169 where COA did not consider that A breached its duty in light of the facts that "Cameron was a normal, active 10 year old; the height from which he had to descend was a low one (about 1.4 metres) which was approximately equivalent to his own height; as Cameron was sitting on the side with his legs dangling down, his feet had to descend little more than a metre for him to get down from the top bunk; and the metal framework of the end of the bed which had been used by him to get up and, on previous occasions, to get up both up and down, was easily accessible to him" @8. **COA did not agree that a reasonable person in A's position would have ensured that the bunk bed had a ladder and guard-rail**.

See *Giovenco* at s5B(1)(b)

In *Al Mousawy v Howitt-Stevens Constructions Pty Ltd & Ors* 8/3/10 [2010] NSWSC 122 Hoeben J considered s5B,5C & 5D in a case where a **hotel ceiling collapsed injuring patrons**. Liability of owner and lessee, who had received complaints about the ceiling/dance floor, and liability of structural engineer, who had been retained to report on the ceiling, considered.

In *Jovanovski v Billbergia Pty Ltd* 31/3/10 [2010] NSWSC 211 Davies J, in a case where an **unknown person put grease on the steps of the P subcontractor's truck causing him to fall**, considered s5D(1) and stated, "[a]s in *Adeels*, there was **no evidence in the present case to show that a warning coupled with a threat to the workforce would have prevented the grease smearing** and the injury to [P]. All that is available is an inference that it might have deterred the perpetrator but it is equally able to be inferred that it would have caused the perpetrator to act with greater care not to be detected if, as seems likely, [P] was the clearly intended victim – there was no evidence of grease on other trucks … More significantly, *Adeels* makes clear that where the issue of causation is governed by s 5D breaches such as those that I have found, cannot be regarded as a **necessary condition of the occurrence of the harm** for the purposes of s 5D(1). The matter can be put no higher than that the appropriate warning might have deterred or prevented the occurrence which caused the injury to the [P]"@79-82. **Appeal dismissed** *Jovanovski v Billbergia Pty Ltd* 2/6/11 [2011] NSWCA 135.

In *Doherty v State of NSW* 20/5/10 [2010] NSWSC 450 Price J considered the risk of psychological injury 'not insignificant' in the case of a **crime scene investigator**. P's return to work after experiencing major depression was not appropriately handled. Causation established. **Appeal and cross appeal** in *State of NSW v Doherty* 5/8/11 [2011] NSWCA 225 dismissed except for COA finding it appropriate to increase the discount for vicissitudes to 30 percent.

The COA considered the **'necessary condition' test** in *Woolworths Ltd v Strong & Anor* 2/11/10 [2010] NSWCA 282 and other aspects of **s5D** from paragraph 48 in a case where the **R slipped on a chip close to a food court**. It could not "be concluded that it was more likely than not that if there had been dedicated cleaning of the area every 15 minutes, supplemented by employees who happened to see a danger either removing it themselves, or calling a cleaner, it is more likely than not that the First Respondent would not have fallen" @69. Section **5E** also considered. **Appeal allowed** in *Strong v Woolworths Ltd* 7/3/12 [2012] HCA 5. Section 5D analysed from paragraph 17. "Reasonable care required inspection and removal of slipping

hazards at intervals not greater than 20 minutes in the sidewalk sales area, which was adjacent to the food court. The evidence did not permit a finding of when, in the interval between 8.00am and 12.30pm, the chip came to be deposited in that area. In these circumstances, it was an error for the Court of Appeal to hold that it could not be concluded that the chip had been on the ground for long enough for it to be detected and removed by the operation of a reasonable cleaning system. The probabilities favoured the conclusion that the chip was deposited in the longer period between 8.00am and 12.10pm and not the shorter period between 12.10pm and the time of the fall" @38. Heydon J dissented. See commentary below.

In *Benic v State of NSW* 30/11/10 [2010] NSWSC 1039 Garling J felt "constrained to express with great respect … [his] profound disagreement with the obiter dicta of the Court of Appeal when it recently expressed the view that the statutory requirement of s 5D for 'factual causation' and 'scope of liability' do not include the common law concepts of material contribution or increase in risk: *Strong* at [47]-[48] per Campbell JA (Handley AJA and Harrison J agreeing)" @516.

See *Zanner v Zanner* 15/12/10 [2010] NSWCA 343 where the COA discussed the **background to s5D and its scope**. In this case a **mother (R) allowed her 11 y.o. son (A) to park a vehicle in a carport** by inching a few metres forward. R had seen her son do this successfully on previous occasions. However, she stood in front of the vehicle, which was a negligent act. **A's foot slipped from brake onto the accelerator** and R was injured. Liability was apportioned **20% to A and 80% to R**.

In *Gaskin v Ollerenshaw* 7/3/12 [2012] NSWCA 33 the A was hired to paint R's roof. He was given assurances that the verandah roof was safe and that there was no need to take precautions such as planking. A did not take such precautions. The roof collapsed and A was injured. Held that A's evidence "could properly have led to an inference that the respondent's assurances were, in the sense discussed, **a necessary condition of the conduct** which led to the accident. On no sensible construction of s 5D, could it be said that such a conclusion was not open to the trier of fact. Alternatively, sub-s (2) may be available" @59. See *Strong* commentary below.

In *Coote v Dr Kelly* 14/3/12 [2012] NSWSC 219 D wrongly diagnosed P's foot lesion as simply a plantar wart. D **failed to consider the alternative diagnosis of acral lentiginis melanoma** (ALM). D erred, but Schmidt J was "confident that his **error was not deliberate** and that **what he was confronted with was extremely unusual**, given that Mr Coote was **suffering from both an AML and a plantar wart**. On the expert evidence, this **lesion was difficult to diagnose**" @103. D "did not act in accordance with widely accepted practice, but should have examined the lesion with magnification; obtained a history of the lesion; considered ALM as a differential diagnosis; and referred Mr Coote for biopsy and specialist assessment. A spot of about 2mm, like a match head, was not consistent with blood spots typically seen in plantar warts, which are capillaries. It follows that this spot was atypical and required investigation" @118. D's failure has exposed P to an imminent risk of death. However, Schmidt J concluded that even "if there had been a diagnosis made in September 2009, Mr Coote would have required excision of the lesion. He would then also have faced all of the risks of the excision which he later received. **That it is possible that his outcome would have been better, so far as the consequences of metastasis is concerned, had excision occurred in 2009, may be accepted, but that it is probable that he would have had a better outcome, has not been shown**" @173. Causation therefore not established.

In *Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd* 17/4/12 [2012] NSWCA 94 the COA considered the **applicability of s5D(1)(b) and (2) in a case involving breach of contract, negligence and s42 of the Fair Trading Act**. The applicability of s5D(1) to cases involving **consecutive or continuing harm** also considered from paragraph 74. Basten JA stated that "that both s 5D(1)(b) and (2) were intended to cover factors variously described as 'value judgments', 'normative considerations' or 'legal policy'. Whether paragraph (a) of s 5D(1) also includes policy considerations is less clear" @69.

See *Ryland v QBE Insurance (Australia) Ltd* 28/5/12 [2012] NSWDC 136 where P, a customer, **slipped on a substance which had been spilled on the vinyl surface of a clothing store**.

An informal system of inspection and cleaning existed. Neilson DCJ found there was "no evidence that this system was in any way defective or contrary to community and retail expectations … [and] that the plaintiff slipped and fell on a **substance that had been spilt … within 10 minutes prior to the plaintiff's falling**" @84. P failed to keep a proper lookout.

See *Wallace* at s5 – General (Medical negligence – failure to warn)

[Strong] "18. The determination of factual causation under s 5D(1)(a) is a statutory statement of the 'but for' test of causation**[14]**: the plaintiff would not have suffered the particular harm but for the defendant's negligence. While the value of that test as a negative criterion of causation has long been recognised**[15]**, two kinds of limitations have been identified. First, it produces anomalous results in particular cases, exemplified by those in which there is more than one sufficient condition of the plaintiff's harm. Secondly, it does not address the policy considerations that are bound up in the attribution of legal responsibility for harm**[16]**.

19. … Under the statute, factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm**[21]**. A necessary condition is a condition that must be present for the occurrence of the harm. However, there may be more than one set of conditions necessary for the occurrence of particular harm and it follows that a defendant's negligent act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the test of factual causation within s 5D(1)(a)**[22]**. In such a case, the defendant's conduct may be described as contributing to the occurrence of the harm. This is pertinent to the appellant's attack on the Court of Appeal's reasons, which is directed to par 48 of the judgment:

> 'Now, apart from the "*exceptional case*" that section 5D(2) recognises, section 5D(1) sets out what must be established to conclude that negligence caused particular harm. That emerges from the words "*comprises the following elements*" in the chapeau to section 5D(1). "*Material contribution*", and notions of increase in risk, have no role to play in section 5D(1). It well may be that many actions or omissions that the common law would have recognised as making a material contribution to the harm that a plaintiff suffered will fall within section 5D(1), but that does not alter the fact that the concepts of material contribution and increase in risk have no role to play in deciding whether section 5D(1) is satisfied in any particular case.' (emphasis in original)

21. The appellant submitted that the Court of Appeal had proceeded upon a view that factual causation under s 5D(1)(a) excludes consideration of factors making a 'material contribution' to the harm suffered by a plaintiff. This interpretation was said to require that the defendant's negligence be the 'sole necessary condition of the occurrence of the harm' and to have prompted a differently constituted Court of Appeal to disagree with it. The latter submission was a reference to the observations made by Allsop P in *Zanner v Zanner***[23]** …

22. The reference to '*material contribution*' (Court of Appeal's emphasis) in the third sentence of par 48 was not to a negligent act or omission that is a necessary, albeit not the sole, condition of the occurrence of the harm. So much is clear from the sentence that follows. Any confusion arising from the Court of Appeal's analysis may be the result of the different ways in which the expression "material contribution" has come to be used in the context of causation in tort**[24]**. …

26. Section 5D(2) makes special provision for cases in which factual causation cannot be established on a 'but for' analysis. The provision permits a finding of causation in exceptional cases, notwithstanding that the defendant's negligence cannot be established as a necessary condition of the occurrence of the harm. Whether negligent conduct resulting in a material increase in risk may be said to admit of proof of causation in accordance with established principles under the common law of Australia has not been considered by this Court**[37]**. Negligent conduct that materially contributes to the plaintiff's harm but which cannot be shown to have been a necessary condition of its occurrence may, in accordance with established principles**[38]**, be accepted as establishing factual causation, subject to the normative considerations to which s 5D(2) requires that attention be directed.

27. The authors of the Ipp Report and Allsop P in *Zanner v Zanner* assume that cases exemplified by the decision in *Bonnington Castings* would not meet the test of factual causation under s 5D(1)(a). However, whether that is so would depend upon the scientific or medical evidence in the particular case, a point illustrated by the decision in *Amaca Pty Ltd*

v Booth with respect to proof of causation under the common law**[39]**. In some cases, although the relative contribution of two or more factors to the particular harm cannot be determined, it may be that each factor was part of a set of conditions necessary to the occurrence of that harm.
28. As earlier noted, the limitations of the 'but for' analysis of factual causation include cases in which there is more than one sufficient condition for the occurrence of the plaintiff's injury. At common law, each sufficient condition may be treated as an independent cause of the plaintiff's injury**[40]**. The Ipp Report noted the conceptual difficulty of accommodating cases of this description within a 'but for' analysis, but made no recommendation because the common law rules for resolving cases of 'causal over-determination' were generally considered to be satisfactory and fair**[41]**. How such cases are accommodated under the scheme of s 5D does not call for present consideration.
29. Correctly understood, there is no conflict between the Court of Appeal's analysis of s 5D in this proceeding and Allsop P's analysis of the provision in *Zanner v Zanner*. The Court of Appeal correctly held that causation is to be determined by reference to the statutory test." **Strong v Woolworths** Ltd 7/3/12 [2012] HCA 5 French CJ, Gummow, Crennan and Bell JJ

[Melchior["Both sides seemed to assume that **the principles embodied in s 5D of the Act were in accord with the common law**. That was the approach adopted by the Court of Appeal in *Ruddock v Taylor* [2003] NSWCA 262; (2003) 58 NSWLR 269 at 286 where Ipp JA explained the section and its purpose:

> '85 As Professor Jane Stapelton has explained in her article "Cause-in-Fact and the Scope of Liability for Consequences" (2003) 119 Law Quarterly Review 388, there are two fundamental questions involved in the determination of causation in tort.
> 86 The first relates to the factual aspect of causation, namely, the aspect that is concerned with whether the negligent conduct in question played a part in bringing about the harm, the subject of the claim. Professor Stapelton argues (at 389) that this inquiry involves determining whether there was, on the part the defendant, "historical involvement in [the plaintiff] suffering actionable damage".
> 87 The second aspect concerns "the 'appropriate' scope of liability for the consequences of tortious conduct" (Stapelton, op cit, at 411). In other words, the ultimate question to be answered when addressing the second aspect is a normative one, namely, whether the defendant *ought* to be held liable to pay damages for that harm. This inquiry may involve normative issues of a general kind, or issues such as whether the so-called evidentiary gap should be bridged (in the sense explained in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613), whether the defendant materially increased the risk (in the sense explained in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32), and whether the damage claimed is too remote.
> ...
> 89 The approach to causation that I have set out forms the basis of s 5D of the *Civil Liability Amendment (Personal Responsibility) Act* 2002. This Act does not govern the present action but, in my view, the principles it embodies in
> regard to causation are in accord with the common law.'

130 Applying those principles, this submission by the plaintiffs fails to meet the test of factual causation. There is no evidence to support the submission. The proposition was never put in terms to any of the doctors. The submission is based on speculation not inference. In that regard, not only is it not known when the clot formed and when it broke off, but it is not capable of being known." **Melchior & Ors v Sydney Adventist Hospital Ltd & Anor** 9/12/08 [2008] NSWSC 1282 Hoeben J

[Neal] "35 … That is because the proceedings were governed by the *Civil Liability Act* 2002 (NSW), s 5D of which relevantly provides as follows:

> '5D General principles
> (1) A determination that negligence caused particular harm comprises the following elements:
> (a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*), ...
> (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.'

36 The real purpose of paragraph (a) is not easy to discern, without reference to extrinsic material … Section 5D was introduced in response to the *Review of the Law of Negligence, Final Report* (2002) ('the Negligence Review') which noted that, in order to answer the question of what the plaintiff would have done if the defendant had not behaved negligently, Australian courts adopted a 'subjective approach'. The Negligence Review affirmed that approach at par 7.40, having described the approach in the following terms at 7.38:

'The subjective approach depends on asking what the plaintiff would actually have done if the defendant had not been negligent, whereas the objective approach depends on asking what the reasonable person in the plaintiff's position would have done if the defendant had not been negligent.'

37 The Negligence Review also noted … that Canadian law asked 'what the reasonable person *in the plaintiff's position and with the plaintiff's beliefs and fears* would have done': ... That approach was rejected on the basis that it required 'an answer to the nonsensical question of what a reasonable person with unreasonable views would have done'. Whether the statute has excluded that approach is less clear and depends on the operation of both paragraphs (a) and (b) of s 5D(3).

38 Paragraph (b) excludes the plaintiff's evidence as to what he or she would have done. The Negligence Review stated at par 7.40:

'[T]he Panel is also of the view that the question of what the plaintiff would have done if the defendant had not been negligent should be decided on the basis of the circumstances of the case and without regard to the plaintiff's own testimony about what they would have done. The enormous difficulty of counteracting hindsight bias in this context undermines the value of such testimony. In practice, the judge's view of the plaintiff's credibility is likely to be determinative, regardless of relevant circumstantial evidence. As a result, such decisions tend to be very difficult to challenge successfully on appeal. We therefore recommend that in determining causation, any statement by the plaintiff about what they would have done if the negligence had not occurred should be inadmissible.'

39 … The modern approach, reflected in the *Evidence Act* 1995 (NSW), is to abandon inadmissibility in favour of allowing the jury (or judge) to assess weight and reliability. Prior to the *Civil Liability Act*, the lack of weight likely to attend self-interested assertions was well understood: see, eg, *Smith v Barking, Havering and Brentwood Health Authority* [1994] 5 Med LR 285 at 289 (Hutchinson J) quoted by Gummow J in *Rosenberg v Percival* [2001] HCA 18; 205 CLR 434 at [89]; see also Madden and Cockburn, 'What the Plaintiff Would Have Done: s 5D(3) of the *Civil Liability Act* 2002 (NSW)' (2006) 3 *Aust Civil Liability* 47. On one view, the difficulty of 'counteracting hindsight bias' might have been thought to lie with the plaintiff. It seems unlikely that the provision was introduced to prevent the trivial waste of time which might attend the adducing and challenging of such evidence. Rather, the purpose of the provision appears to be to prevent a trial judge placing any weight on such evidence, in circumstances where it could not be said to be an abuse of his or her advantage as a trial judge. (Were it otherwise, an appellate court could intervene.)

40 Whatever the real purpose of the provision, **the issue for determination is how a court is now to identify what course the plaintiff would have taken, absent negligence. That assessment might include evidence of the following:**

(a) conduct of the plaintiff at or about the relevant time;

(b) evidence of the plaintiff as to how he or she might have felt about particular matters;

(c) evidence of others in a position to assess the conduct of the plaintiff and his or her apparent feelings or motivations, and

(d) other matters which might have influenced the plaintiff."

Neal v Ambulance Service of NSW 10/12/08 [2008] NSWCA 346 Basten JA, Full Court

s5D(2)

[Adeels Palace] "52 In the present case … the 'but for' test of factual causation was not established. It was not shown to be more probable than not that, but for the absence of security personnel (whether at the door or even on the floor of the restaurant), the shootings

would not have taken place. That is, the absence of security personnel at Adeels Palace on the night the [Ps] were shot was not a necessary condition of their being shot. Because the absence of security personnel was not a necessary condition of the occurrence of the harm to either [P], s 5D(1) was not satisfied. Did s 5D(2) apply?
54 Section 5D(2) makes provision for what it describes as 'an exceptional case'. But the Act does not expressly give content to the phrase 'an exceptional case'. All that is plain is that it is a case where negligence cannot be established as a necessary condition of the harm; the 'but for' test of causation is *not* met. In such a case the court is commanded 'to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party'. But beyond the statement that this is to be done 'in accordance with established principles', the provision offers no further guidance about how the task is to be performed. Whether, or when, s 5D(2) is engaged must depend, then, upon whether and to what extent 'established principles' countenance departure from the 'but for' test of causation.
55 At once it must be recognised that the legal concept of causation differs from philosophical and scientific notions of causation**[36]**. It must also be recognised that before the Civil Liability Act and equivalent provisions were enacted, it had been recognised**[37]** that the 'but for' test was not always a *sufficient* test of causation. But as s 5D(1) shows, the 'but for' test is now to be (and has hitherto been seen to be) a *necessary* test of causation in all but the undefined group of exceptional cases contemplated by s 5D(2).
56 Even if the presence of security personnel at the door of the restaurant *might* have deterred or prevented the person who shot the [Ps] from returning to the restaurant, and even if security personnel on the floor of the restaurant *might* have been able to intervene in the incident that broke into fighting in time to prevent injury to anyone, neither is reason enough to conclude that this is an 'exceptional case' where responsibility for the harm suffered by the [Ps] should be imposed on Adeels Palace. To impose that responsibility would not accord with established principles.
57 It may be that s 5D(2) was enacted to deal with cases exemplified by the House of Lords decision in *Fairchild v Glenhaven Funeral Services Ltd***[38]** where [Ps] suffering from mesothelioma had been exposed to asbestos in successive employments. Whether or how s 5D(2) would be engaged in such a case need not be decided now. The present cases are very different. No analogy can be drawn with cases like *Fairchild*. Rather, it would be contrary to established principles to hold Adeels Palace responsible in negligence if not providing security was *not* a necessary condition of the occurrence of the harm but providing security *might* have deterred or prevented its occurrence, or might have resulted in harm being suffered by someone other than, or in addition to, the [Ps]. As in *Modbury***[39]**, the event which caused the [Ps'] injuries was deliberate criminal wrongdoing, and the wrongdoing occurred despite society devoting its resources to deterring and preventing it through the work of police forces and the punishment of those offenders who are caught. That being so, it should not be accepted that negligence which was not a *necessary* condition of the injury that resulted from a third person's criminal wrongdoing was a cause of that injury. Accordingly, the submission that the [Ps'] injuries in these cases were caused by the failure of Adeels Palace to take steps that *might* have made their occurrence less likely, should be rejected." **Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem** 10/11/09 [2009] HCA 48 (footnotes omitted) [*Applied* in *Stojan (No 9) Pty Ltd v Kenway* 12/11/09 [2009] NSWCA 364 at 143]

s5D(3)

Goldring DCJ considered this section in *LK v Parkinson* 19/3/09 [2009] NSWDC 47 in the context of whether the question 'if you were advised that there were surgical risks with tubal ligation, you would have chosen a Mirena Inter Uterine Device' was a proper question in light of s5D(3).

In *Frisbo Holdings v Austin Australia* 11/3/10 [2010] NSWSC 155 Hislop J accepted P's submission "that s 5D(3) had no application as the object and purpose of the Act was to make provision for the recovery of damages for death or personal injury caused by negligence. The sub-section only applies to statements given by a plaintiff who has suffered personal injury. The reference to economic loss in the definition of 'harm' was to economic loss suffered by the person sustaining personal injury. The **claim made by the plaintiffs was not a claim for**

damages for death or personal injury caused by negligence but was a claim for an indemnity or for pure economic loss"@36.

In *Warragamba Winery Pty Ltd v State of NSW* 15/11/11 [2011] NSWSC 1492 Walmsley AJ considered the **breadth of s5D(3)** in a case where a hypothetical issue was considered in evidence – namely what the Ps would have done if the Ds had warned them appropriately of the fire approaching their properties. "The fact that the legislature specifically excluded the operation of s 5D(3) only to statements against interest, emphasises the breadth of reach of s 5D(3)" @30. The **hypothetical evidence disallowed**.

s5E – Causation (onus of proof)

See *O'Gorman v Sydney South West Area Health Service* 29/10/08 [2008] NSWSC 1127 where from paragraph 146 Hobe J discussed how **s5D and s5E are in accord with the common law**.

See *Rickard & Ors v Allianz Australia Insurance Ltd & Ors* 23/10/09 [2009] NSWSC 1115 where Hoeben J stated that a "finding of causation in relation to the first alternative has to comply with s 5E *CLA* and with the principles identified by this Court in *Flounders v Millar* [2007] NSWCA 238 at [4–39] (Ipp JA) and *Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153 at [29–39] (Giles JA) and [123–154] (Ipp JA). In this case while it was clear that the failure to appropriately position a warning sign to the east of 'Lyntods' may have increased the risk of injury, there was no evidence that this risk came home in the relevant sense. (*Seltsam Pty Limited v McGuiness; James Hardie & Co Pty Limited v McGuiness* [2000] NSWCA 29; (2000) 49 NSWLR 262 (Spigelman CJ at [119])"@134. **Appeal dismissed** in *Allianz Australia Insurance Ltd v RTA NSW; Kelly v RTA NSW* 9/12/10 [2010] NSWCA 328 where Giles JA stated that "**it should be concluded that a 'Water Over Road" sign placed 150 to 300 metres [as opposed to the 924m distance it was actually placed] to the east of 'Lyntods' would not have changed Mr Kelly's driving**, or at least that it is speculative whether or not it would have done so. Causation was not established" @151. Mr Kelly had not changed his driving behaviour when he passed the sign that was in place.

See *Giovenco* at s5B(1)(b)

In *Peterson v South Eastern Sydney Illawara Area Health Service & Elliott* 24/6/10 [2010] NSWDC 114 Levy SC DCJ considered the hospital's and visiting medical consultant's liability in relation to an **allegedly unreasonable delay in arranging further surgery where there was a non-union, or delayed union, of P's complex Type 3 Pilon tibial fracture**. D's not in breach of their duties. Causation not established.

See *Hirst v Sydney South West Area Health Service* 22/8/11 [2011] NSWSC 664 per Davies J concerning **onus and pre-existing injuries**. The standing of *Watts v Rake* and *Purkess v Crittenden* awaits an authoritative decision of the COA. Davies J considered that the principle in *Watts v Rake* applied notwithstanding s5E.

s5F – Meaning of 'obvious risk'

The risk of falling off a tailgate loader not considered to be an 'obvious' or 'inherent risk' within s5F or s5I respectively by Murrell SC DCJ in *Richards v Cornford* 7/4/09 [2009] NSWDC 60. The risk could be avoided by the exercise of reasonable skill and care.

Section 5F considered from paragraph 103 in *Thomas v Shaw* 26/6/09 [2009] NSWSC 510 by Kirby J in the case of a sleepover where a **bunk bed did not have a ladder or a guard rail** and where visiting ten year old child injured whilst descending bunk. **Appeal allowed** in [2010] NSWCA 169 where COA did not consider that A breached its duty in light of the facts that "Cameron was a normal, active 10 year old; the height from which he had to descend was a low one (about 1.4 metres) which was approximately equivalent to his own height; as Cameron was sitting on the side with his legs dangling down, his feet had to descend little more than a metre for him to get down from the top bunk; and the metal framework of the end of the bed which had been used by him to get up and, on previous occasions, to get up both up and down, was easily accessible to him" @8. **COA did not agree that a reasonable person in A's position would have ensured that the bunk bed had a ladder and guard-rail**.

See *Addison v The Owner – Strata Plan No. 32680* 6/10/10 [2010] QDC 251 where Gibson DCJ from para. 43 provides a **useful discussion of the leading cases interpreting the meaning of 'obvious risk'**. In this case a 19 y.o. fell in a pit at night. **He knew of the pit because he had traveled on the private laneway during the day**, but could not see on this occasion as it was pitch black. "[T]here was no fencing of any kind or indication that the property in question was private property. There was plenty of lighting at the commencement of the path, from both directions. This was as a result of the street lighting. **It was only when the plaintiff arrived towards the middle of the path that he found himself in difficulties**. … The danger to the plaintiff lay from the fact that having commenced along the pathway because the lighting was adequate, he reached a portion of the pathway where his path both ahead and back was difficult, if not impossible to see. There was **nothing to warn him that this portion of the path was particularly dark**. The opportunity to appreciate this was limited by the suddenness with which he found himself in complete darkness due to a combination of factors, namely the moonless night and the fact that it was a dark winter evening. **This risk was not obvious when he commenced walking along the path**, and the extensive use of this path by other members of the public meant he took for granted that it was safe for him to use it" @54-59. Risk not found to be obvious and liability established. **30% contributory negligence**.

See *Campbell v Hay* 19/2/12 [2013] NSWDC 11 where Marks ADCJ found the **D aircraft instructor (an experienced pilot) negligent for not heading for a landing strip immediately after noticing engine vibrations** and in continuing on to Katoomba relying on a misplaced innate sense of luck. D's forced landing, which did not result in loss of life, was not negligent. Nor was the D aware of the engine problem. Nor ought he have been. P was 47 in 2007 when he suffered his injuries as a student of D. P found to be involved in a **dangerous recreational activity**. Various authorities canvassed. **Obvious risk as defined by s5F also found**. Appeal dismissed 16/4/14 in [2014] NSWCA 129.

See *Kelly* at Slips/Trips where P **ran down steep dunes to jump into a lake**, an activity that many others were doing and which he had done several times before.

See *Ackland v Stewart, Vickery & Stewart* 21/2/14 [2014] ACTSC 18 per Burns J, where P became a quadriplegic in 2009 after performing a **backward somersault on a jumping pillow** at a fun park and landing on his neck. Such activity **held to be a dangerous recreational activity**, but the **risk of serious neck injury was not considered obvious**. P was 21 and a law student at the time. D breached its duty of care by not providing signs or warnings prohibiting somersaults and for failing to direct P to desist from doing somersaults. D knew of Jumping Pillows Pty Ltd's recommendations against somersaults. See full précis at Quadriplegia (recent awards).

See *Chandra* at s5B(1)(b) and *Giovenco* at s5B(1)(b).
See *El Khoury* at s5 – General factual situations … (Diving injuries)

> [Perrett] "37 The assumption implicit in Mr McCulloch's approach appeared to be that, if I were satisfied that the risk that materialised when Mr Perrett fell was an 'obvious risk' … it would necessarily follow that the [Ds] were not in breach of any duty of care to Mr Perrett. The contention, if I have understood it correctly, appeared to be that, following the enactment of the *Civil Liability Act*, a person is not liable in negligence for harm suffered due to the materialisation of an 'obvious risk' as defined in s 5F.
> 38 With great respect … I think it inverts the process to begin by considering the application of the provisions of Division 4 of Part 1A. I do not accept that those provisions preclude a finding of breach of duty in respect of the materialisation of an 'obvious risk' within the meaning of s 5F.
> 39 Assuming the existence of a duty to take reasonable care to avoid injury to persons such as Mr Perrett, the first task … is to determine whether the [Ds] breached that duty. That issue is determined by applying the *Shirt* calculus. It is well established that the obviousness of the risk to a careful pedestrian is a relevant factor in that determination: *Temora* at [31] per Giles JA. It will sometimes even be a dominant factor, but it is not conclusive: *Temora* at [41]. That was the law before the enactment of the *Civil Liability Act*, and in my view it remains the law.

40 If it is concluded that the duty of care has been breached, only then does it become necessary to consider any substantive defences relied upon by the [Ds]. If that point is reached, one of the elements of the defence of voluntary assumption of risk (assuming that is one of the defences relied upon) is that the [P] was aware of the relevant risk. Section 5G of the *Civil Liability Act* is an aid to proof of that element of the defence (if the risk was obvious within the meaning of s 5F) but does not, in my view, create a discrete statutory defence. …
74 In the present case, the test is whether the risk of falling down the steps would have been obvious to a reasonable person in the position of Mr Perrett. The burden of proof on that issue is on the [Ds].
75 As noted by Basten JA in *Fallas v Mourlas* [2006] NSWCA 32; (2006) 65 NSWLR 418 at [152], a difficulty that attends the task of determining whether a risk is an 'obvious risk' within the meaning of s 5F is to know the level of particularity with which the relevant risk should be identified. It might readily be thought that, in general, the risk of falling down stairs is an obvious risk within the meaning of s 5F so that, in accordance with s 5H, the owner or occupier of premises that include flights of stairs does not owe a duty of care to persons who attend those premises to place a sign at the top and bottom of every flight of stairs warning of the risk of injury when negotiating stairs.
76 That is not, however, how the present case was run. The contention put on behalf of Mr Perrett was that, by reason of their uniform appearance, the steps were difficult to see and that the difficulty was compounded by the distracting presence of the sign set beyond the first step.
77 In my view, **the determination of the question of 'obvious risk' in the present case turns on whether the presence of those steps would have been obvious to a reasonable person in the position of Mr Perrett**. I am not satisfied that it would.
Perrett v Sydney Harbour Foreshore Authority; Wine & Vine Personnel Pty Ltd v Sydney Harbour Foreshore Authority 30/9/09 [2009] NSWSC 1026 McCallum J

s5G – Injured persons presumed to be aware of obvious risks

See *Perrett v Sydney Harbour Foreshore Authority; Wine & Vine Personnel Pty Ltd v Sydney Harbour Foreshore Authority* 30/9/09 [2009] NSWSC 1026 per McCallum J from paragraph 35. The **relationship between s5F & s5G considered**.

s5H – No proactive duty to warn of obvious risk

"47 The third section in Division 4 of Part 1A is s 5H, which provides that, except in specified circumstances, a person does not owe a duty of care to another person to warn of an obvious risk to that person. The effect of that provision is to carve out liability for failure to warn of an 'obvious risk' from the scope of potential liability for failure to warn. Section 5H does not, however, create a substantive defence, except in response to an allegation of negligence by failure to warn. In respect of any allegation of negligence other than failure to warn, s 5H has no work to do. It certainly does not provide that there is no duty to take reasonable care to avoid injury caused by the materialisation of an 'obvious risk'."
Perrett v Sydney Harbour Foreshore Authority; Wine & Vine Personnel Pty Ltd v Sydney Harbour Foreshore Authority 30/9/09 [2009] NSWSC 1026 McCallum J

s5I – No liability for materialisation of inherent risk

The risk of falling off a tailgate loader not considered to be an 'obvious' or 'inherent risk' within s5F or s5I respectively by Murrell SC DCJ in *Richards v Cornford* 7/4/09 [2009] NSWDC 60. The risk could be avoided by the exercise of reasonable skill and care.

See from paragraph 48 *Perrett v Sydney Harbour Foreshore Authority; Wine & Vine Personnel Pty Ltd v Sydney Harbour Foreshore Authority* 30/9/09 [2009] NSWSC 1026 per McCallum J

See *Paul v Cooke* 25/7/12 [2012] NSWSC 840 where Brereton J stated that "Section 5I does not operate to extinguish liability for breaches of duty that cause harm, just because the same harm can also be caused without negligence, but merely **restates the common law position that there is no liability in respect of a risk that materialises without negligence - except in the context of a breach of a duty to warn of such a risk**. It is concerned with the particular risk and its materialisation in the instant case. Accordingly, it is not in truth a 'defence' - anymore than it was at common law - but simply the corollary of the requirement that the

plaintiff prove breach of duty and causation. The onus remains on the plaintiff to prove breach of duty and causation, and the defendant does not bear any onus of proving that a risk is 'inherent', or that the plaintiff has 'assumed' the risk. The 'reasonable care and skill' referred to in s 5I(2) is that of the defendant, and not that of some subsequent intervener whose intervention is occasioned by the defendant's negligence. Accordingly, s 5I(1) does not apply where the risk would not have materialised if the defendant had used reasonable care and skill. Applied to this case, if I be wrong in respect of causation, then although the coiling procedure in 2006 involved an inherent risk of rupture, which materialised, on the probabilities it would not have occurred if Dr Cooke had made a timely and accurate diagnosis: the occurrence could and would have been avoided by the exercise of reasonable care and skill on his part. Accordingly, save for the necessity to undergo the additional CT scans in 2006, Dr Cooke's admitted negligence was not causative of harm to Mrs Paul" @129-130. **Appeal dismissed** in *Paul v Cooke* 19/9/13 [2013] NSWCA 311. However, appeal court did not agree with trial judge's handling of s5I. Ward JA stated **"there is not a dichotomy in s 5I between the 'occurrence' being unavoidable and the 'risk' being unavoidable. What must be identified is the particular risk that cannot be avoided with the exercise of reasonable care and skill**. The section refers to the risk of 'something occurring'. It is in that context that one focusses on the occurrence, to see whether what has occurred is the materialisation of such a risk. Here, the risk of intra-operative rupture was always present and could not with reasonable care and skill be avoided once the decision was made to have an operation of whichever kind the appellant elected to have. It was a risk that could only have been avoided had the decision to undergo surgery not been made." @16-17.

s5K - Definitions

This section considered in a case where a D gym operator was held liable to a P injured whilst undertaking an exercise regime. D, in arguing that it had not breached its duty owed to P by erring re the suitability of the regime, claimed that the exercise programme was not a **'recreational activity'** as defined by s5K because the P engaged in it to lose weight and to get fit and not as 'recreation'. The learned judge erred by accepting this argument. The definition of **'sport'** within s5K also considered. **Paragraph (c)** also considered. *Belna Pty Ltd v Irwin* 26/2/09 [2009] NSWCA 46 Full Court

In *Mahon v The Paintball Place P/L & Anor* 1/7/10 [2010] NSWDC 124 Levy SC DCJ, in a case where **participants in a paint ball game clashed after the game whilst still on the D's premises and P was injured**, considered that s5K did not apply.

See *El Khoury* at s5 – General factual situations … (Diving injuries)

In *Vreman & Morris v Albury City Council* 11/2/11 [2011] NSWSC 39 Harrison J found the D not liable in negligence for harm suffered by the P's "because the harm was suffered as a result of the materialisation of an obvious risk of a **dangerous recreational activity** in which they were each separately engaged" @103. Both P's were **riding their BMX bikes at a skate park** when they were injured and where they were aware that the **recently painted surface had become more slippery**. D's **warning sign was however inadequate** as it did "not give a general warning of risks that include the particular risks" @112. Harrison J considered "that whilst the risk of falls such as those suffered by Mr Vreman and Mr Morris was not insignificant, **the additional or greater risk of falls associated only with the application of paint to the concrete surfaces was insignificant** [@134] … [and that it] is not possible … to say that either accident would not have happened if the surface of the skate park had been unpainted concrete" @143.

s5L – Dangerous recreational activities

In *Nicol v Whiteoak & Anor (No. 2)* 5/12/11 [2011] NSWSC 1486 Adamson J stated that "Travelling on a motor vessel in a protected waterway such as the Georges River may not be dangerous at all if the driver of the vessel is not intoxicated and is taking due care. However where, as here, it was dusk, the boat was not illuminated, it was travelling at such a speed that the sound of its motor could readily be identified at a distance and remarked upon and, I infer, the driver was intoxicated, the recreational activity of boating on a river had become, by those circumstances, dangerous" @49. The P was a passenger and in "the absence of any evidence to implicate the [P] in the dangerous aspects of the otherwise relatively safe **recreational**

activity of travelling on a boat in a protected waterway such as the Georges River … [found] that the first defendant has not discharged the burden of proof of establishing a defence under s 5L" @73.

See *Campbell v Hay* 19/2/12 [2013] NSWDC 11 where Marks ADCJ found the **D aircraft instructor (an experienced pilot) negligent for not heading for a landing strip immediately after noticing engine vibrations** and in continuing on to Katoomba relying on a misplaced innate sense of luck. D's forced landing, which did not result in loss of life, was not negligent. Nor was the D aware of the engine problem. Nor ought he have been. P was 47 in 2007 when he suffered his injuries as a student of D. P found to be involved in a **dangerous recreational activity**. Various authorities canvassed. **Obvious risk as defined by s5F also found**. Appeal dismissed 16/4/14 in [2014] NSWCA 129.

See *Echin v Southern Tablelands Gliding Club* 28/5/13 [2013] NSWSC 516 where Davies J found that **gliding was a dangerous recreational activity** and that "Even if gliding generally could not be considered as a dangerous recreational activity, the act of performing a landing over the powerlines was a dangerous recreational activity" @124. "The risk of striking the powerlines was an obvious risk of gliding over powerlines and, more particularly, of performing a landing over the powerlines because of the need for a descent over them or very shortly after passing over them" @126.

See *Ackland v Stewart, Vickery & Stewart* 21/2/14 [2014] ACTSC 18 per Burns J, where P became a quadriplegic in 2009 after performing a **backward somersault on a jumping pillow** at a fun park and landing on his neck. Such activity **held to be a dangerous recreational activity**, but the **risk of serious neck injury was not considered obvious**. P was 21 and a law student at the time. D breached its duty of care by not providing signs or warnings prohibiting somersaults and for failing to direct P to desist from doing somersaults. D knew of Jumping Pillows Pty Ltd's recommendations against somersaults. See full précis at Quadriplegia (recent awards).

s5M(1) – No duty of care for recreational activity when risk warning

This section considered in a case where a D gym operator was held liable to a P injured whilst undertaking an exercise regime. D, in arguing that it had not breached its duty owed to P by erring re the suitability of the regime, claimed that the exercise programme was not a **'recreational activity'** as defined by s5K because the P engaged in it to lose weight and to get fit and not as 'recreation'. The learned judge erred by accepting this argument. The definition of **'sport'** within s5K and **'risk warning'** within s5M also considered. *Belna Pty Ltd v Irwin* 26/2/09 [2009] NSWCA 46 Full Court

See *Action Paintball Games Pty Ltd (In liquidation) v Barker* 13/5/13 [2013] NSWCA 128 where it was found on appeal that there was "**no obligation on the appellant, in exercise of its duty of reasonable care, to remove the offending tree root**" @37. A ran an **outdoor 'laser tag' game in bushland** and A, who was 10, tripped over the tree root and fractured her elbow. The R did warn participants of general risks of the activity and A's father was with her when the warning was given. Various provisions of section 5 considered, including s5M.

s5N – Waiver of contractual duty of care for recreational activities

In *Insight Vacations P/L v Young* 11/6/10 [2010] NSWCA 137 the COA considered the interrelationship between s5N and sections 68B, 68(1)(c), & s74(2A) of the Trade Practices Act re **'recreational services'** in a case where a passenger was injured on an overseas tour bus. **Appeal dismissed by High Court** in *Insight Vacations P/L v Young* 11/5/11 [2011] HCA 16. The High Court stated that, "Section 5N of the Civil Liability Act … is not a law of a kind picked up and applied by s 74(2A). Section 5N does not itself provide any exclusion, restriction or modification of liability. It permits parties to contract for the exclusion, restriction or modification of liability. That is reason enough to conclude that Insight's appeal should be dismissed. In any event, s 5N, had it been picked up and applied by s 74(2A), would not have engaged with the facts and circumstances of this case. Section 5N applies only to contracts for the supply of recreation services in New South Wales. Insight's contract with Mrs Young was to supply recreation services to her outside New South Wales. And in any event, on its true construction, the exemption clause did not apply to the events that happened. The

exemption clause should be construed as engaged only when a passenger was seated, and as having no application when the passenger was standing or moving about the coach" @8-9.

s5O – Standard of care for professionals

See *Hawes v Holley* 22/8/08 [2008] NSWDC 147 where ADCJ Hungerford upheld the s5O defence in the case of a doctor who was found not to be negligent in failing to administer a drug when there were differing medical opinions re doing so in the circumstances.

See *O'Gorman v Sydney South West Area Health Service* 29/10/08 [2008] NSWSC 1127 where from paragraph 109 s5O and the **standard of care of health professionals** considered by Hoeben J. D held not to be able to rely on the s5O defence.

Section referred to in *MD v Sydney South West Area Health Service* 13/2/09 [2009] NSWDC 22 where Goldring DCJ found that it must be pleaded and particularised.

In *Kocev v Toh* 9/7/09 [2009] NSWDC 169 Hungerford ADCJ considered that **chiropractic treatment** given to P (a QL stretch) did not breach the chiropractor's standard of care.

In *Hope v Hunter* 27/11/09 [2009] NSWDC 307 Levy SC DCJ found that the D **surgeon did not operate according to widely accepted standards of professional practice when in a ganglion excision operation he damaged an artery** of the P's.

In *Thompson v Haasbroek & Ors* 29/3/10 [2010] NSWSC 111 Davies J found that Dr Haasbroek did not operate according to widely accepted standards of professional practice when he **failed to diagnose P's cervical radiculopathy.** This was so even though cervical radiculopathy was quite a **rare complaint.**

In *Peterson v South Eastern Sydney Illawara Area Health Service & Elliott* 24/6/10 [2010] NSWDC 114 Levy SC DCJ considered the hospital's and visiting medical consultant's liability in relation to an **allegedly unreasonable delay in arranging further surgery where there was a non-union, or delayed union, of P's complex Type 3 Pilon tibial fracture**. D's not in breach of their duties.

See *Weller v Phipps* 30/11/10 [2010] NSWCA 323 where COA affirmed decision that **solicitor had been negligent in failing to advise or obtain counsel's advice**.

See *Indigo Mist Pty Ltd v Palmer* 9/8/12 [2012] NSWCA 239 where s5O defence not made out in case involving smooth glass **stairs that were unsuitable in a hotel due to their slippery nature when wet**.

See *AV8 Air Charter Pty Ltd v Sydney Helicopters Pty Ltd* 7/12/12 [2012] NSWDC 220 where a **civilian helicopter struck an unmarked suspended electricity wire in a restricted military area**. Levy SC DCJ found that in light of the cloudy weather conditions the pilot gave a satisfactory explanation for flying in a restricted zone and found that he was not negligent in hitting the wire. The s5O point did not relevantly arise as no negligence had been established. However, the D, a corporate entity, would not have fulfilled the requirement of being a **'person practising a profession'**. The proportionate liability provisions of CLA found to apply as, had liability been established, "the energy supply company would more probably than not have been found liable to the plaintiff for breach of duty of care and negligence in leaving the wire in an unmarked state" @249. Damages for repair of helicopter and loss of profits notionally assessed. **Appeal dismissed** 12/3/14 in [2014] NSWCA 46 except the trial judge's assessment of damages was found to be "unreliable because he confused the helicopter under consideration with another helicopter" @128.

See *Fischer v Howe* 2/5/13 [2013] NSWSC 462 where Adamson J considered s5O in a case where **D owed P a duty as an intended beneficiary to procure an informal will**.

See *Belokozovski v Magarey* 7/3/14 [2014] NSWDC 5 where in 2006 P had an "**laparoscopic cholecystectomy**. This is surgery involving entry to the abdomen through an incision cut close

to, and just above, the umbilicus. The purpose is to remove the patient's gall bladder. For some time after the surgery the plaintiff suffered from severe pain in his abdomen together with a frequent discharge from the operation wound. He required a number of subsequent operations until 2010 when his umbilicus was excised and his physical problems came to an end" @2. D denied negligence relying on s5O. R found negligent for "proceeding to surgery without first obtaining liver function tests", but not for "failing to remove the sutures after surgery or, at least, taking steps to investigate if the sutures were the source of the discharge" @5. R not found to be negligent by reason of using nylon sutures as opposed to absorbable sutures.

[Melchior] "141 In relation to the application of s 5O I respectfully adopt the approach of McClellan CJ at CL in *Halverson v Dobler* [2006] NSWSC 1307, that the section is intended to operate as a defence. This approach was approved by the Court of Appeal in *Dobler v Kenneth Halverson* [2007] NSWCA 335 at [59] – 60] where Giles JA said:

'59 Section 5O was amongst the tort law reforms consequent on the *Review of Law of Negligence Final Report, September 2002* ("the *Review*"). It was intended to introduce a modified *Bolam* principle. Its importance does not lie so much in questions of onus of proof as in who determines the standard of care. Commonly, as in the present case, there will be expert evidence called by the plaintiff to the effect that the defendant's conduct fell short of acceptable professional practice and expert evidence called by the defendant that it did not; the expert evidence may or may not recognise that the opposing professional practice is one which has some currency. Apart from s 5O the Court would determine the standard of care, guided by the evidence of acceptable professional practice. It would not be obliged to hold against the plaintiff if the defendant's conduct accorded with professional practice regarded as acceptable by some although not by others. **Section 5O has the effect that, if the defendant's conduct accorded with professional practice regarded as acceptable by some (more fully, if he "acted in a manner that ... was widely accepted ... by peer professional opinion as competent professional practice"), then subject to rationality that professional practice sets the standard of care.**

60 In this sense, s 5O provides a defence. The plaintiff will usually call his expert evidence to the effect that the defendant's conduct fell short of acceptable professional practice, and will invite the court to determine the standard of care in accordance with that evidence. He will not be concerned to identify and negate a different professional practice favourable to the defendant, and s 5O does not require that he do so. The defendant has the interest in calling expert evidence to establish that he acted according to professional practice widely accepted by peer professional opinion, which if accepted will (subject to rationality) mean that he escapes liability.'

142 In accordance with that interpretation of s 5O and applying the 'modified *Bolam* principle' the defendants have established that Dr Newman acted in a manner which as of May 2004 was widely accepted in Australia by orthopaedic surgeons practising in the field of foot and ankle surgery as competent, professional practice." **Melchior & Ors v Sydney Adventist Hospital Ltd & Anor** 9/12/08 [2008] NSWSC 1282 Hoeben J

s5Q – Liability based on non-delegable duty

In *Galea v Bagtrans P/L* 15/12/10 [2010] NSWCA 350 the COA found that **jolting incidents whilst the A was travelling over pot holes** constituted a 'motor accident or incident' (**an 'incident'** to be precise) pursuant to s3. A was a **truck driver employed by labour hire company** Adecco. He was **placed with Bagtrans P/L whose truck which he drove had a defective seat**. A had complained about seat and was told erroneously by an employee of Bagtrans that the seat had been fixed. He subsequently commenced a journey and suffered injury when he experienced severe jolting. Liability apportioned 85% to Bagtrans and 15% to Adecco.

In *Harris v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor* 10/11/12 [2011] NSWDC 172 Elkaim SC DCJ considered the school's and the operator of the ski resort's (2nd D) liability when the P was **injured in a beginner's ski class while on a school excursion** when he was 16. The 2nd D was found negligent. It breached its duty of care to the P by conducting ski lessons for learners in an area where there was an obstacle which learners were not equipped to deal with. There was "a dangerous ditch and mound … which a proper inspection would have identified" @131. In the circumstances P was engaged in a '**dangerous recreational activity**'. "[I]f the plaintiff had lost control and fallen over, or fallen

due to an undulation in the surface, or even simply fallen over, and been injured, that would have been the materialisation of an obvious risk. But skiing into a ditch on a beginners' slope is quite different. This is the **materialisation of a risk that is far from obvious**" @145. Exemption of s5L (dangerous recreational activity) does not apply. 2nd D wholly negligent.

s5R – Standard of contributory negligence

Sections 5R & 5S considered in *Adams by her next friend O'Grady v State of NSW* 28/11/08 [2008] NSWSC 1257 Rothman J from paragraph 132.

In *Hodges v Coles Group Ltd* 4/6/09 [2009] NSWDC 189 Williams DCJ at paragraph 31 stated that "[t]he Civil Liability Act s 5R provides that the standard of care required from an injured person is that of a reasonable person in that person's position, having regard to what the person knew or ought to have known at the time. I cannot see that the plaintiff's actions in continuing the unloading procedure with a heavy trolley when Mr Cheek had departed to attend yet another delivery, amounted to a failure to take reasonable care for his own safety".

In *Le v Rawson* 15/10/09 [2009] NSWCA 332 the COA held that the trial judge erred by applying a subjective test, when the **test was objective**.

In *Doherty v State of NSW* 20/5/10 [2010] NSWSC 450 Price J considered the risk of psychological injury 'not insignificant' in the case of a **crime scene investigator**. P's return to work after experiencing major depression was not appropriately handled. Causation established. Held that by "**failing to reveal his true position** and by being misleading the plaintiff made it particularly difficult for the medical practitioners, psychologists and supervisors to help him. The **plaintiff negligently exposed himself to crime scenes** in 2003 and 2004. The traumatic exposures which followed would not have occurred but for this conduct"@270. **35% contributory negligence** found. **Appeal and cross appeal** in *State of NSW v Doherty* 5/8/11 [2011] NSWCA 225 dismissed except for COA finding it appropriate to increase the discount for vicissitudes to 30 percent.

In *Peterson v South Eastern Sydney Illawara Area Health Service & Elliott* 24/6/10 [2010] NSWDC 114 Levy SC DCJ did not find contributory negligence on P's part for **failing to cease smoking after being advised to in the context of the slow healing of his fractures**.

See *BestCare Foods Ltd & Anor v Origin Energy LPG …* 23/8/11 [2011] NSWSC 908 where Nicholas J did not find contributory negligence on the part of P when their **factory was destroyed by fire and a massive explosion due to a leakage of LPG**.

In *Robson v Gould & Anor* 17/11/11 [2011] NSWDC 176 Elkaim SC DCJ was "satisfied that **a reasonable person in the position of the [P motorcyclist] would have been aware of the value of a headlight in making her vehicle more visible**. The [P] agreed that she was so aware. In addition, the act of turning on the headlight was a very small burden, in particular compared to the foreseeable risk of harm arising from a motorist not seeing the motorcycle" @24. P's contributory negligence assessed at 7.5%. D crossed an intersection of a major highway without sufficient regard to P, who was on the highway.

See *Boral Bricks Pty Ltd v Cosmidis (No 2)* 7/5/14 [2014] NSWCA 139. "Assuming that the requirement that people should take responsibility for their own lives and safety is now reflected in s 5R, and was intended to override the approach of Murphy J in *Watt*, there is a question as to whether the statements in *Talbot-Butt* still reflect the law in this State. The potential dangerousness of heavy machinery and fast vehicles can no doubt be applied universally, although the consequence of its application will vary depending on whether one, both or neither party is in control of such a vehicle. On the other hand, applying the general principles in s 5B(2) one could approach the matter differently. Thus, the probability that harm would occur if care were not taken and the likely seriousness of the harm would operate differentially with respect to the driver of the forklift and the pedestrian, but with the same result. That is, **no distinction is made between the fact that in from one perspective the driver is in control of a vehicle that could cause serious harm to a pedestrian, whilst from the perspective of the pedestrian, it was the likelihood of serious harm which was to be considered**. If the plaintiff were aware, or ought to have been aware, of the presence of a large forklift operating in

the area and if the forklift driver were aware, or should have been aware, of the likely presence of pedestrians, and if each were equally careless, liability should be shared equally. A purposive approach to the operation of s 5R (and s 5B) requires that this approach be adopted. To approach the matter in this way is not to decline to follow applicable earlier authority of this Court. *Talbot-Butt* long pre-dated the *Civil Liability Act*; it also pre-dated s 74 of the *Motor Accidents Act*, the forebear of s 138 of the *Motor Accidents Compensation Act*" @99-100 per Basten JA, Emmett JA agreeing.

[Perrett] "The principles applicable in determining whether Mr Perrett has been contributorily negligent are the same as those applicable in determining negligence on the part of a defendant: see s 5R of the *Civil Liability Act*. The task is to determine whether Mr Perrett contributed to his fall by failing to take reasonable care of himself against the measure of a reasonable person in his position: *Tollhurst v Cleary Brothers* [2008] NSWCA 181 at [92] per Giles JA. The test directs attention to the standard of care required of a reasonable person in the position of Mr Perrett, on the basis of what he knew or ought to have known at the time.

94 I am **not satisfied that Mr Perrett ought to have known of the presence of the steps. I do not think he overlooked their presence due to inadvertence on his part, but rather due to the combination of factors discussed above, including the absence of edging on the steps, the distracting presence of the sign set back from the top of the first step and the presence of other people in the area**.

95 Since he had not perceived the presence of the steps, in my view reasonable care did not require Mr Perrett to stop immediately in order to read the sign. The only evidence as to how far he continued in order to read it was his evidence set out above suggesting that he moved about a metre and perhaps a shade more. He did so in circumstances in which, in my view, he was entitled to expect that the surface was smooth. Accordingly, I am not satisfied that the defence of contributory negligence is made out." **Perrett v Sydney Harbour Foreshore Authority; Wine & Vine Personnel Pty Ltd v Sydney Harbour Foreshore Authority** 30/9/09 [2009] NSWSC 1026 McCallum J

[Stojan] "144 Pursuant to s 5R of the *Civil Liability Act* the principles are applicable in determining whether a person has been negligent also applied in determining whether the [P] was guilty of contributory negligence in failing to take precautions against the risk of the harm which befell her. The standard of care required of the [P] was that of a reasonable person in her position, and the matter was to be determined on the basis of what she knew or ought to have known at the time: s 5R(2).

145 Section 5R(1) reflects the 'fundamental idea that people should take responsibility for their own lives and safety' and also the proposition expressed by Callinan and Heydon JJ in *Vairy* (at [220]) that 'the duty that [an injured P] owes is not just to look out for himself, but not to act in a way which may put him at risk, in the knowledge that society may come under obligations of various kinds to him if the risk is realized': *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380; (2005) Aust Torts Reports ¶81-815 (at [68] – [70]) per Ipp JA (Giles JA and Hunt AJA agreeing); see also *Gordon Martin Pty Ltd v State Rail Authority of New South Wales & Anor* [2009] NSWCA 287 (at [39] – [41]) per Beazley JA (Giles and Ipp JJA agreeing).

146 The question whether a person has been guilty of contributory negligence is determined objectively. The Council and Stojan bore the burden of proving that the [P] had been guilty of contributory negligence: … [various cases cited]." **Stojan (No 9) Pty Ltd v Kenway** 12/11/09 [2009] NSWCA 364 See precis at s5B(1)(b).

s5S – Contributory negligence can defeat claim

Sections 5R & 5S considered in *Adams by her next friend O'Grady v State of NSW* 28/11/08 [2008] NSWSC 1257 Rothman J from paragraph 132.

See *Addison* at s5F

In *Richardson v Mt Druitt Worker's Club* 10/2/11 [2011] NSWSC 31 Adams J dismissed P's claim as untenable when he **injured himself after falling from a locked gate which he was attempting to climb**. It was dark and it was raining. P could have walked a short distance to

get the key. P's conduct was not reasonably forseeable. D was not required to warn persons that the gate was locked.

s5T – Contributory negligence … under Compensation to Relatives Act
See *Giovenco* at s5B(1)(b)

s11A – Application of Part 2
In *Taylor v The Owners – Strata Plan No 11564* 27/7/12 [2012] NSWSC 842 Garling J decided that "a claim for damages under the *Compensation to Relatives Act* is one which is for damages that relate to the death of a person" @51. Decision confirmed on appeal in [2013] NSWCA 55. But see précis below at s12(2) where High Court allowed appeal.

s12(2) - Damages for past or future economic loss-maximum for loss of earnings etc
In *Taylor v The Owners – Strata Plan No 11564* 27/7/12 [2012] NSWSC 842 Garling J decided that "the word 'claimant' in s 12(2) includes a deceased upon the basis of whose earnings a claim for loss of expectation of support is made in a *Compensation to Relatives Act* action" @52. The section "applies to the earnings of a deceased person upon whose tortiously caused death, an action under the *Compensation to Relatives Act* is based" @81. Section 12(2) considered in some detail. Interpretation of Section 12(2) confirmed by majority on appeal in [2013] NSWCA 55. **Appeal allowed by High Court** 2/4/14 in [2014] HCA 9. The High Court decided that "the separate question: '**Insofar as the plaintiffs claim damages pursuant to ss 3 and 4 of the *Compensation to Relatives Act* 1897, is any award of damages limited by the operation of s 12(2) of the *Civil Liability Act* 2002?**' be answered: "No, the operation of s 12(2) of the *Civil Liability Act* 2002 (NSW) does not limit the first plaintiff's claim for damages pursuant to ss 3 and 4 of the *Compensation to Relatives Act* 1897 (NSW) as pleaded on behalf of herself and any other entitled relatives of the late Mr Craig Taylor in that it does not require the court to disregard the amount by which the gross weekly earnings of Mr Craig Taylor would, but for his death, have exceeded an amount that is three times the average weekly earnings at the date of the award" @45.

In *Nair-Smith v Perisher Blue* 7/6/13 [2013] NSWSC 727 Beech-Jones J accepted the following submissions. Sections "12(2) and 12(3) do not operate to place an overall cap on the amount of damages that may be awarded. … [T]hey only impose a limit on the first step in determining any award for economic loss, namely the determination of what the injured claimant's past or future earnings (or earning capacity) would have been but for the accident or injury. … [I]n undertaking that step, the Court should disregard any difference between the number determined and the figure denominated in s 12(2). … [T]he next step is to determine what the actual earnings have been and will be, and the third step is to calculate the difference. … [N]either the second nor third steps are constrained by s 12. … The proposition it contended for was … accepted as a given in *Fkiaras v Fkiaras*" @335. Section 12 & 13 applied an the issue of buffer considered. In **further proceedings at** [2013] NSWSC 1463 Beech-Jones J found that this was a breach of contract claim not governed by Part 2 of the CLA and that the appropriate award of damages for **NEL at common law was $135,000**. Common law assessments also made for other heads.

s13 – Future economic loss - Claimant's prospects and adjustments
See also s126 of Motor Accident Compensation Act 1999 which is in identical terms.

In *Zreika v State of NSW* 6/5/09 [2009] NSWCA 99 Ipp JA from paragraph 28 discussed the implications of s13 on the court's power to award a buffer for future economic loss. The court may still award such a buffer and did so in this case for the A's shoulder injury taking "into account the possibility that, at some future time, the appellant might not be able to work in the auto glazing industry, his talent for running his own business, his chequered work history as an employed person, the periods that he was out of employment and the reasons for him not being employed"@44. Ipp JA also stated "Of course, the evidence may disclose that a reduced capacity to work may not be productive of financial loss, even where there is an unquestionable loss of capacity to earn. In that event no buffer will be awarded: *Fegan v Lane Cove House Pty Limited* [2007] NSWCA 88"@39.

See Kipriotis at FEL/LOEC – Buffer/Cushion

In *Doherty v State of NSW* 20/5/10 [2010] NSWSC 450 Price J considered s13 in relation to a **police officer's prospects of progressing up the ranks**. **Appeal and cross appeal** in *State of NSW v Doherty* 5/8/11 [2011] NSWCA 225 dismissed except for COA finding it appropriate to increase the discount for vicissitudes to 30 percent.

> [Dyldam] "62 The primary judge made the following assessment of discount for the purposes of s 13 of the *Civil Liabilities Act* 2002:
> '[71] I turn, then, to assess the "percentage possibility" that the plaintiff may have been rendered unemployable by some mechanism other than the injury the subject of these proceedings. That assessment involves a foray into unknown territory. However, the exercise is little different to the exercise that has conventionally been undertaken by courts awarding damages for future economic loss. The "conventional" 15% was based upon the accumulated experience and knowledge of judges dealing with cases of personal injury. It represents the known possibilities that individuals may suffer non-compensable injury or accident, or may, in other ways, have their earning capacity reduced or eliminated.
> [72] Here, the plaintiff was, before February 2003, a fit young man, able to discharge the heavy duties of his employment without apparent difficulty (other than some occasional muscle tiredness or soreness resulting from the nature of the work he was doing). There is no evidence that he engaged in any activities that would have exposed him to greater than normal danger or increased the risk that he would have lost the capacity to work.
> [73] Senior counsel who appeared for Dyldam argued for an "adverse vicissitudes contingency" reduction of as much as 50%. This was based upon the report of Dr Shnier. Dr Shnier said that there was:
> ... a long standing pre-existing degenerative intervertebral disc disease at L5/S 1 ... evidenced by the disc space narrowing.
> [74] He referred also to evidence that the plaintiff had sought medical advice in relation to back pain — which the plaintiff insisted, and I accept, was no more than muscle strain for the reasons I have already mentioned — and also called in aid a back injury suffered by the plaintiff in 1993 in a motor vehicle accident. The latter I discard completely — there was no evidence that the plaintiff continued to suffer any ill effects from that injury; there is evidence that he recovered, by way of damages, what seems to be a very small amount, indicative of a not very serious injury; and, finally, the plaintiff was able to engage in the very heavy work of a bricklayers' labourer. There was no evidence tendered to suggest that the degenerative condition would have precluded him from continuing to work in his occupation as a bricklayers' labourer or in some other unskilled work yielding comparable income.
> [75] Accordingly, I decline to increase what I consider to be a reasonable figure to allow for the vicissitudes, as now required by s 13; the amount allowed for future economic loss will be reduced by 15% for that purpose.'" [15% discount affirmed] **Dyldam Developments P/L v Jones** 8/4/08 [2008] NSWCA 56 Hodgson JA, Full Court

> [De Beer] "201 In *Roads and Traffic Authority of NSW v Chandler* [2008] NSWCA 64, it was observed by *Basten* JA, with whom *Mason* P and *Bell* JA agreed:
> '55 Whether, and if so in what way, s 13(1) affects the exercise required in assessing damages under the general law is not entirely clear. Under the general law, a plaintiff is required to demonstrate that a disability resulting from a tortious act will continue in the future and will affect his or her earning capacity, in a manner which will probably cause financial loss: c.f. *McCracken v Melbourne Storm Rugby League Football Club Ltd* [2007] NSWCA 353. The phrase "most likely future circumstances" may be comparative, in the sense of identifying from a possible range those circumstances most likely to eventuate, or qualitative, in the sense of requiring an outcome that is not merely probable, but "most likely" to arise. The former appears to be the natural meaning of the phrase, read in context, and does not significantly affect a general law assessment. That construction was accepted by Hodgson JA in *MacArthur Districts Motor Cycle Sportsmen Inc v Ardizzone* [2004] NSWCA 145; 41 MVR 235 at [11].'" **De Beer v The State of NSW & Anor** 11/5/09 [2009] NSWSC 364 Schmidt AJ

s15 – Damages for gratuitous attendant care services

In *Ehlefeldt v Rowan-kelly* 1/5/09 [2009] NSWSC 331 Hoeben J awarded the maximum amount for gratuitous care services in the case of a 33y.o. woman suffering hypoxic brain injury and who was also assessed at 100% of the most extreme case.

In *Liverpool City Council v Laskar* 20/4/10 [2010] NSWCA 52 the COA considered the meaning of 'domestic services' in s15B and compared s15 and s15B.

In *Amaca Pty Ltd v Hicks* 16/9/11 [2011] NSWCA 295 the COA found it was appropriate for the trial judge to expressly eschew taking judicial notice of commercial rates for domestic assistance and to rely on his understanding that commercial rates can differ. The calculation was based on the average weekly earnings of all employees in NSW, which was $24.64. "Adopting an average hourly rate no doubt elided differences between those who might be expected to provide services at lower rates and those whose rates were likely to be higher. No error of law was shown to arise from such an approach; indeed it is arguable that, at least in determining the ceiling on such awards, that is the approach required by ss 15(4) and 15A(5) of the … Act" @29.

s15(2)

A **62 y.o. R with Parkinson's disease suffered right side neck pain as a result of A's negligence**. R was **largely independent before the accident**. He "suffers significant daily pain as the result of his injury. The level of his symptoms is unlikely to improve in the future. The jaw injury interferes with his ability to eat. Generally, the **respondent's ability to carry out the normal activities of daily life have (sic) been significantly compromised as the result of his injury**" @38. P was assessed at 30% of the most extreme case. The Full Court considered s15(2). See commentary below. *Westfield Shoppingtown Liverpool v Jevtich* 18/6/08 [2008] NSWCA 139 Bell JA, Full Court

In *Basha v Vocational Capacity Centre Pty Ltd* 15/12/09 [2009] NSWCA 409 the COA considered whether "the requirement in s 15(2)(b) that the need for the damages for gratuitous attendant care should have arisen **'solely because of the injury to which the damages relate'** was satisfied having regard to the appellant's pre-existing condition. However the parties accepted the proposition stated in *Woolworths Ltd v Lawlor* [2004] NSWCA 209 (at [28] – [30]) (per Beazley JA (Hodgson and Tobias JJA agreeing) that the Court could award such damages even where the need for the award only arose because of an increase in the plaintiff's need for services occasioned by the injury"@122.

[Jevtich] "22 The appellants did not submit that the requirement of subsection (2)(b) that the court be satisfied the need has arisen (or arose) solely because of the injury precluded an award because the respondent's pre-existing condition created the need for some services. Senior Counsel for the appellants accepted that it was **open to the Court to award damages for the increment in the need for services occasioned by the injury**. This is consistent with the views expressed by Beazley JA (with whom Hodgson and Tobias JJA agreed) in Woolworths Ltd v Lawlor [2004] NSWCA 209 at [28] – [30].
23 Senior Counsel for the appellants submitted that s 15(2)(b) effects a 'reversal of a Watts v Rake type onus'. … In his submission, it was incumbent on the respondent to adduce medical evidence to permit the Court to differentiate between the needs created by the Parkinson's disease and those arising as the result of the injury.
24 In Purkess v Crittenden (1965) 114 CLR 164 at 168 Barwick CJ, Kitto and Taylor JJ explained that Watts v Rake was concerned with the character and quality of the evidence required to displace a plaintiff's prima facie case. In Johnston v Cowra Shire Council [2000] NSWCA 117 Heydon JA (with whom Stein JA agreed), after referring to the joint reasons in Purkess at 168, observed (at [35]):
'The Court was saying that no reduction in damages can be made on the mere submission of the defendant based on an alleged pre-existing incapacity, unless that submission meets an evidential burden. If the defendant does that, the legal burden remains with the plaintiff to satisfy the trier of fact on the whole of the evidence as to the extent of the injury. Here the defendant had to tender evidence capable of establishing a pre-existing condition and its effects. If it did this it was for the plaintiff to prove the extent to which his injury was caused by the defendant's negligence.'
25 In this case there was no question as to the existence of the pre-existing condition, nor

that it occasioned the need for some attendant care services. Section 15(2) precluded the court from awarding damages for attendant care services unless it was satisfied, inter alia, that the need had arisen (or arose) solely because of the compensable injury and that the services would not be (or would not have been) provided but for the compensable injury. Subsection (2) is directed to satisfaction with respect to 'these services'. It was **necessary for the respondent to satisfy the court of the increment in the need for services caused by the injury**. It does not follow that his claim was to be rejected in the absence of expert evidence." **Westfield Shoppingtown Liverpool v Jevtich** 18/6/08 [2008] NSWCA 139 Bell JA, Full Court

[Angel] "127 In Woolworths Beazley JA, with the agreement of Hodgson and Tobias JJA, expressed the view, obiter, that **s 15(2) of the *CL Act* applied notwithstanding a person having some other disability which itself required attendant care services**. **Subsection (2) operated so as to permit an award of damages for attendant care, but only to the extent that that care arose due to disability from the injury sustained in the compensable accident**. The following paragraphs express her Honour's reasoning:

'[28] ... it was submitted that sub-s.2(b) only operated where there was no other cause or reason why the gratuitous services needed to be provided. An example on the appellant's argument in which an award under s.15 would be precluded was where a plaintiff with pre-existing symptomatic degenerative changes already required assistance of say five hours per week at the time of an accident. If, as a result of an accident causing an aggravation of those pre-existing changes, it was found that such a person needed more attendant care services, say 15 hours per week, there was no entitlement under s.15 because of the operation of s.15(2)(b). In other words the need for attendant care services had more than one cause. The opposing argument and one which was adopted by senior counsel for the respondent, was that in such a case, the plaintiff would be entitled to an award of ten hours for gratuitous attendant care services because the need for those ten hours had arisen "solely because of the injury to which the damages relate". This construction derives directly from the definition of "injury" which includes "impairment of a person's physical or mental condition".

[29] Although the matter is not without difficulty, I am inclined to the view that the second of these constructions is correct. It derives from a construction of the Act as a whole. In my opinion, such construction does not do any violence to the express words of the section. Senior counsel for the appellant argued that if such a construction was intended some word other than "solely" would have been used. He postulated that "substantially" would have been a likely candidate. In my opinion, that argument reinforces the likelihood that the second construction is correct. If the word "substantially" were used, instead of the word "solely", then the section would have directed the Court to make an assessment whether the need for the services arose substantially or mainly because of the injury. If the need arose substantially because of the injury a plaintiff would be entitled to an award notwithstanding that portion of the need was attributable to some other cause. So in the example given in the previous paragraph, a plaintiff would be entitled to an award for 15 hours of attendant services, not 10.' …

130 We remain of the view that the opinion expressed in Woolworths is the correct construction of the section. The Council did not advance any further argument as to why that construction was not correct. Rather, its submission acknowledged the reasoning in Woolworths and then, without elaboration, made the second submission in the alternative in these terms:

'Having found that [the appellant] suffered a residual incapacity not caused by her fall, there should be no award because the need for attendant care services was not caused solely by any negligence of the Council. Alternatively, his Honour made no finding as to the amount of additional care [the appellant] required as a consequence of any negligence of the Council.'"

Angel v Hawkesbury City Council 25/6/08 [2008] NSWCA 130 per Beazley & Tobias JJA, Full Court

s15(3)

See *Harrison v Melhem* 29/5/08 [2008] NSWCA 67 especially Mason P, Full Court where s15(3) of NSW Civil Liability Act analysed in depth. Section 15(3)(a) & (b) also considered in *RTA v McGregor & Anor* 11/11/05 [2005] NSWCA 388 from para.158. The loophole in s15 of

the Civil Liability Act as regards domestic assistance exposed by *Harrison v Melhem* was closed on 12/11/08 by the Civil Liability Legislation Amendment Act (2008). Similar amendments made to the NSW Motor Accidents and Motor Accidents Compensation legislation. See paragraph 101 of *Alam v Rail Corporation NSW* 26/11/08 [2008] NSWDC 265 per Gibson DCJ.

In *Allianz Australia Insurance Ltd v Roger Ward & Ors* 30/11/10 [2010] NSWSC 720 [57 MVR 327] Hidden J stated that **claims under s15B and s128 of the MAC Act must be separately assessed** and that "[b]efore a future claim can succeed it must be shown that the threshold will be met in the future" @21. "It is now clear that a claimant cannot recover damages for gratuitous services unless they are, or are to be, provided for at least 6 hours per week and for a period of at least 6 months. (The use of the term 'consecutive' in subs (3)(b) makes it clear that that period must be a continuous one.) Accordingly, the approach in *Geaghan v D'Aubert* has been restored, and it is applicable to **s 15B(2)(c)** of the CL Act" @32.

See *Upper Lachlan Shire Council v Rodgers* 23/8/12 [2012] NSWCA 259 where COA per Allsop P agreed that "the **statutory threshold is only met if the gratuitous services have been provided for at least six hours per week during an unbroken period of six months**: *Pacific Steel Constructions Pty Ltd v Barahona* [2009] NSWCA 406 at [163]; *Hill v Forrester* [2010] NSWCA 170 at [8]-[9] and [29]-[37], though see [95] and [105]-[108]. To the extent that s 15(3) may be ambiguous, recourse may be had to extrinsic material under the *Interpretation Act 1987* (NSW), s 34(1)(b). **The mischief or purpose in the amendments bringing s 15(3) into its current form were to bring the operation of the provision back to the position before *Harrison v Melhem*** [2008] NSWCA 67; 72 NSWLR 380" @27.

s15B – Damages for loss of capacity to provide domestic care services

See *Amaca Pty Ltd v Novek* 17/3/09 [2009] NSWCA 50 at *Dependants* re meaning of 'dependants'.

In *Liverpool City Council v Laskar* 20/4/10 [2010] NSWCA 52 the COA considered the **meaning of 'domestic services'** in s15B and compared s15 and s15B. Whealy J, with whom the other judges agreed stated that "[t]he trial Judge found that Nabila, because of her disabling condition, was wheelchair bound and required a considerable amount of physical assistance both day and night. She needed virtual 24-hour care. For example, she was unable to shower or use the lavatory without assistance. A young infant undoubtedly cannot perform the domestic service of showering herself or toileting. However, with maturity, young children are able to perform these services. Nabila is not because of her disabilities. It was a matter for the trial Judge to be satisfied, in those circumstances, whether the insertion and removal of the catheter and urine bag were domestic services provided to her by her parents and whether there would be a need for those services to be provided in the future for the relevant period of time. It was also necessary for the trial Judge to be satisfied that that need was reasonable in all the circumstances. It is clear from the trial Judge's reasoning that she was satisfied in relation to each of these matters. …The same observations may be made in relation to the method by which Nabila was assisted from the wheelchair into the car so as to enable her to be taken to school each day. There was a considerable amount of lifting which the respondent said he had to do between six and ten times a day. Nabila could not lift herself and there is no reason to doubt that those actions in lifting her up for whatever purpose plainly fell within the description of domestic services. Finally, there was the issue of massage and exercise. The trial Judge found that the respondent and his wife were taught some elementary physiotherapy so that they could work on their daughter at home to maintain her muscle tone. The plaintiff could not move her own limbs so as to maintain her own muscle tone. It had to be done for her. This was achieved by way of a stretch of each limb and subsequent massage. Similarly, when Nabila was put into a special brace for sleeping or placed in splints for her daily activities, her legs were first massaged. Once again, it was because Nabila could not perform these services for herself. In my opinion, it could not be said that these activities fell outside of the boundaries of the provision of domestic services to a dependent whose physical disabilities made it impossible for her to do these things for herself. Section 15B speaks in its own terms and it should be interpreted free from any supposed fetters arising from considerations which have led to the enlargement of other concepts, and for the purposes of defining, or for that matter de-limiting, other heads of damage dealt with in the legislation" @63-64.

See *Goddard v Central Coast Health Network* 19/12/13 [2013] NSWSC 1932 where Adamson J found that **s15B of the Civil Liability Act applies to the assessment of damages under the Compensation to Relatives Act**.

See *Amaca Pty Ltd v Phillips* 31/7/14 [2014] NSWCA 249 where the **R had ceased work to care for his invalid wife who had Alzheimer's dementia and various other co-morbidities, but soon after developed mesothelioma**. "The amount awarded for … 's15B damages' was calculated by the Tribunal by reference to the number of hours that Mr Phillips would, but for his illness, have spent caring for his wife in the future, having regard to what was found to be Mrs Phillips' life expectancy, namely 2.5 years. By the time of the Tribunal hearing, Mr Phillips' life expectancy was not long. It was accepted that on his death, the remaining family members will not be able to care full-time for Mrs Phillips and she will be placed in a nursing home or other institutional care, something that his Honour found would not have happened but for Mr Phillips' illness. **Amaca has appealed from the award of s 15B damages, contending that the amount should have been calculated by reference to the objective commercial cost of nursing home care for the duration of Mrs Phillips' life expectancy**" @3-5. **Appeal dismissed**. "[I]t cannot be said that the approach adopted by his Honour was incorrect ... **Nothing in the legislation required his Honour to use objective commercial cost as a starting point**; nor was his Honour required to take into account what it is known will actually happen on Mr Phillips' death for the purpose of assessing the appropriate compensation for Mr Phillips for the loss of *his* capacity to care for his wife *at home*. Indeed, on one view, if the commercial cost of care were the sole appropriate measure of damages the more appropriate measure might be to assess the cost of what home care would be, as opposed to institutional care, since that is what Mr Phillips has lost the capacity to provide" @56.

See *Dean* at Dust diseases – General assessments.

s15B(2)

In *Ehlefeldt v Rowan-kelly* 1/5/09 [2009] NSWSC 331 Hoeben J awarded $354,900 re the P's loss of capacity to care for her children in the case of a 33y.o. woman suffering hypoxic brain injury and who was also assessed at 100% of the most extreme case. See commentary from paragraph 34 re preconditions for making this award and the necessity to factor in contingencies relevant to P's pre-injury capacity such as her chaotic lifestyle as a drug addict.

In *Allianz Australia Insurance Ltd v Roger Ward & Ors* 30/11/10 [2010] NSWSC 720 [57 MVR 327] Hidden J stated that **claims under s15B and s128 of the MAC Act must be separately assessed** and that "[b]efore a future claim can succeed it must be shown that the threshold will be met in the future" @21. "It is now clear that a claimant cannot recover damages for gratuitous services unless they are, or are to be, provided for at least 6 hours per week and for a period of at least 6 months. (The use of the term 'consecutive' in subs (3)(b) makes it clear that that period must be a continuous one.) Accordingly, the approach in *Geaghan v D'Aubert* has been restored, and it is applicable to **s 15B(2)(c)** of the CL Act" @32.

s15B(2)(d)

See *Amaca Pty Ltd v Novek* 17/3/09 [2009] NSWCA 50 where sub-section considered in case where **grandmother lived with her daughter and son-in-law and looked after their children while they worked**. In grandmother's claim in Dust Diseases Tribunal, which was continued by her daughter after her death, it was held that the grandmother provided gratuitous services to grandchildren and that they were her dependants. The **reasonableness of the need for the grandmother's services discussed**. But see also *Perez*.

See *State of NSW v Perez* 3/6/13 [2013] NSWCA 149 where **grandfather** (claimant)**, who jointly provided care for grandchildren (with grandmother) about three days a week, was incapacitated because of mesothelioma** and grandmother now provides the services. See commentary below re methodology for calculating loss of domestic care services provided by grandfather. Matter remitted for consideration of gratuitous domestic care services of grandparents for grandchildren. See *Perez v State of NSW* 25/7/13 [2013] NSWDDT 7. There were four grandchildren including very young children and teenagers. Tribunal not prepared to provide damages after claimant reached the age of 75 as, even if he did not have

mesothelioma, it would be unreasonable to expect him to provide such services at 75. Consideration given to appropriate rates of compensation where claimant provided services in company of wife as compared with separately from her.

[Perez] "18 The preferred reading of s 15B should, if possible, give all the words work, without reading in further words or contradicting the apparent sense in which they are used. Further, and importantly in the present circumstances, the provisions referred to above should be read as a whole. Once that is done, it will be seen that the term 'need' appears only in paragraph (d): the focus of the operative provisions and the definitions is 'services', and in particular services of a domestic nature provided by the claimant.

19 The critical reference to 'need' in paragraph (d) focuses upon the specified temporal scope of the services provided. That scope, as identified in paragraph (c), is that the services be provided for at least six hours per week for at least six consecutive months. **The phrase 'reasonable in all the circumstances' qualifies not the word 'need', but the phrase 'that need'**. Read in context, the focus is not merely the need of the dependant, but the time which would have been taken to deliver services in satisfaction of that need. No doubt some service providers will be more efficient than others. There is an evaluative judgment involved which, the paragraph provides, shall be undertaken by reference to the standard of reasonableness and having regard to all relevant circumstances in the particular case. It is thus not merely an abstract quality of the need which is in issue.

20 There is an interrelationship between 'need', 'services' and dependency. Thus, a dependant is someone who has a need which may be satisfied by the provision of particular services in circumstances which give rise to a relationship of dependency between the dependant and the service provider. Thus, the grandchildren have needs to be fed, cared for and accommodated. However, that does not define the needs in a way relevant to the present statutory purpose. It is possible that a particular child may need more than one person to care for him or her at any given point in time. Further, particular needs may be met concurrently.

21 … [I]t is convenient to note that **paragraph (c) requires an assessment of the time over which services would have been provided 'to the claimant's dependants'**. That appears to involve a cumulative assessment. Thus, babysitting four children over three hours would not involve the provision of services to each child over three hours (giving a total of 12 hours), but rather provision of services to all four dependants over three hours. …

28 Although it does not arise in the present case, there is **reason to doubt that s 15B(2) requires the trial judge to assess why it was that the claimant was providing services**. **State of NSW v Perez** 3/6/13 [2013] NSWCA 149 per Basten JA (Ward JA & MacFarlan JA concurring)

s15B(11)(b)

See *Amaca Pty Ltd v Novek* 17/3/09 [2009] NSWCA 50 where sub-section considered by COA from para. 64. See also commentary below:

[Novek] "91. … what the court is required to take into account by section 15B(11)(b) is the extent to which the *act of providing* the services would *itself* have benefited ineligible persons. In the present case, it seems to be implicit in the judge's findings that the benefit that the Respondent and Neale derived as a causal consequence of Mrs Dawson being at home looking after the children, in the form of being free to go out to work, derives not only from the act of providing the services, but also from the fact that those services are provided every day, and for sufficient hours in the day to not require the Respondent and Neale to be present during those hours. I take it that that is what the judge means when he says that the benefit of going out to work is a collateral and not a direct benefit. In my view a benefit that derives from not only the act of providing the services, but also from other surrounding circumstances that must exist before the benefit is derived, is outside the scope of section 15B(11)(b).

92 The operation of the provision can be tested by an example different from the present case, of a grandparent who was the principal financial support of a grandchild (so that the grandchild was thereby a dependant of the grandparent) who had minded the child for two or three hours on three or four days of the week (sufficient to overcome the threshold in section 15B(2)(c)). If the grandparent became unable, through the defendant's tort, to mind the child, damages could still be recovered by the grandparent for loss of the capacity to provide gratuitous domestic services of childminding to the grandchild. In most households provision of child minding by the grandparent for that length of time on a day, and not on all

days of the working week, would not enable the parent of the child to go out to work. Thus even if the Appellant's argument is right no deduction under section 15B(11)(b) would be called for. If a grandparent provided more childcare than this, it would continue to be the case that, on the Appellant's argument, no deduction was called for, right up to the point at which the frequency and length of time during which the childcare was provided was such that the parent could go out to work.
93 I would not accept that the legislative intention was to create as grossly unfair a situation as would arise if the grandparent who provided not quite enough childcare to enable a parent to go out to work had no deduction from damages, while a grandparent who provided just enough childcare to enable a parent to go out to work would suffer a deduction in damages. It needs to be recalled that what section 15B aims to compensate is the injured claimant, for loss of the claimant's capacity. It would be bizarre if a greater loss of capacity resulted in a smaller award of damages." **Amaca Pty Ltd v Novek** 17/3/09 [2009] NSWCA 50 Campbell JA (Full Court

s16 – Determination of damages for non-economic loss

Dinkha O, '*Recent Non-economic Loss Awards Under s16 of the Civil Liability Act 2002*' (2011) 8 (6 & 7) Civil Liability 228

In *Insight Vacations P/L v Young* 11/6/10 [2010] NSWCA 137 the COA considered the meaning of 'personal injury damages', 'disappointment', and 'distress'. **Appeal dismissed by High Court** in *Insight Vacations P/L v Young* 11/5/11 [2011] HCA 16.

[Ayoub] "[I]t must always be borne in mind that the assessment of non-economic loss is an evaluative process in respect of which minds may reasonably differ: Woolworths Ltd v Lawlor [2004] NSWCA 209 (at [14]). An appellate court will not interfere with a trial judge's assessment of damages 'simply because it would have awarded a different figure had it tried the case at first instance': Precision Plastics Pty Ltd v Demir [1975] HCA 27; (1975) 132 CLR 362 (at 369) per Gibbs J. in Khan v Polyzois [2006] NSWCA 59 Hislop J (with whom Mason P agreed) said the Demir principle applies to the assessment of non-economic loss under s 16 of the *Civil Liability Act* 2002, and, *a fortiori*, they would apply , too, to the assessment of non-economic loss under s 134 of the MAC Act.
175 In short, an appeal from an assessment of damages for non-economic loss in relation to personal injuries from a judge sitting without a jury is to be determined in the same manner as an appeal from the exercise of discretion by a trial judge. An error within the terms of House v R [1936] HCA 40; (1936) 55 CLR 499 (at 504 – 505) must be identified: Franklins Limited v Burns; Burns v Franklins Limited [2005] NSWCA 54 (at [49]) per McColl JA (Beazley and Tobias JJA agreeing).
176 Accordingly, an appeal court may only alter the trial judge's decision if the judge acted on a wrong principle of law, misapprehended the facts or made 'a wholly erroneous estimate of the damage suffered': Moran v McMahon (1983) 3 NSWLR 700 (at 719 and 723) per Priestley JA (with whom McHugh JA agreed); Jones v Bradley (at [117]) per Santow JA (with whom Meagher and Beazley JJA agreed); see also Diamond v Simpson (No 1) [2003] NSWCA 67; (2003) Aust Torts Reports ¶81-695 (at [15]–[17]); Ghunaim v Bart [2004] NSWCA 28; (2004) Aust Torts Reports ¶81-731 (at [100]).".
Kendirjian v Ayoub 14/8/08 [2008] NSWCA 194 McColl JA, Full Court

s18 – Interest on damages

See *Sutton v Firth (No 3)* 17/3/09 [2009] NSWDC 68 where Hungerford ADCJ held that s18 applied in a professional negligence action for loss of opportunity to bring a claim for common law damages.

[Kipriotis] "225 **Section 18 of the Act relevantly provides**:-

'(2) If a court is satisfied that interest is payable on damages (other than damages in respect of which a court cannot order the payment of interest under subsection (1)), the amount of interest is to be calculated:-

(a) for the period from when the loss to which the damages relate was first incurred until the date on which the court determines the damages, and

(b) in accordance with the principles ordinarily applied by the court for that purpose, subject to subsection (3).

(3) The rate of interest to be used in any such calculation is:-

(a) such interest rate as may be determined by the regulations, or
(b) if no such rate is determined by the regulations - the relevant interest rate as at the date of determination of the damages.
(4) For the purposes of subsection (3), the relevant interest rate is the rate representing the Commonwealth Government 10-year benchmark bond rate as published by the Reserve Bank of Australia in the Reserve Bank of Australia Bulletin (however described) and as applying:-
(a) on the first business day of January of each year (in which case the rate is to apply as the relevant interest rate for the period from 1 March until 31 August of that year), or
(b) on the first business day of July of each year (in which case the rate is to apply as the relevant interest rate for the period from 1 September of that year until the last day of February of the following year).'

226 For the purposes of calculating the award of interest, the relevant interest rate is 6.34% (this being the Commonwealth Government 10-year benchmark bond rate as applying on 2 January 2008, the first business day of January of the year 2008). 227 In Cullen v Trappell (1980) 146 CLR 1, Gibbs J (as he then was) discussed the awarding of interest on past economic loss, in particular interest on past loss of earning capacity. His Honour noted the judgment of Lord Diplock in Cookson v Knowles [1977] QB 913 at 921, in which his Lordship proposed two means of calculating such an award of interest: halve the period for which interest is to be given but employ current rates of interest, or give interest for the whole period using half the current rates: Cullen v Trappell (supra) at 19. In Cullen (supra) the majority of the Court determined that the Court of Appeal had correctly calculated the award of interest for economic loss, the Court of Appeal having given interest for the whole period at half the current rates at that time. 228 Pursuant to s.18 of the Civil Liability Act, and having had regard to the approaches discussed in Cullen v Trappell (supra), the plaintiff is entitled to award of interest on past economic loss totalling $9,840 (calculation set out below - this figure taking into account the weekly compensation payments totalling $26,717.72 received by the plaintiff, and calculated applying the current rate of 6.34% over half the period, the period otherwise being 30 September 2003 up until judgment)."

Kipriotis v Royal Tiles P/L & Ors 26/8/08 [2008] NSWSC 871 Hall J

s21 – Limitation on exemplary, punitive and aggravated damages

See *Corby v State of NSW* 5/6/09 [2009] NSWDC 117 where Murrell SC DCJ considered this section and the issue of entitlement to aggravated and exemplary damages in the context of a P being allegedly assaulted by a police officer at a police station. Appeal allowed in part in *State of NSW v Corby* 3/3/10 [2010] NSWCA 27. Relevant legislative regime carefully analysed. Section 26C found to operate with respect to aggravated damages, but not exemplary damages.

s26A - Definitions

See *Corby v State of NSW* 5/6/09 [2009] NSWDC 117 where Murrell SC DCJ considered this section and the issue of entitlement to aggravated and exemplary damages in the context of a P being allegedly assaulted by a police officer at a police station. Appeal allowed in part in *State of NSW v Corby* 3/3/10 [2010] NSWCA 27. Relevant legislative regime carefully analysed. Section 26C found to operate with respect to aggravated damages, but not exemplary damages.

s26B – Special provisions for offenders in custody

In *Michael v State of NSW* 31/3/11 [2011] NSWSC 231 P was assaulted and injured whilst in custody. Fullerton J stated that "Pt 2A of the *Civil Liability Act* must be read subject to Pt 1A and that an injury caused by the negligence of the protected defendant in s 26B must be construed as 'allegedly caused' and that the issue of factual causation in s 5D of the *Civil Liability Act* is reserved for determination by the Court" @77.

s26BA – Protected Defendant to be given notice of incident giving rise to claim

See *Dawson v State of NSW* 28/3/12 [2012] NSWDC 47 where **inmate failed to give the requisite notice in time**. P had a full and satisfactory explanation for failing to do so due to being misled by prison staff and being poorly advised by solicitors. Hence he was ignorant of the requirements of s26BA.

s26C – No damages unless permanent impairment of at least 15%

See *Corby v State of NSW* 5/6/09 [2009] NSWDC 117 where Murrell SC DCJ considered this section and the issue of entitlement to aggravated and exemplary damages in the context of a P being allegedly assaulted by a police officer at a police station. Appeal allowed in part in *State of NSW v Corby* 3/3/10 [2010] NSWCA 27. Relevant legislative regime carefully analysed. Section 26C found to operate with respect to aggravated damages, but not exemplary damages.

s30(2) – Limitation on recovery from pure mental harm arising from shock

In *Sheehan v SRA; Wicks v SRA* 31/8/09 [2009] NSWCA 261 the P's were police rescuers who came on the scene of the aftermath of an horrific train crash where several people were dead and many injured. The court held that "s 30(2)(a) does not extend to persons who came upon the scene after the incident itself in which persons were killed, injured or put in peril was over. It follows that the appellants do not fall within the scope of those entitled to recover for purely mental harm"@77. The history and scope of s30(2) considered. Court also held that "[t]he *Civil Liability Act*, s 30(2)(a) and s 32(2)(b) may extend to persons who come upon the scene after the incident in which a person was killed, injured or put in peril is over if that person witness[es], at the scene, a further incident or consequential event in which a person is '*killed, injured or put in peril*': [64] and [75]-[76]"per head note. Note that Giles JA approached the issues differently to the majority. **Appeal allowed by High Court** in *Wicks & Sheehan v State Rail Authority of NSW* [2010] HCA 22. The High Court stated: "To begin inquiries by asking whether s 30(2)(a) of the Civil Liability Act is engaged, without first deciding whether State Rail owed a duty to each [A] to take reasonable care not to cause him psychiatric injury, was to omit consideration of an important anterior question"@15. The meaning of '**being killed, injured, or put in peril**' considered. "The **survivors of the derailment remained in peril until they had been rescued by being taken to a place of safety**. … [R's] submission that neither Mr Wicks nor Mr Sheehan witnessed, at the scene, a victim or victims being killed, injured or put in peril should … be rejected. … [R's] further submission, that the combined effect of s 30(1) and s 30(2) requires that a [P] must demonstrate that the psychiatric injury of which complaint is made was occasioned by **observation of what was happening to a *particular* victim**, should also be rejected. … Rather, the reference in s 30(1) to 'another person (***the victim***)' should be read **…** as 'another person or persons (as the case requires)'. The reference to 'victim' in s 30(2)(a) is to be read as a reference to one or more of those persons. In a mass casualty of the kind now in issue, s 30(2)(a) is satisfied where there was a witnessing at the scene of one or more persons being killed, injured or put in peril, without any need for further attribution of part or all of the alleged injury to one or more specific deaths"@51-54.

s32 – Mental harm – duty of care

See *Sheehan* above at s30(2). Sub-section (2)(b) considered.

In *Hollier v Sutcliffe* 23/4/10 [2010] NSWSC 279 Hulme J considered the duty of care re mental harm in a case where a **doctor allegedly incorrectly inserted an Implanon contraceptive implant** into P's arm and then failed to take appropriate action to remedy the error. **Section 32(1) is concerned with mental harm, whether pure or consequential**. The relevance of a person being a '**person of normal fortitude**' considered. No liability found.

See *Kuehne* at NSW CLA s44 and Dog attack

In *Thompson v NSW Land & Housing Corporation* 31/8/11 [2011] NSWCA 941 Hislop J found that there "was **no evidence that the defendant knew or ought to have known of any preceding vulnerability to alleged psychiatric illness on the part of the plaintiff**. In the absence of such knowledge, the psychiatric illness was not foreseeable" @67. P alleged he suffered injury as a result of termiticide treatment to the block of units he lived in. D not found liable.

See *AX by Tutor ZX v Ashfield Municipal Council* 3/4/12 [2012] NSWDC 32 for Gibson DCJ's **discussion of the leading authorities on s32 and the concept of 'normal fortitude'**. In this case a young P suffered a relatively minor foot injury (a cut toe) at a swimming pool and due to this and a combination of more significant stressors experienced psychological issues. P's

response was not the response of a person of 'normal fortitude'. D did not owe P a duty of care by reason of s32.

s34 – Proportionate liability (application of part)

See *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* 20/3/13 [2013] NSWCA 58 where COA considered s34 in a case where R was sued for breaching its obligations of care under a mortgage origination deed. Consideration of whether this was an action for damages within Part 4 and whether the claim arose from a failure to take reasonable care.

s35 – Proportionate liability for apportionable claims

See *Perpetual Trustee Company Limited v Kotevski* 11/9/09 [2009] NSWSC 954 where Schmidt J considered s35 & s35A and found that the material facts for concluding that a person was a concurrent wrongdoer had not been pleaded. An amendment to the pleadings was allowed.

In *Resource Equities v Carr Resource Equities v Garrett* 15/12/09 [2009] NSWSC 1385 McDouggall J held that Pt4 of the CLA had no application to claims for breaches of duty under the Corporations Act. See paragraph 331.

See *The Owners-Strata Plan 62658 v Mestrez Pty Ltd & Ors* 18/10/12 [2012] NSWSC 1259 where Lindsay J considered "the operation of CLA s. 35 (1), and **principles of subrogation, in the context of a claim for relief made by a Plaintiff directly against the insurer of a defendant who is, or may be, a 'concurrent wrongdoer' in relation to an 'apportionable claim'** within the meaning of those expressions as defined by CLA s. 34(1)(a) and CLA s. 34(2) respectively" @6.

See *The Owners - Strata Plan 69312 v Allianz Australia Insurance Limited* 23/11/12 [2012] NSWSC 1477 where Bergin CJ stated that "It seems to me that the clear intention of the legislature, when ss 34 and 35 are read together, is that the person who has failed to take reasonable care is, as identified in s 35, the 'defendant' who is entitled to have a limitation placed on the amount reflecting the defendant's responsibility for the damage or loss. Accordingly when s 35(1) is read with s 34(1), the irresistible conclusion is that it is the defendant whose conduct must cause the economic loss. The loss that is the subject of the indemnity under the Policy may have arisen from a failure to take reasonable care in that the builder's breach of statutory warranty may have arisen from the builder's failure to take reasonable care to carry out the residential building work carefully. However, the loss sued upon by the plaintiff as the insured is the loss caused by the insurer failing to indemnify the insured for the loss. The insurer's conduct that caused that loss does not arise from the insurer failing to take reasonable care in making its decision as to whether or not to indemnify the builder" @16-17. **Whether a claim for indemnity under an insurance policy is an apportionable claim under the CLA considered**.

In *Rennie Golledge Pty Ltd v Ballard* 10/10/12 [2012] NSWCA 376 Barrett JA, concurring, stated that "The consent judgment against the applicant (sole defendant in the District Court) for 'damages to be assessed' entailed an admission by the applicant that it is liable for the whole of the respondents' loss or damage as ultimately quantified. The applicant cannot, consistently with that admission, maintain that it is liable for only such part of that whole as might be produced by apportionment under Part 4 of the *Civil Liability Act 2002* in consequence of a finding of 'concurrent wrongdoer' status of the builder: see the discussion in *Suncorp-Metway Ltd v Anagiotidis* [2009] VSC 126 at [63], [64]" @154)

s35(c)

Section 35(c) considered by Hall J in *Artistic Builders P/L & Anor v Nash & Ors* 17/12/10 [2010] NSWSC 1442 where the issue of **apportionment of liability between solicitors and counsel** arose in the context of a sale of a commercial property.

See *Pastrovic & Co. Pty Ltd v Farrington* 12/8/11 [2011] NSWDC 94 Johnstone J

s35A – Duty of Defendant to inform Plaintiff about concurrent wrongdoers

See *Pastrovic & Co. Pty Ltd v Farrington* 12/8/11 [2011] NSWDC 94 Johnstone J

See *The Owners-Strata Plan 62658 v Mestrez Pty Ltd & Ors* 18/10/12 [2012] NSWSC 1259 where Lindsay J considered the "identification and elaboration of any obligation an insurer (joined as a co-defendant with its insured) may have, under or by reference to CLA s. 35A or rules of court governing pleadings, to **plead and particularise allegations the insurer makes about the existence, and culpability, of non-parties said by it to be concurrent wrongdoers** whose conduct should be weighed in the balance in the Court's determination of proportionate liability under s. 35(1)" @7.

See *Sanderson Motors Pty Ltd v Lindsay Bennelong Developments Pty Ltd* 27/6/14 [2014] NSWSC 846 per Ball J. Section 35A "**simply gives the court power to award costs against a defendant who does not notify a plaintiff as soon as practicable of the existence of other potential concurrent wrongdoers**. It does not require the plaintiff to join those concurrent wrongdoers. Nor does it relieve the defendant of the obligation to plead the existence of those concurrent wrongdoers as a ground for reducing its own liability" @32. **General principles of concurrent wrongdoers and apportioning liability** considered.

s42 – Principles concerning resources … of authorities

In *Rickard & Ors v Allianz Australia Insurance Ltd & Ors* 23/10/09 [2009] NSWSC 1115 Hoeben J upheld the RTA's defence in the case of a category two road for which there were limited resources.

See *Holroyd City Council v Zaiter* 8/4/14 [2014] NSWCA 109 per Hoeben JA (with whom Gleeson JA agreed) and Emmett JA. P, when he was 9, was head injured when he **rode his bicycle down a grassed slope into an unfenced 2m deep drainage channel in an area under D's control**. He was successful at first instance with damages reduced by 10% to account for his failure to wear a helmet. P not found to be involved in dangerous recreational activity. D appealed on several bases. An argument that another child had stopped and got off her bike did not give rise to a defence of "obviousness" of the risk. Nine year old children are notorious for lack of maturity and the actions of one child do not dictate the bounds of reasonableness. In fact, D not only knew of the danger but was proposing to remedy the danger when the accident occurred. **D's argument per s42 of the CLA that failure to remedy this problem was due to an allocation of resources was not accepted**. The financial information produced by D simply did not establish that it was resources limited such that the drainage channel couldn't be fenced.

See *Council of the City of Liverpool v Turano & Anor* 31/10/08 [2008] NSWCA 270 [(2008) 51 MVR 262] from paragraphs 144-160 where Beazley JA considers s42 in a case where a **tree is blown over killing a driver**. Council not found to have owed duty in the circumstances. The "Council's failure to properly maintain the culvert outlet so as to drain water flowing to the west: '... more likely than not resulted in the area around the western end becoming almost permanently damp and undermining the stability of the tree by causing root damage and soil degradation'"@130 but "there was nothing to draw the attention of Council officers to any risk such as materialised in this case"@142. Sydney Water however breached its duty. ***[**Note that High Court allowed appeal from this decision.** See *Sydney Water Corporation v Turano* 13/10/09 [2009] HCA 42]

[Refrigerated Roadways] "389 Both section 42(a) and (c) used the phrase *'the functions required to be exercised by the authority'*. As section 42 deals quite generally with the way one should proceed in deciding whether a public or other authority has a duty of care or has breached a duty of care, the force of *'required'* seems to me to be *'required by the law of negligence'* – ie, required by the legal standard of taking reasonable care not to harm in a relevant way a person to whom the public or other authority owes a duty of care. It does not refer to a requirement in the nature of a statutory duty. …

393 The *'resources reasonably available to the authority'* would include resources that the authority … already has and that it might reasonably be expected to expend in provision of its functions, and any that might reasonably be provided to it. If, for example, an authority had real estate that it used for its offices or works depots, they are resources of the authority, but not might not be reasonably available for the purpose of exercising any of the functions that are the subject of debate in litigation. The *'resources reasonably available to the authority for the purpose of exercising its functions'* would also include such amount as

had been made available to that authority by appropriation (in the case of authorities funded from the state budget), or from other sources of income like levying of rates, or asset sales, or grants from some other level of government. The wording of section 42(a) seems to leave open an argument about whether more money than was actually made available to the authority from external sources was *'reasonably available'* to it.

394 Insofar as the NSW government had decided that it would devote none of its own money to the National Highway, and would rely on Federal funds for that sort of expenditure, it would only be if it could be said that more money than the Federal Government actually made available for expenditure on the National Highway was *'reasonably available'* to the RTA that the possibility of spending such money could enter into a question of whether the RTA had been negligent in the present case. … [In this case] there is no reason to conclude that more money was *"reasonably available".*

395 The effect of section 42(a) … is that what the RTA can be required by the law of negligence to do is limited by the financial and other resources that are reasonably available to the RTA for the purpose of carrying out the care, control and management of freeways and any other roads that are under its care, control and management. Its budget for that purpose is so large that any expenditure that would have been involved in earlier screening of the Glenlee Bridge, or indeed in earlier screening of all overpasses on freeways would have been well within its budget.

396 When section 42(b) uses the expression *'those resources'* it is referring back to section 42(a). What section 42(b) requires not to be challenged, in the present case, is the '*general allocation*' by the RTA of those resources that are reasonably available to the RTA for the purpose of the care control and management of freeways and other roads under its care control and management.

397 There is an important difference in prepositions between section 42(a) and section 42(b). Section 42(a) is concerned with the resources reasonably available *to* the authority, while section 42(b) is concerned with the allocation of those resources *by* the authority. In other words, section 42(b) starts from the position that certain resources are reasonably available to the authority, and considers the allocation that is made by the authority of those resources.

398 Effect must be given to the word *'general'* in section 42(b). It seems to be drawing a distinction between the general and the specific. It will be a matter that needs to be decided concerning any particular set of resources that is allocated to a public authority, whether a particular decision about allocation of those resources by the authority is regarded as a decision about the general allocation of resources, or a decision about the specific allocation of resources.

399 The force of the words *'is not open to challenge'* in section 42(b) is to prohibit a particular manner of contending that a public or other authority is under a duty of care, or has breached a duty of care. Thus, in a case like the present, which concerns an allegation of breach of duty of care, application of section 42(b) needs to be carried out bearing in mind *each particular manner* in which it is alleged a duty of care has been breached.

400 In *State of New South Wales v Ball* [2007] NSWCA 71; (2007) 69 NSWLR 463 at 466-7 [13]- [18], Ipp JA (with whom McColl JA and Young CJ in Eq agreed) was able to decide, on the strength of the particulars in a statement of claim, that at least some aspects of the claim a [P] wished to make involved a challenge to the general allocation of resources affecting the [P's] work as a police officer. In consequence, his Honour struck out those allegations from the statement of claim. Sometimes it might happen that the particulars are narrowly drafted, or that a [D] chooses not to make such a strike out application, but once the case is heard it is apparent that the substance of a complaint of negligence that [P] is making involves a challenge to the general allocation of resources by a public authority.

401 In the present case, if one allegation had been that the RTA misapplied well-established principles and made careless factual errors in the way it prioritised overpasses for screening, and that a principled and careful prioritisation process would have put the Glenlee Bridge close enough to the top of the priority list to have been screened before 23 August 1998 with the money that the RTA actually chose to spend on bridge screening, the challenge that was being made would have been to the allocation of resources that the RTA had actually allocated to bridge screening. I do not think that such a challenge would be one to the general allocation of the resources reasonably available to the RTA for the purpose of exercising its functions.

402 It is elementary that deciding any allegation of breach of duty of care involves considering what is the reasonable response to the risk. … 403 … [I]n the present case, if the allegation had been that the RTA did not take seriously enough the risk of objects being dropped from overpasses, and should have spent more money on remedying that risk than on, for instance, providing warning lights and protective barriers at railway level crossings, the challenge would be to the allocation by the RTA of money to screening overpasses as opposed to other road safety measures. One would need to decide whether a challenge of that type was to the *'general allocation'* by the RTA of the resources reasonably available to it for the purposes of exercising its functions.
404 Concerning allegations that are permissible in accordance with section 42(b), whether such an allegation is accepted is a matter of application of the common law plus principles of the ***Civil Liability Act*** other than section 42(b) and any other relevant legislation.
405 In light of the conclusion I have come to about breach of duty under the general law, it is not necessary to answer that question. It can be said, however, that it could in principle be wrong to apply section 42(b) by saying that all that is being challenged is the failure to do the comparatively small amount of work that would have been needed to prevent the particular injury that the particular [P] suffered. To approach the matter in this way pays insufficient attention to the detail of the argument that the [P] put as to the particular ways in which the [D] has failed to exercise reasonable care. It is in principle quite possible for one way in which it is alleged a public or other authority has failed to exercise reasonable care, resulting in a particular [P] being injured, to involve alleging that the taking of reasonable care would have required the authority to make a different general allocation of resources than that which it in fact made, while another way of alleging that the public or other authority has failed to exercise reasonable care, resulting in the same injury, does not involve alleging that the taking of reasonable care would have required the authority to make a different general allocation of resources to that which it in fact made.
406 The reasoning process I have engaged in earlier in this judgment – considering the question of whether the RTA's taking reasonable care required it to screen the Glenlee Bridge earlier – has been carried out by taking into account the broad range of the RTA's activities. At least in the present case, section 42(c) adds nothing to the common law". **RTA of NSW v Refrigerated Roadways P/L** 22/9/09 [2009] NSWCA 263 per Campbell JA

s43A – Proceedings against public … authorities for the exercise of special statutory powers

In *Rickard & Ors v Allianz Australia Insurance Ltd & Ors* 23/10/09 [2009] NSWSC 1115 an accident occurred between two vehicles on a highway when the driver of one (Kelly), insured by R, **failed to slow down from about 100 kph to 60 kph to drive safely through water that was across the road**. Hoeben J found that either Kelly did not slow down sufficiently upon seeing a hazard ahead, or his lookout was inadequate. The RTA erected a **water over the road sign** 924m to the east of the accident. This was **too far away** and constituted a breach of duty. **Section 5B** of CLA breached. The **defence in s43A** of the CLA was carefully considered from para. 110. Hoeben J stated that the "[Ps] and Allianz satisfied the test prescribed by s 43A(3) and that the **placing of the Water Over Road' sign 924 metres to the east … was so unreasonable that no road authority could properly consider it to be a reasonable exercise of its power** to do so"@128. The RTA also sought to rely on **s44** of the CLA but Hoeben J was "not satisfied that the erection of a 'Water Over Road' sign constitute[d] an **action to 'prohibit or regulate'** an activity"@130. Causation however was not established against the RTA. The RTA also succeeded in its various defences for failing to erect a culvert in the vicinity of the accident. See precis at **s42 & s45 of the CLA** at New South Wales – Civil Liability Act. The **adjacent landowners/occupiers**, the Lavis's, were **not liable either for contributing to the water build-up on the road**. Judgment was entered against Allianz. A**ppeal** dismissed in *Allianz Australia Insurance Ltd v RTA NSW; Kelly v RTA NSW* 9/12/10 [2010] NSWCA 328 but Giles JA stated at para. 90 that "Applying the terms of s 43A, I respectfully differ from the trial judge. Accepting the guiding principle that a warning sign should be close enough so that the driver would recognise the hazard when he or she came to it, and attributing to the RTA Mr McGregor's observations of water in the dip, in my view the RTA could, and could properly consider placing the 'Water Over Road' sign where it was placed [more than 900m from water] a reasonable exercise of its special statutory power. Placing the 'Water Over Road' sign east of the dip, to act as a warning for the dip and for the water over the road at 'Lyntods', was in the circumstances not an act so unreasonable that no authority having

the RTA's special statutory power to erect warning signs could properly consider it to be a reasonable exercise of that power."

See *Simon & Anor v Hunter & New England Local Health District. McKenna v Hunter & New England Local Health District* 2/3/12 [2012] NSWDC 19 where Elkaim SC DCJ **did not find s43A applicable in a case where a psychiatric patient was discharged from hospital and then killed a friend who was taking him on a long trip to Victoria**. There was no exercise of a power to detain or not to detain. The claims of the relatives of the deceased against the doctor responsible for allowing him to leave the hospital failed.

See *Warragamba Winery Pty Ltd v State of NSW (No. 9)* 26/6/12 [2012] NSWSC 701 where Walmsley AJ considered s43A in a case where a **lightening strike caused a fire which caused damage to factories and houses near national park**. Liability of public authority not established.

See *Curtis v Harden Shire Council* 10/9/14 [2014] NSWCA 314 where A's partner (Ms P) was killed in a car accident. **Ms P lost control of her vehicle on loose gravel and hit a tree**. The R had been doing roadwork in the area and had failed to erect warning signs. The trial judge found R had breached its duty of care by failing to erect adequate signage, but did not find R liable due to A failing to establish causation or a breach of s43A. On appeal, court agreed that s43A was engaged and that "the **omission to include … signage was … conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt**" @228 *per Beazley P*. Correct approach to issue of causation considered. "The comparison of probabilities with possibilities, the former satisfying the standard of proof while the latter do not … is entirely conventional" @333 *per Beazley P*. Majority found **trial judge had erred by not finding that causation had been established** on the facts. R was negligent in failing to erect a reduced speed sign specifying a 60 kph limit, given the slippery road surface.

See *Kuehne* at NSW CLA s44 and Dog attack

s44 – When … authority not liable for failure to exercise regulatory functions
See *Rickard* precis at s43A

In *Kuehne (by his tutor) & Kuehne v Warren Shire Council* 25/5/11 [2011] NSWDC 30 Elkaim SC DCJ **did not find s44 to be applicable** in a case where the 1st P's 4y.o. sister and the 2nd P's daughter died in 2006 as a result of being **attacked by dangerous pig hunting dogs which were insecurely kept on their street**. She was attacked in the yard where the dogs were kept. The **council was aware of the danger the dogs posed due to numerous complaints**. The Ps submitted that "the Council's negligence lay in its failure to implement, or make use of, its powers under the CAA [Companion Animals Act], in particular the power under Section 34 to declare a dog *'dangerous'"* @110. "[T]he plaintiffs had a sufficient interest to enable them to enforce the powers of the Council under Section 34 of the CAA. I would go further, however, and conclude in the terms referred to by McHugh J, that the plaintiffs here have a personal right to sue for damages. The CAA provided the Council with a regime to prevent its residents from being exposed to dangerous dogs. It is implicit in a control of dangerous animals that persons may be subject to the obvious danger associated with the animals. Residents of Warren depended on the Council to exercise its statutory obligations in respect of dangerous dogs. The CAA gave the Council the necessary powers. The residents of Garden Avenue were personally interested in the control of the dangerous dogs that lived at Number 29. … [T]his reliance created a right to sue for damages for contravention of the Council's statutory duties so that a duty of care existed" @129-130. Council found to have breached its duty. Concerning s43A of the CLA Elkaim SC DCJ found "the circumstances were such that the Council's failure to act was *'so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power'"* @162. Liability established under CLA. **Appeal allowed** in [2012] NSWCA 81 "because the mere fact that the dogs were pig hunting dogs could not, without more, sustain the finding that they were therefore required to be declared as dangerous dogs. Even if the Council knew that pig hunting dogs were kept at 29 Garden Avenue, it had to be demonstrated that their attacks on pigs were *'without provocation'*. The

evidence established precisely the opposite" @41. Therefore the trial judge had erred in his interpretation of s33 of the Companion Animals Act 1988, which was his prime basis for establishing liability. Section 43A of the CLA also stood in the way of R succeeding. Cross appeal re damages dismissed except on limited basis concerning care. See précis also at Dog attack.

See *Lee v Carlton Crest Hotel (Sydney) Pty Ltd* 19/9/14 [2014] NSWSC 1280 where Beech-Jones J from para. 389 provides analysis of s44 in the context of claim by a widow who witnessed her husband's death as a result of driving through a **negligently constructed railing in a car park. Council had approval and inspection responsibilities re car park's construction**.

s45 – Special non-feasance protection for road authorities

In *Colavon P/L t/as Thormans Transport v Belligen Shire Council* 19/12/08 [2008] NSWCA 355 [(2008) 51 MVR 549] the Council's **failure to install guide posts**, which were a 'traffic control facility', was not actionable per s45. The installation of such did not constitute 'road work'.

In *Rickard & Ors v Allianz Australia Insurance Ltd & Ors* 23/10/09 [2009] NSWSC 1115 there was knowledge in an officer of the RTA of the need for a culvert to be built. However, RTA had the benefit of immunity as Hoeben J found that the **officer did not have the requisite authority**.

See *Botany Bay City Council v Latham* 13/10/13 [2013] NSWCA 363 where COA held "There was **no evidence that the Council had actual knowledge of the particular paver which caused Ms Latham to trip**. Such evidence as there was … was to the contrary. Accordingly, … the evidence was insufficient to establish that the Council had "actual knowledge of the particular risk, the materialisation of which resulted in the harm" within the meaning of s 45" @49.

See *Cavric v Willoughby City Council* 7/5/14 [2014] NSWDC 46 where Elkaim SC DCJ determined that a **council owned car park adjacent to a shopping centre was a road**. "The car park … while serving as a place in which shoppers at the Plaza would park their cars was also a thoroughfare used by pedestrians so that, as in *Stojan*, the car park must satisfy the first two conditions identified by McColl JA. In relation to the third condition, the car park was used by the public to make their way either from their motor vehicles to the shopping centre or perhaps even as a thoroughfare from Eastern Valley Way or Harden Avenue, as pedestrians, to the shopping centre" @71. "Once the car park becomes a public road then, in relation to it, the [D] must be seen as a roads authority" @73. **P was injured when she was pushing an overloaded trolley, which also had one of her children in it, and the trolley was destabilised when it hit a pothole in the car park**. There was no basis for concluding how long the pothole had been in the condition it was on the day of the accident. **D did not have actual knowledge of the risk**. It was not enough to show that their should have been actual knowledge. P's claim therefore failed. Contributory negligence was considered. P's **contributory negligence would have been 15%** as she "should have exercised more care in proceeding towards her car with both a child and a heavily laden trolley. The [P] made the decision to do the shopping *'in one go'* when there were alternatives available to her. She lived very close to the Centre and presumably could have visited on other occasions during the week. Although not raised in evidence one must also consider the possibility of having supermarket items delivered" @96.

> [Turano] "181 The operation of s 45 is fundamental to the determination of the Council's liability in this case. His Honour erred in failing to consider it. …
> 182 In order for the Council to fall outside the protection afforded by s 45, it had to have '*actual knowledge of the particular risk the materialisation of which resulted in the harm*' that arose from the failure to carry out roadworks, or to consider carrying out roadworks. It was accepted that drainage works were '*road works*' for the purposes of the section: see the *Roads Act* 1993.
> 183 The application of s 45 has been considered in a number of recent authorities in this

Court: see Leichhardt Council v Serratore [2005] NSWCA 406; North Sydney Council v Roman [2007] NSWCA 27; (2007) 69 NSWLR 240; Angel v Hawkesbury City Council [2008] NSWCA 130; and Blacktown City Council v Hocking [2008] NSWCA 144.

184 The central issue in each of those cases was **what constituted actual knowledge** for the purposes of the section. In Serratore, Giles JA (Hodgson and Ipp JJA agreeing) held, at [15], that **a finding of actual knowledge could be made by inference** and that if the inference was fairly available and the roads authority called no evidence to rebut it, the Court could more comfortably find actual knowledge.

185 In Roman, the question arose as to **what level within a Council actual knowledge had to reside**. There was no evidence in that case to establish that an officer at the relevant decision-making level had actual knowledge of the defect in the roadway, although knowledge resided in the workers who performed street cleaning work and whose duties included looking out for and reporting upon hazards in the streets that might require repair.

186 The majority in Roman, Basten JA, with whom Bryson JA agreed, held, at [157], that actual knowledge for the purposes of s 45(1) had to be found in the mind of an officer within Council, who had delegated or statutory authority to carry out or consider carrying out the relevant roadwork. McColl JA rejected the majority's approach. Her Honour held, at [60], that **knowledge of persons who, acting within the scope of their duties, learned of a particular risk and were under an obligation to report it, as part of the road authority's system of maintaining roads in its jurisdiction, should be attributed to the roads authority**.

187 In Angel and Hocking the Court (Spigelman CJ, Beazley, Giles, Tobias and Campbell JJA) sat to determine the correctness of Roman. In Hocking, Tobias JA, at [223], upheld McColl JA's approach to the operation of s 45.

188 In this case, two questions arise for determination. The first is what was the particular risk that materialised. The second is whether the Council had actual knowledge of that risk. The evidence was clear that **the Council had no knowledge that any of the trees in the vicinity of the culvert were distressed**. Mr Brookfield said that the Council had no notice that the water main had been installed. However, both Mr Bewsher and Mr Burn stated that the November 1999 survey revealed the existence of the water main and the Telstra line. There were also the references on the drawing for the road widening proposal to which I have referred.

189 Mrs Turano identified two risks, which she said resulted in the harm that materialised. First, she contended that the laying of the water main and Telstra line above the level of the culvert outlet pipe, had caused water to be dammed and thus to stay in the pit longer than would have been the case had the culvert remained free-draining, as it was designed to be. The second was that by laying the water pipe in sand, water had been conducted along the sand in the direction of the tree. It was submitted that the combination of both of these factors had caused the tree roots to become compromised, which in turn, had affected the stability of the tree, resulting in it being blown over in high wind conditions.

190 I agree that the particular risk that materialised was as articulated by Mrs Turano. Did the Council have actual knowledge of that risk? It is apparent from the 1999 survey that the Council had knowledge that the water main and the Telstra line had been installed in the vicinity of the culvert. Assuming for the moment that the notification of the water main on the survey constituted relevant actual knowledge of that fact by the Council, there was no evidence that anyone within the Council had ever inspected the water main, or had observed that it had been laid in sand.

191 Accordingly, there was **no evidence of actual knowledge in the Council of one of the basal facts constituting the particular risk, the materialisation of which resulted in the harm**. That is sufficient for the Council to be protected from liability in this case. I am also of the view that there was no evidence that, as at the date of the accident, the Council had actual knowledge that the water main was laid above the level of the discharge area, so as to cause water from the culvert to dam or pond.

192 I am of the opinion, therefore, that it has not been established that the Council had actual knowledge of the risk, the materialisation of which resulted in the harm in this case. It follows that **s 45 operates and the Council has no liability to Mrs Turano**.

Council of the City of Liverpool v Turano & Anor 31/10/08 [2008] NSWCA 270 Beazley JA, Full Court [(2008) 51 MVR 262]

***[**Note that High Court allowed appeal from this decision.** See *Sydney Water Corporation v Turano* 13/10/09 [2009] HCA 42]

s50 – No recovery where person intoxicated

Section 50 considered in *Jackson v Lithgow City Council* 24/11/08 [2008] NSWCA 312 by Allsop P, Full Court.

In *Davies v George Thomas Hotels P/L* 21/4/10 [2010] NSWDC 55 an **intoxicated hotel patron fractured his ankle after slipping on a wet bathroom floor**. The floor was wet due to a leaky toilet pan. D had a warning sign in place, but it was not adequately positioned to be seen by P. "[T]he defendants' negligence in failing to repair the leak was a necessary condition of the occurrence of the fall and the plaintiff's injury. … [H]ad a warning sign been placed in a prominent position outside the bathroom, the plaintiff would have entered the bathroom very carefully and it is likely that he would not have slipped. The defendants did not contend that the difficulty of addressing a leak or placing a warning sign was such that they should avoid liability by reason of the operation of s 5D (1) (b)"@27. P had drank about 12 standard drinks in 7 hours. P **not considered** by Murrell SC DCJ **to be "intoxicated to the extent that (his) capacity to exercise reasonable care and skill was impaired" within the meaning of s 50(1)**"@31

In *Amanda's OnThe Edge Pty Ltd v Dries* 24/11/11 [2011] NSWCA 358 the COA found that the requirements of s50(1) were not met and Allsop P stated that "**The 'extent' of the intoxication relevant for such a finding will depend on the circumstances and the subject or subjects in respect of which the reasonable care and skill may be impaired**. Operating machinery, driving a car or flying a plane may be tasks where very little alcohol would be required for the person's capacity to exercise skill and care to be impaired (adequately satisfied by six beers and two bourbons). Here, the care and skill was walking over open ground to get to a destination. There was no reason for him, in the dark, to suspect such a danger [unguarded wall] as befell him" @36.

In *Langendoen v Coolangatta Estate Pty Ltd* 9/11/12 [2012] NSWDC 210 Elkaim SC DCJ considered the extent of P's intoxication and could not "find that the plaintiff is not entitled to damages by reason of Sections 50(1) and (2). To be quite clear, my findings are firstly that the **requisite degree of impairment has not been established** and secondly that the **accident is likely to have occurred even if the plaintiff had not been intoxicated**" @51. Section 50(3)'s presumption of contributory negligence was however triggered because **had P "not been intoxicated she may well have been able to better control her movements** in sitting down or getting up and been able to recover from the loss of balance" @52. P's contributory negligence was 40%.

See *Tocker v Moran* 14/12/12 [2013] NSWSC 248 where **P was at a party and dancing around a bonfire. He tripped and fell into the fire and suffered burns**. Various provisions of s5 considered, including s50 and contributory negligence through intoxication. Mahony SC DCJ "satisfied that, at the time of his injury, the **plaintiff was intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired**. Therefore, pursuant to s 50 (2) CLA there should be no award of damages in respect of any liability that would otherwise be sheeted home to the defendant" @52.

s51 – Part applies for civil liability for death, injury or property damage

Sections 51, 54 & 54A considered in *Adams by her next friend O'Grady v State of NSW* 28/11/08 [2008] NSWSC 1257 Rothman J from paragraph 127.

s52 – No civil liability for acts in self-defence

See *Kassam v CAN 075092232 Pty Limited (in liquidation)* 17/8/09 [2009] NSWDC 262 per Hungerford ADCJ from paragraph 124. D's security guards not found to be acting in self-defence.

See *Hall v van der Poel* 24/12/09 [2009] NSWCA 436

s52(2) – No civil liability for acts in self-defence

See *Sangha v Baxter* 9/4/09 [2009] NSWCA 78 where this sub-section considered by the COA in circumstances where driver argued he was reversing the vehicle, which injured another, in self defence due to the injured person trying to assault him.

s53 - No civil liability for acts in self-defence

See *Kassam v ACN 075092232 Pty Limited (in liquidation)* 17/8/09 [2009] NSWDC 262 per Hungerford ADCJ from paragraph 124. D's security guards not found to be acting in self-defence.

s54 – Criminals not to be awarded damages

Sections 51, 54 & 54A considered in *Adams by her next friend O'Grady v State of NSW* 28/11/08 [2008] NSWSC 1257 Rothman J from paragraph 127.

In *Kassam v ACN 075092232 Pty Limited (in liquidation)* 17/8/09 [2009] NSWDC 262 the **complete defence provided by s54(1) was made out** despite the D's vicarious liability for its security guards' conduct. **P committed the offeces of affray and assault which contributed to his injuries**. Section 54(2) considered, but it was not found to save P's damages claim. Hungerford ADCJ concluded "that the provision is concerned to deny damages to an injured person who has committed a serious criminal offence except where the injury was caused by conduct of the [D] which itself constituted a criminal offence. Without more, therefore, s 54 (2) cannot be called in aid by the [P]" @120.

In *Hage-Ali v State of NSW* 14/10/09 [2009] NSWDC 266 Elkaim SC DCJ did not allow the D to rely on s54 in circumstances where the P's serious offence of possessing cocaine on a Monday could not be sufficiently connected to her arrest the following Wednesday. It **could not be said that injury or damage 'followed' P's offence**. Elkaim SC DCJ also stated that D "fails in relation to **Section 54(1)(b)**. Once again, it would take an interpretation in the broadest terms to suggest that the plaintiff using cocaine on the Monday or any previous day ***'contributed materially'*** to the damage caused by her arrest on the Wednesday. The fact that the plaintiff used the cocaine has nothing to do with the damage suffered" @222. Further Elkaim SC DCJ stated that the P "was arrested for supply of cocaine. Her actual conduct was use and possession of the illegal substance. I do not see how it can be said that any supply, which she did not do, could have contributed to the damage caused by the arrest" @223.

In *Hall v Yang* 1/4/14 [2014] NSWDC 36 per Levy DCJ, P was seriously injured when his motorcycle struck D, who turned across his path at an intersection. D, a taxi driver, made an **abrupt turn without indication when given unexpected directions by his passenger**. D was negligent for failing to observe P and give way prior to making his turn. D raised a complete defence as to whether P was engaged in "furious driving" within the meaning of s53 of the Crimes Act 1900 (NSW) which, in turn, amounted to a "serious offence" under s54 of the CLA under the heading "Criminals not to be awarded damages". His Honour found, based on eyewitness testimony and expert evidence, that P was probably travelling at 65kph (15kph over the speed limit) prior to the collision. This fell far short of establishing an allegation of furious driving. **D was negligent for turning across P's path, but P contributed to the accident by driving at an excessive speed**, some 30% over the speed limit. In travelling at this speed he left himself with significantly less opportunity to avoid the accident. **Contributory negligence was assessed at 25%.** See also précis at NSW – References … Head.

> "220. In *Sangha v Baxter* [2007] NSWCA 264 Young CJ in Eq, as he then was, said this in relation to **the word '*following*' in Section 54**:-
>
> > 'It seems to me that it cannot be that every action after someone has committed a serious offence can be caught by the words "following … ". Just where the cord must be cut is unclear. It may be that if one were to set down a test one would do it in similar words to those of Lord Normand in the Privy Council in *Teper v R* [1952] AC 480 at 487 (a res gestae case) that the injury must occur "if not absolutely contemporaneous with the" crime then "at least so clearly associated with it, in time, place and circumstances" that it can be considered part of the criminal conduct.'"

Hage-Ali v State of NSW 14/10/09 [2009] NSWDC 266 Elkaim SC DCJ

s54A – Seriously mentally ill persons

Sections 51, 54 & 54A considered in *Adams by her next friend O'Grady v State of NSW* 28/11/08 [2008] NSWSC 1257 Rothman J from paragraph 127.

Schedule 1 – Clause 35

In *Petit v State of NSW & Anor* 27/7/12 [2012] NSWDC 105 Mahony SC DCJ considered the meaning of **'incident giving rise to the claim'**.

Compensation to Relatives Act 1897

s3 – Causing death through neglect

See *Lee* at Nervous Shock

s4 – By whom and for whom action may be brought

In *Grosso v Deaton* 20/4/12 [2012] NSWCA 101 [61 MVR 349] the COA canvassed the relevant principles of assessment in a case under the *Compensation to Relatives Act 1897 (NSW)* where a **single mother caring full-time for her 12 year old and eight year old sons (of different fathers) was killed in a car accident**. The claim was brought by the children's grandmother as executor of the deceased's estate. The claim was for **loss of domestic services and loss of an expectation of financial benefit**. After the death, the fathers of the boys (who both worked full-time) provided care. The impact of this on damages considered. "To the extent that a father was providing some assistance or maintenance prior to the mother's death, allowance must be made in calculating the loss for those other contributions. If, upon death, relatives, including the father, step into the mother's role, the loss may be ameliorated or eliminated ... On the other hand, it is clear that the provision of services by 'relatives or friends gratuitously or at small cost as a benevolent gesture to the family' does not preclude the recovery of the true value of those services from the tortfeasor ... However, the principle that recovery is not precluded by the provision of gratuitous services replacing those of the deceased, is qualified, in the case of a spouse, by the requirement that allowance be made for the possibility of remarriage" @19-20.

In *Logan v Hankook Tire Co Ltd* 3/5/13 [2013] NSWSC 450 Garling J was **not prepared to join two dependent children of the deceased who were aged 15 and 16** and who after being properly advised did not wish to be joined. The court was also not able to identify an available tutor for them. "Because the deceased … was killed whilst he was engaged in his employment, the plaintiff Rosemary Logan, his de facto spouse, and both of the dependent children, were entitled to benefits under the *Workers Compensation Act* 1987" @10.

Dust Diseases Tribunal Act 1989

s11 - Claims for damages for dust diseases etc to be brought under this Act

In *Trustees of the Sydney Grammar School v Winch* 27/2/13 [2013] NSWCA 37 the COA decided that the Dust Diseases Tribunal did not have jurisdiction pursuant to s11(1) of the Dust Diseases Tribunal Act 1989 (NSW) to consider a nervous shock claim brought by the deceased's daughter. The R could not be said to be **'claiming through'** her Father. Nor could her proceedings be described as 'proceedings for damages in respect of that dust-related condition or death'.

s12D – Damages for non-economic loss not to be reduced by certain compensation payments

See *Parkinson v Lendlease Securities and Investments P/L* 4/6/10 [2010] ACTSC 49 Higgins CJ from paragraph 50.

Dust Diseases Tribunal Regulation 2013

s52 – Effect of agreement or determination as to apportionment

See *Brooks v Trend Roofing Pty Ltd & Anor* 8/5/09 [2009] NSWDDT 11 Kearns J. (*decided under 2007 version of regulations)

Law Reform (Misc. Provisions Act) 1946

s5(1)(b) – Proceedings against and contribution between joint and several tortfeasors

See *Nau v Kemp & Associates* 12/7/10 [2010] NSWCA 164 where the COA considered recovery under this section when 'double dipping' and considered the section generally.

Legal Profession Act 1987 *repealed

s198C & s198D

In *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross … & Thelander* 12/12/12 [2012] HCA 56 the High Court considered the **meaning of 'personal injury damages'** in the context of the issue of costs under the *Legal Profession Act* in a case where the P had been assaulted by a security guard. The majority held that the claim was a claim for 'personal injury damages' under the Act.

Legal Profession Act 2004

s337(1) – Interpretation and application

The interaction between this provision, as it relates to cost capping and the meaning of 'personal injury damages', and Part 2 of the CLA considered by Hall J in *Williamson v State of NSW* 30/3/10 [2010] NSWSC 229. See High Court appeal at [2012] HCA 57 where appeal dismissed. **A claim for 'personal injury damages does not include a claim for damages for false imprisonment**.

In *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross … & Thelander* 12/12/12 [2012] HCA 56 the High Court considered the **meaning of 'personal injury damages'** in the context of the issue of costs under the *Legal Profession Act 1987 (NSW)* in a case where the P had been assaulted by a security guard. The majority held that the claim was a claim for 'personal injury damages' under the Act.

In *Hammond v Stern* [2013] NSWSC 70 13/2/13 the issue was "whether Part 2 of the *Civil Liability Act* and ss 337 and 338 of the *Legal Profession Act* 2004 apply to professional negligence actions. That issue is resolved by determining the meaning of the phrase 'personal injury damages' in Part 2 of the *Civil Liability Act*" @12. Harrison AsJ concluded that "the professional negligence claim is a claim for 'damages that relate to ... injury to a person'. Therefore, the professional negligence claim is a claim for 'personal injury damages' and s 338 of the *Legal Profession Act* applies to the consent judgment made between the parties" @45.

Limitation Act 1969

s18A – Personal injury

In *Radford v State of NSW* 30/10/09 [2009] NSWDC 278 Levy SC DCJ tentatively concluded that a claim for aggravated and exemplary damages was not strictly a claim for personal injury damages (even though a claim for personal injury had been involved, but was not in the amended pleadings) and therefore the 3 year limitation period under s18A of the Limitation Act 1969 (NSW) did not apply. On appeal in *State of NSW v Radford* 28/10/10 [2010] NSWCA 276 the COA decided that under the NSW legislation "**an action based on assault in which the plaintiff claims aggravated damages for injury to feelings, is properly characterised as an action '*for damages for personal injury*'**" @105. "[T]he respondent alleges that he suffered emotional upset, anxiety, distress and humiliation by virtue of the alleged assault (and the unlawful imprisonment). His claim … is for damages for impairment of his mental condition. Each of the consequences he alleges flowed from the assault can readily be described as an impairment of the respondent's mental condition. His claim is therefore for damages for personal injury" @116. "[A] claim for exemplary damages alone, if such a claim is permissible, may not be an action for damages for personal injury within s 18A(1) of the *Limitation Act"* @128.

s50C & s50D – Date cause of action is discoverable

Section 50D considered by COA in *Frizelle v Bauer* 3/8/09 [2009] NSWCA 239. See commentary below.

In *Mullens v Sydney West Area Health Service* 29/4/11 [2011] NSWSC 346 Hislop J considered s50D(1)(b)&(c) re 'fault' and 'serious injury.'

See *Sheehan v Ainsworth Game Technology Ltd* 28/7/11 [2011] NSWSC 797 where Schmidt J considered s50C(1)(a), s50D(1)(b), s50D(1)(c) & s50D(2) in a case where the P suffered an injury to her thumb in 2006 which slowly developed into a serious injury. Legal advice "was given at a time when her injuries appeared to be relatively minor. They became much more serious and eventually reached the point where it became apparent that she had a common law claim. In the circumstances, that she only received advice about these matters in 2010, was **not the result of her failure to take 'all reasonable steps'**" @48. Claim not held to be brought outside limitation period.

See *State of NSW v Gillett* 13/4/12 [2012] NSWCA 83 where COA considered the **meaning of 'fault' in s50D(1)(b)**. *Baker-Morrison* approach confirmed. "Basten JA [in *Baker-Morrison*] was correct when he stated … that **a cause of action was discoverable when a plaintiff knew or ought to have known the key factors necessary to give rise to liability**. As his Honour pointed out, s 50D(1)(b) involves a relationship of causation between '*fault*' and injury" @94. Section **50D(2)** also considered and *Baker-Morrison* approach confirmed. "As I understand his Honour's reasons, Basten JA was doing no more than postulating an objective test. For the purposes of s 50D(2), the court had to determine whether a fact within the meaning of s 50D(1) would have been ascertained if a person had taken all reasonable steps to ascertain it before the relevant date. This would involve an inquiry of the steps actually taken by the plaintiff, if any, and whether those steps satisfied the court's determination of what were reasonable steps to take in the particular circumstances of a given case" @104.

In *Opuko v P & M Quality Smallgoods …* 14/5/12 [2012] NSWSC 478 Adamson J held "it was reasonable for the plaintiff to rely on the fact that he had originally been employed by P & M as the basis for his view that he was still employed by P & M on the day of the accident. His belief would tend to be reinforced by the terms of the letter of termination and the subsequent letter to his solicitors in April 2005 and the fact both letters were sent on P & M letterhead. I do not consider that **'all reasonable steps'** required the plaintiff to investigate whether what appeared to be the case was consistent with his group certificates or whether the ABN on his tax return matched the ABN on his letter of termination or the ABN on his group certificates. At all events, because the matter was not explored with the plaintiff in cross-examination, I accept that the **plaintiff has established that he did not appreciate that he had a claim for damages against P & M or HUT until 2007 when he was first advised that he was employed by Kaybron 6 and not, as he had believed, by P & M**" @67-68)

In *Booth v AE & EM Kiel Pty Ltd* 21/5/12 [2012] NSWDC 71 Levy SC DCJ found that the P's cause of action was not discoverable in circumstances where P tripped over a lopped tree branch near a motel occupied by D. P suffered bruising to his hip. He was stoic about it and hoped it would improve. He sought treatment, but it **wasn't until after the limitation period had expired that he found out he would need hip replacement surgery and that his injury was therefore sufficiently serious** to justify suing D.

In *Baggs v University of Sydney Union* 4/3/13 [2013] NSWSC 152 the issue was **"whether the plaintiff needed to make a legally informed evaluative judgment as to the identity of the occupier of the Wentworth Building before knowledge or awareness that the defendant was the entity at fault could be attributed to her under s 50D(1)(b)** or whether, as the defendant submitted, her belief that the Union was at fault in May 2003 was sufficient" @48. Fullerton J concluded : "I find it difficult to interpret the plaintiff's belief that the University Union was negligent as anything other than an attribution of fault on the basis that she believed (and on reasonable grounds) that the Union was the occupier of the Wentworth Building and that the failure to maintain the fire stairs and to ensure they were free of debris and well lit was their responsibility, breach of which rendered them liable for her injuries. I am satisfied that those interrelated facts were within her understanding and evaluation in May 2003 without the need for professional advice and, accordingly, that she knew the identity of the defendant as the entity at fault for the purposes of s 50D(1)(b). **Appeal allowed** 19/12/13 in [2013] NSWCA 451. "[T]he **primary judge erred in concluding that Ms Baggs knew that her injury was caused by the fault of the Union**. Ms Baggs' understanding was that the Union, as part of the University, owned the building and was at fault. In the language of *Baker-Morrison*, **she did not know that the Union was a separate legal entity from the University or that the Union as distinct from the University occupied the building and was responsible for the care and**

control of the fire stairs. Each was a matter which Ms Baggs was required to know as a factor necessary to establish legal liability on the part of the Union" @28.

[Frizelle] "27 There are circumstances in which s 50D may only be satisfied where the applicant has taken all reasonable steps to ascertain a fact which may involve medical or legal evaluation. It was not in doubt in *Baker-Morrison* … that the mother whose child had been injured did not know either that the injury was caused by the 'fault' of the State or that it was sufficiently serious to justify bringing an action, if such knowledge required the application of any degree of professional expertise or assessment: at [24]. Nor was it established that there were any steps that she ought to have taken, but did not, within the period of 26 days following the accident, which was the period in issue in that case.

28 The present case falls into a different category. The period during which the necessary assessment had to be made was a period of some nine months after the date of the accident. The fact that further evidential material might need to be gathered was beside the point, so long as the seriousness of the injury could reasonably have been assessed within that period. Further, the issue was not the threshold in the *Civil Liability Act* with respect to non-economic loss, but the quantum of the applicant's economic loss. No doubt her prognosis remained somewhat uncertain in April 2004, but the primary judge was satisfied that the impairment of her earning capacity, and the likelihood that it would continue, was known to her at least by early 2004. On the evidence, that finding has not been shown to be open to significant doubt.

29 At the heart of the applicant's claim was the suggestion in the affidavit, not fully supported when taken into account with the cross-examination, that she did not believe that she had a cause of action in relation to an injury which was sufficiently serious to justify the bringing of the action because of advice received from her solicitors. His Honour found that the injury 'obviously was a serious one and the plaintiff conceded that in her evidence': … He then noted that there was a further question as to whether it was sufficiently serious to justify the bringing of an action, and continued … to consider whether that was so. In the passages set out above, he concluded that it was sufficiently serious and that the applicant appreciated that fact.

30 There may be a case in which the applicant has taken all reasonable steps to ascertain facts depending upon the advice of professional persons, but, having been given wrong advice, does not have the necessary state of mind. According to *Baker-Morrison*, the terms of s 50D(1) may not be engaged: see, *Baker-Morrison* at [59]. That, however, is not the present case and the correctness of that view does not arise.

31 In substance, his Honour's analysis of the evidence suggests that the delay in commencing proceedings was in part due to the dilatoriness of the applicant in maintaining contact with and providing information to her solicitors, and partly the dilatoriness of the solicitors." **Frizelle v Bauer** 3/8/09 [2009] NSWCA 239

s52 – Disability

See *DC v State of NSW* 1/3/12 [2012] NSWSC 142 and *TB v State of NSW* 1/3/12 [2012] NSWSC 143 where DC & TB (sisters) were **sexually abused in the 1970s and 1980s by their stepfather**. Action brought against D and YACS (now DOCS) for being negligent in failing to report the matter to the police. Limitation period suspended due to P's being under disability. In the alternative P's granted extension of time.

s60G – Ordinary action (including surviving action)

See *O'Hagan v Sakker* 11/7/11 [2011] NSWDC 60 where leave granted pursuant to s60G after considering s60I. The P "asserts an **alleged failure by the defendant to remove what has variously been described as either a surgical sponge or pack from the plaintiff's abdominal cavity at the conclusion of a surgical procedure** variously described as a partial or hemi-colectomy or a sigmoid colectomy which the defendant performed upon her on 10 August 1992" @5. The **pack was found 15 years later**.

In *Andrews v Allianz Australia Insurance* 7/3/11 [2011] NSWDC 162 P **injured her teeth in a car accident in 1980. P needed further dental treatment as an adult**. Extension of time granted by Cogswell SC DCJ. **Section 60I & 69G** considered.

See *DC v State of NSW* 1/3/12 [2012] NSWSC 142 and *TB v State of NSW* 1/3/12 [2012] NSWSC 143 where DC & TB (sisters) were **sexually abused in the 1970s and 1980s by their**

stepfather. Action brought against D and YACS (now DOCS) for being negligent in failing to report the matter to the police. Limitation period suspended due to P's being under disability. In the alternative P's granted extension of time. Section 60I also considered.

Motor Accident Compensation Act 1999

Articles

Gumbert J, *'Obligations Increase for Motor Accident Claimants and Insurers'* (2008) 46(9) LSJ 62 (this article reviews recent amendments to ss82, 84A, 85A, 86(3)&(4), 96(1), 123. Sch 5 and other provisions)

Aims & Overview of Act

See paragraph 76 of *Gudelj v MAA of NSW* 14/5/10 [2010] NSWSC 436

s3 - Definitions

In *Zotti v Australian Associated Motor Insurers Ltd* 8/10/09 [2009] NSWCA 323 [54 MVR 111] the COA considered the meaning of the words and phrases **'injury', 'as a result of'', 'collision' and 'caused during'** in s3 of the Motor Accidents Compensation Act (NSW) 1999. Consideration of these terms was given in the context of a **cyclist slipping on oil and injuring himself two hours after a previous collision at the site**. The cyclist sued the third party insurer of one of the drivers involved in the previous collision, but his **action was dismissed because there was no temporal connection between the oil spillage and the bicycle accident and hence there was no 'injury' attracting the operation of the Act**. The COA confirmed that "the injury in this case was not 'sustained during' a collision. It is not open to this Court to hold that, even if the collision could, for some purposes, be the 'proximate cause' of the injury, that the injury was 'caused during' the collision, within the meaning of the Act @33.

In *Ron Lai Plastic Pty Ltd v Ngo* 28/5/10 [2010] NSWCA 128 [55 MVR 1] the COA confirmed that the **knocking down of a plastic extrusion machine by a forklift** constituted a **'motor accident'** pursuant to s3 of the NSW Motor Accidents Act.

In *Galea v Bagtrans P/L* 15/12/10 [2010] NSWCA 350 the COA found that **jolting incidents whilst the A was travelling over pot holes** constituted a 'motor accident or incident' (**an 'incident'** to be precise) pursuant to s3.

See *Chaseling v TVH Australasia P/L* 15/4/11 [2011] NSWDC 24 where **load fell from forklift** reversing down ramp causing injury to P's right leg. Levy SC DCJ found D negligent and no contributory negligence on P's part. Injury found to have occurred 'during or in the use or operation of a motor vehicle' within the meaning of s3 of MAC Act. **Appeal dismissed** in *TVH Australasia Pty Ltd v Chaseling* 22/5/12 [2012] NSWCA 149 [60 MVR 535].

In *Nominal Defendant v Hawkins* [2011] NSWCA 93 [58 MVR 362] the **driver of the vehicle slowed and beeped his horn continually in order to harass a cyclist. One of the vehicle's passengers threw an object at the cyclist and struck him**. The cyclist then hit an object on the road and the driver accelerated away. The COA canvassed several similar cases and concluded that the cyclist's injuries were **caused by the fault of the driver of the motor vehicle in the use or operation of the vehicle**, within the meaning of s.3(1) of the *Motor Accidents Compensation Act* 1999. The cyclist's injuries fell within the definition of 'injury' in s3.

See *QBE Insurance (Australia) Ltd v CGU Workers Compensation (NSW) Ltd* 20/4/12 [2013] NSWSC 377 [64 MVR 1] where a **fork-lift accident occurred due to a defect in the vehicle** due to poor maintenance. Beech-Jones J considered s. 3(a)(iv) was satisfied in the circumstances. Various 'defect' cases in the context of s. 3(a) considered.

In *Izzard v Dunbier Marine Products (NSW) Pty Ltd* 10/5/12 [2012] NSWCA 132 the 2nd R suffered severe injuries when a steel perimeter frame fell on him as he was dismounting from a trailer whilst in the course of his employment unloading the [contractor's] trailer. He used the frame as a hand-hold while dismounting. "[T]he upright brackets or frames on the trailer were insecure when the chains holding them in place were released, and the frames remained in an upright position. … [T]heir design was negligent and … they constituted a defect in the trailer due to the fault of the owner … Although the trailer was not in motion at the time of the

accident, the injury was caused during its **use or operation by a defect in the trailer …** [T]he employer was negligent in failing to play its part in either requiring the [As] to vary the design of their vehicle to remove the defect, or to instruct its employees not to climb onto the trailer. I also agree with the attribution of responsibility, after reduction for contributory negligence, of 60% to the [A contractor] and 40% to the employer" @24-26.

s3A – General restrictions on application of Act

In *RG & KM Whitehead Pty Ltd v Lowe* 14/5/13 [2013] NSWCA 117 [63 MVR 375] Per Tobias AJA, with whom Barrett JA and Preston CJ agreed, P was instructed by his employer D to assist in manoeuvring the tines of a forklift into a sleeve. He was struck by the tines and injured when they swang free. At first instance the trial judge found that s3A(1) of the MAC Act applied as the accident occurred **during the "driving" of the forklift** as the incident occurred in the course of the loader doing what it was designed to do. The decision was overturned on appeal. Authority including *Insurance Commission of WA v Container Handlers Pty Ltd [2004] HCA 24* suggested that there was a **clear distinction between the driving of a vehicle in the sense of locomotion and the operation of a lifting device independent of driving**. His Honour found that "...the loader was being operated when its tines were being manipulated but ... was not being driven in any relevant sense if it was otherwise stationary" @56.

In *Allianz Australia Insurance Ltd v Gonzalez* 18/4/13 [2013] NSWSC 362 P suffered physical injuries in a collision. P also claimed that **following the accident and on the next day she was intimidated by the other driver and his friends** and that as a result she suffered psychological injury. Adams J found that **P's psychological injuries were not caused by the driving or the 'use or operation of the vehicle'** as per s3A.

s4(1)(b) & (2) - Definitions

In *Ralston v Bell & Smith t/as Xentex Patch & Grout* 31/3/10 [2010] NSWSC 245 [55 MVR 300] Hislop J considered that the owner who hired its vehicle for less than three months to another was still the owner of the vehicle. See paragraphs 19-24.

s7A – Definition of 'blameless motor accident'

See *Axiak b.h.t. D. Axiak v Ingram* 28/11/11 [2011] NSWSC 1447 [59 MVR 505] per Adamson J. Here a 14 y.o. crossed the road carelessly and was hit by a car. Accident not a 'blameless' one. **Appeal allowed** in *Axiak v Ingram* 27/9/12 [2012] NSWCA 311. Tobias AJA (other judges concurring) satisfied that "subject only to the anomaly of s 7K(1) … that the primary judge was in error in construing the word *'negligence'* in the definition of ***'fault'*** for the purposes of s 7A as including non-tortious negligence such as the first appellant's contributory negligence. Accordingly … the first appellant is entitled to rely upon Division 1 of Part 1.2 of the Act and to claim damages under Chapter 5 of the Act" @71. First appellant's damages reduced by 50% for her contributory negligence in carelessly running across road. Settlement approved 11/12/13 in [2013] NSWSC 2023 per Davies J.

s7F – Contributory negligence

See *Axiak* precis at s7A.

s7K – Claims where child at fault

See *Axiak* precis at s7A.

s7J – Damages for children when driver not at fault

In *Suncorp Metway Insurance Ltd v Wickham Freightlines Pty Ltd & Ors* 30/8/12 [2012] QSC 237 [61 MVR 534] P sought declaratory relief concerning the proper construction of the statutory policy contained in the schedule to the Motor Accident Insurance Act 1994 (Qld). "The first and second respondents are insured by a statutory policy issued by Suncorp under the Queensland Act" @2. They are the owner and driver of a prime mover that collided with a young cyclist (Master Weston) crossing a pedestrian crossing in NSW in 2008. Master Weston claims under s7J "on the basis that the first defendant's prime mover was a motor vehicle that had motor accident insurance cover within the meaning of s 3B(2) of the NSW Act" @3. "Suncorp accepts that the statutory policy issued by it in respect of the first defendant's vehicle responds to Master Weston's claim in negligence. It disputes that the statutory policy responds to the claim to the special entitlement because s 5(1) of the Queensland Act under which the

Suncorp policy was issued applies to injuries caused by a 'wrongful act or omission'. Suncorp disputes that any injury which is 'deemed to have been caused by the fault' of the first respondent or the second respondent in the use or operation of the prime mover that was involved in the accident was caused by a 'wrongful act or omission' within the meaning of the Queensland Act" @5. Applegarth J held that "The terms and purpose of the relevant provisions of the Queensland Act support the conclusion that the statutory policy contained in the schedule to the Queensland Act may respond to the 'deemed fault' of an owner or driver of a motor vehicle in New South Wales pursuant to s 7J of the NSW Act. In such a case the relevant 'injury, damage or loss' does not arise 'independently of any wrongful act or omission'. The law deems it to be the case that the injury was caused by the fault of the owner or driver. Fault is defined to mean negligence or any other tort and this constitutes a 'wrongful act or omission' within the meaning of the Queensland Act" @37. In *Weston v Wickham Freightlines Pty Ltd* 28/6/13 [2013] NSWSC 867 P sought leave to file an amended statement of claim, to plead an alternative claim on the basis of a 'blameless accident'. P's "case is that as a matter of law, even if negligence is not established, he ought to recover on the basis dealt with in *Axiak* on the pleaded facts. The defendants' case was that the amendment sought to introduce a marked and illogical inconsistency with the claim of negligence presently advanced and that it raised a ground or claim inconsistent with those already advanced in the existing statement of claim. Accordingly, the amendment should not be permitted, given the provisions of Rule 14.18" @9. P succeeded. Leave granted.

s33(3A) – Claim against Nominal defendant when vehicle not insured

In *Maric v The Nominal Defendant* 16/5/12 [2012] NSWDC 69 P suffered injuries in a motorcycle accident on a gravel road. An uninsured motorcycle was involved. Section 33(3A) considered. Appeal dismissed 26/6/13 in [2013] NSWCA 190. The primary judge had not erred in not concluding that the accident happened on a 'road'. However, the trial judge did err by finding Mr Morrissey negligent, and that therefore A was contributorily negligent.

s34 – Claim against Nominal Defendant where vehicle not identified

In *Sukkarieh v Nominal Defendant* 14/8/08 [2008] NSWDC 163 the requirements of s34 were discussed by Murrell SC DCJ from paragraph 10. P not required to make futile or charade enquiries. Requirements of section met in this case.

In *Saleh v The Nominal Defendant* 15/5/09 [2009] NSWDC 1 Levy SC DCJ from paragraph 200 considered the requirements of s34(1) and stated that "in the circumstances of this case **due inquiry and search would not have established the identity of the vehicle that was involved in the incident** … because, realistically, the police arrived at the scene promptly to investigate the circumstances whilst other witnesses were still at the scene. It was their duty to try and ascertain the relevant events. The **police investigation did not reveal the identity of the other vehicle** notwithstanding that Mr Jaouhar's statement signalled that another vehicle was involved. This may have been due to limited police resources, pre-occupation with ensuring the [P] received help and clearing the road in peak hour traffic and a limited opportunity to further interview and a limited Mr Jaouhar who was injured and dazed at the time. … Even if Mr Jaouhar had been able to provide a more coherent and detailed statement at the time there is no reason to believe that inquiries would have revealed the identity of the unknown vehicle. I am satisfied that **once the police and the witnesses … had left the scene the trail to be followed to attempt to find the other vehicle was well and truly cold**"@217-218. [note: **Appeal allowed** in *Nominal Defendant v Saleh* 17/2/11 [2011] NSWCA 16 [57 MVR 412] New trial ordered]

In *Nominal Defendant v McLennan* 18/05/12 [2012] NSWCA 148 [61 MVR 1] P was injured in an incident in a car park. D argued that he had not been struck by a car, leading evidence from medical experts that the injury was more likely to have resulted from an assault which, combined with threats P had received prior to the injury and a history of untruths in matters of compensation, ought to have led to an adverse finding on credibility. The trial judge found for P. The decision was overturned on appeal. The CA, in a lengthy decision, found the trial judge had palpably misused his advantage and sent the matter for re-trial. **The judge neither considered inconsistencies between the accident description and the medical evidence nor properly addressed P's history of deceit**. P's account of having lain unconscious in the car park for some four hours without anyone coming to his aid was difficult to accept as was his

failure to seek immediate medical attention or report the incident to police that same day. Section 34 MACA 1999 (NSW) considered.

See *Workers Compensation Nominal Insurer v Nominal Defendant* 11/9/13 [2013] NSWCA 301 where **A unsuccessfully sought to argue that "s34's obligation of due inquiry did not apply to an employer (in whose shoes it was effectively standing) in circumstances where it sought indemnity pursuant to s 151Z(1)(d)** [of the Workers Compensation Act 1987] " @34.

s36 – Nominal Defendant as tortfeasor

In *Nominal Defendant v Staggs* 3/9/10 [2010] NSWCA 224 the COA considered whether the R (through its insurer Allianz) gave a 'full and satisfactory explanation' for failing to give notice within three months of receiving the claim. See also s66 below re 'full and satisfactory explanantion'.

s58(1) – Application

In *Allianz Australia Insurance Limited v Girgis & Ors* 25/11/11 [2011] NSWSC 1424 [59 MVR 548] Adams J decided that a Medical Assessor's certificate under ss 58(1) and 61(2) of the Motor Accidents Compensation Act 1999 is not conclusive evidence of causation of injury by accident for all purposes and that an assessor is not bound by a Medical Assessor findings re causation in assessing earning capacity or economic loss.

s58(1)(d) – Medical assessment (application)

In *Ackling v QBE Insurance (Australia) Limited & Anor* 28/8/09 [2009] NSWSC 881Johnson J considered it appropriate for a medical assessor to consider issues of causation within a s58(1)(d) dispute.

In *Nguyen v MAA NSW & Anor* 3/5/11 [2011] NSWSC 351 Hall J concluded that "There is … no warrant for reading the words *'the degree of impairment of the injured person'* as an impairment of and only of the particular part of a person's body injured in an accident. The reference to *'permanent impairment'* is expressed as related to the injured person (*'of the injured person'*) as a result of the injury caused by the motor accident" @98. "[T]he medical assessment undertaken pursuant to s.60 of the Act was affected by legal error, in that the medical assessor proceeded upon a different basis, namely, that there needed to be a causal connection between the motor accident and a *'primary and isolated'* injury to the right and/or left shoulder(s)" @120.

s60(1) – Medical assessment procedures

In *Licciardo v Hudson (No 1)* 6/11/09 [2009] NSWDC 289 Levy SC DCJ referred the issue of the P's whole person impairment to the MAS assessor for further assessment. Power to so remit existed.

s60(2) – Medical assessment procedures

In *Goodman v The MAA of NSW & Anor* 3/9/09 [2009] NSWSC 875 Hoeben J did not consider a decision pursuant to this section to refer the P for further medical assessment to be reviewable.

s61 – Status of medical assessments

The relevance of the Medical Assessments Service's assessments in related proceedings considered by Goldring DCJ in *Baker v Smith Snack Food Company Ltd* 20/2/09 [2009] NSWDC 11 from paragraph 47.

In *Ackling v QBE Insurance (Australia) Limited & Anor* 28/8/09 [2009] NSWSC 881Johnson J rejected the "submission that a Medical Assessor (under s.61) or a Review Panel (under s.63) has no jurisdiction to consider and determine whether an injury was caused by the motor accident in question"@81.

See also *Gladanac v Wang* [2009] NSWDC 234 29/9/09 per Bozic SC DCJ from paragraph 16 where the status of medical assessments is considered.

In *Allianz Australia Insurance Limited v Girgis & Ors* 25/11/11 [2011] NSWSC 1424 [59 MVR 548] Adams J decided that a Medical Assessor's certificate under ss 58(1) and 61(2) of the Motor Accidents Compensation Act 1999 is not conclusive evidence of causation of injury by accident for all purposes and that an assessor is not bound by a Medical Assessor findings re causation in assessing earning capacity or economic loss.

See *Frost v Kourouche* 7/3/14 [2014] NSWCA 39 where the COA considered the "content of the **obligation to accord procedural fairness** owed by a review panel reviewing a medical assessment under the *Motor Accidents Compensation Act 1999*" @3. Opportunity to respond to inconsistencies and opportunity for adjournment to consult with solicitor considered.

See *Insurance Australia Limited T/as NRMA Insurance v Parisi* 5/9/14 [2014] NSWSC 1248 where Campbell J stated that "the **availability of contemporaneous clinical material obviously remains important for fact finding purposes** in the assessment of the damages to which the claimant may be entitled. For the reasons given by Mason P in *Brown v Lewis,* **a conclusive certificate under s 61(2) of the Act does not foreclose that inquiry**" @55.

> [Kendirjian] "187 A MAA Review Panel issued three certificates on 26 August 2005. One certified that the impairments to the appellant's cervical and lumbar spine were permanent and were assessed as giving rise to a whole person impairment which, in total, was greater than 10 per cent. That certificate was conclusive evidence as to the matters it certified: s 61(2), MAC Act. Another certificate issued under s 61(1) found that the appellant had an impairment to his past and future earning capacity as a result of the injury caused by the accident. That finding was not conclusive as to the matters it certified, not being one of the four matters referred to in s 61(2). As a certificate referring to a matter not set out in s 61(2), it was 'evidence (but not conclusive evidence)' as to the matters it certified: s 61(3).
>
> 188 **The effect of a s 61(2)(a) certificate is well established: it opens the door to an award of damages for non-economic loss, but does not impose any statutory restraint (save for the cap provided by s 134) on the amount which may be awarded for non-economic loss**: Hodgson v Crane [2002] NSWCA 276; (2002) 55 NSWLR 199 (at [39]) per Heydon JA (Sheller JA and Davies AJA agreeing).
>
> 189 A s 61(2)(a) certificate does not have a conclusive effect on the issue of damages for economic loss as explained in Brown v Lewis by Mason P (Santow and McColl JJA agreeing):
>
> '22 It is conceivable that matters certified in accordance with s61(2)(b) (whether any treatment already provided to the injured person was reasonable and necessary in the circumstances) or (c) (whether an injury has stabilised) may afford (conclusive) evidence relevant to a particular aspect of damages assessment, including the assessment of economic loss. *The terms of any certificate "as to any other matter" (cf s 61(3)) or the medical assessor's reasons for his or her finding (cf s 61(9)) may also assist (non-conclusively) in resolving some issue referable to economic loss*. But the court must never lose sight of the principle *that "damages for both past and future [economic] loss are allowed to an injured plaintiff 'because the diminution of his earning capacity is or may be productive of financial loss. ... It is necessary to identify both what capacity has been lost and what economic consequences will probably flow from that loss. Only then will it be possible to assess what sum will put the plaintiff in the same position as he or she would have been in if injury had not been sustained"*(Husher v Husher (1999) 197 CLR 138 at 143[7], per Gleeson CJ, Gummow, Kirby and Hayne JJ, citations omitted). Sections 124-130 of the MACA provide additional restrictions upon the award of damages for economic loss in respect of a motor accident.
>
> 23 *Extreme caution is required before anything relevant or useful could be extrapolated from a certificate under s 61(2) for the purpose of calculating economic loss*. Section 61(2)(a) only deals with the threshold issue whether the degree of permanent impairment is greater than 10%. Section 133 points to information (MAA Medical Guidelines and the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition) that does not concern itself with the economic consequences of injury, and excludes information (derivative psychiatric or psychological injury, impairment or symptoms: see s 133(2)) that may be critically important to assessing economic loss. *In short, the statutory concept of (permanent) "impairment" is not to be equated to the notion of incapacity (permanent or temporary) that may be a stepping-stone in a case involving a claim of damages for economic loss*. It is Part 5.2 of the Act (ss124-130) that contains the legislative

qualifications upon the common law principles governing assessment of damages for economic loss. Those provisions do not engage the statutory concept of 'permanent impairment'.
24 *It is conceivable that matters certified or reported in the reasons of the medical assessor may have a bearing on factual issues touching damages for economic loss. But everything would depend on the nature of the particular injury*. Some injuries that would not produce a greater than 10 per cent degree of permanent impairment would have catastrophic economic impact on some plaintiffs (eg the violinist who lost the tip of a finger). Conversely, some injuries that produced a greater than 10 per cent degree of permanent impairment would have minimal economic impact on most plaintiffs.' (courts emphasis added in underline)
190 Accordingly, the primary judge was in error in observing that the s 61 certificates were conclusive on the issue of the appellant's earning capacity. …"
Kendirjian v Ayoub 14/8/08 [2008] NSWCA 194 McColl JA, Full Court

s62(1) – Referral of matter for further medical assessment

In *Garcia v Motor Accident Commission* 2/10/09 [2009] NSWSC 1056 Rothman J considered the meaning of **'additional relevant information about the injury'** and stated that the "term 'additional information' about the injury does not include a restatement of information already received. Nor does it include a summary of information already received. It does include new information about an injury, even though it does not describe the injury or some other feature of the injury. An expert medical opinion as to the cause of injury is relevant evidence and is 'about the injury'. Further, to the extent that an opinion has not previously been expressed (by any expert) it results in the opinion being 'additional information' not previously considered. In those circumstances, an opinion expressed by a medical expert, in circumstances where the Assessor had not previously received expert opinion of that kind, would be 'additional relevant information about the injury'. Such an opinion would satisfy one of the pre-conditions prescribed in s 62(1)(a) of the Act"@38. ***Note that this was decided before s62(1A) inserted.** See *Glover* and *Doyle* below.

In *Licciardo v Hudson (No 1)* 6/11/09 [2009] NSWDC 289 Levy SC DCJ referred the issue of the P's **whole person impairment** to the MAS assessor for further assessment. Power to so remit existed.

In *Glover-Chambers v MAA of NSW & Anor* 3/2/10 [2010] NSWSC 17 McCallum J found that s62 as it stood before the **2008 amendments** applied as P had referred the matter before the commencement of the amendment and the matter was never referred by the proper officer after that date. **The decision refusing P's application for a further medical assessment was in error as it posed the wrong question**, namely – "whether the outcome 'would be altered' if the matter were to proceed to further assessment in light of the additional information"@23. The appropriate question should have been "whether the evidence was capable of having a material effect on the outcome of the previous assessment"@24.

In *Doyle v Glass & Ors* 22/2/10 [2010] NSWSC 94 Associate Justice Harrison stated that "[t]he statutory test in s 62(1A) of the Act is that the matter may not be referred to assessment on the grounds of additional information about the injury unless the additional information is such as to be capable of having a material effect on the outcome of the previous assessment. The Proper Officer applied the test that the additional information may have a material effect on the outcome of the previous assessment … It is my view that **there is a difference between 'may have a material effect' and 'is such as to be capable of having a material effect'**. 'May' is defined as 'expressing uncertainty' and 'capable of' is defined as 'having the ability, strength or fitted for': Macquarie Dictionary Online. It is my view that the proper test is more stringent than the one the Proper Officer applied. The Proper Officer asked herself the wrong question and by so doing made an error of law that is jurisdictional error"@27-31.

In *Meeuwissen v Boden & Anor* 25/2/10 [2010] NSWSC 106 Latham J considered the meaning of 'material' in s62(1A) and s63(3). Appeal allowed in [2010] NSWCA 253. Latham J found to have misconstrued the legislation.

In *MAA NSW v Mills* 23/4/10 [2010] NSWCA 82 the COA considered the issue of "whether the power in s. 62(1) … to refer again for medical assessment under Pt 3.4 of Ch 3 of the Act could be exercised to require assessment only of the degree of permanent impairment, excluding whether the permanent impairment was as a result of injury caused by the relevant motor accident"@1. It was decided that the referral could not be confined in that way.

In *Alavanja v NRMA Insurance Ltd* 26/10/10 [2010] NSWSC 1182 Davies J considered the meaning of '**additional relevant information**' in relation to **further expert opinions** and stated that "[i]t seems to me that if material before the Assessor has expressed an opinion that particular injuries were caused by the accident, the fact that another expert says the same thing but using different or greater analysis will not mean the information is additional" @35.

In *Trazivuk v MAA of NSW & Ors* [2010] NSWCA 287 the COA stated that the "correct **exercise of the s 62(1)(b) discretion** is of some general importance. Where denial of procedural fairness in Dr Menogue's assessment is acknowledged, it would be unjust to leave the [A] with the claims assessor's erroneous refusal of his second application for referral again for assessment, even though the [A] may not improve his position on reconsideration of the application or a further assessment. Leave to appeal should be granted" @94.

In *Singh v MAA NSW (No. 2)* 16/12/10 [2010] NSWSC 1443 Rothman J did not consider that further material about A's psychological condition amounted to **'additional relevant information'** pursuant to s62(1)(a). "[T]he combined effect of the DVD, surveillance report and the opinions of Dr Selwyn Smith is to provide material of the same kind as had already been considered. A further medical opinion is only additional information if it is of a different kind (i.e. deals with different issues) than opinions already expressed and considered" @63.

In *Allianz Australia Insurance Limited v Mackenzie and Anor* 30/11/12 [2012] NSWSC 1458 Johnson J stated that "The **test to be applied … under s.62(1A)** … was whether *'the deterioration or additional information is such as to be capable of having a material effect on the outcome of the previous assessment'*. As is to be expected given the gate-keeper function exercised under the section, this assessment involves a type of screening role. **The test is one of having a capacity to have a material effect on the outcome, not whether it has, in fact, a material effect** on the outcome of the previous assessment" @181. "To state that areas for debate remain to be considered and determined by the medical assessor, if a further medical assessment is ordered, is not to apply a form of inadmissible test. It is an explanation of the approach as to why the further assessment ought be allowed to proceed, conscious of the different roles of the Proper Officer (as gate keeper) and the medical assessor (as the person to perform the further medical assessment and to certify as to its outcome, with reasons to explain the result)" @183. **** but see QBE Insurance (Australia) Ltd v MAA of NSW Ltd below***

See *QBE Insurance (Australia) Ltd v MAA of NSW Ltd* 15/5/13 [2013] NSWSC 549 where Rothman J considered whether the MAA "through its Proper Officer, erred when it was not satisfied that material provided by QBE was additional relevant information capable of having a material effect on the outcome of the previous assessment and, to the extent that it erred, whether that error was jurisdictional, or reviewable for error of law" @2. Rothman J concluded that "The **criteria in s 62(1)(a) and s 62(1A) of the *MAC Act* are not jurisdictional facts**. The views expressed by me in *Singh (No 1)* and *Singh (No 2)* cannot stand following *Rodger v De Gelder* in the Court of Appeal. The Proper Officer's decision is not initiated by jurisdictional error in that it: does not misapprehend the nature or limits of its power; deals with the correct question; takes into account all relevant material; does not take account of irrelevant material; does not misunderstand the function to be performed; was not made in bad faith; and accorded procedural fairness. There is **error of law on the issue of whether there is a ground of additional relevant information about the injury**. That was the only error of law. The result would have been the same if the error were not made. The error was not determinative or operative. As a consequence, certiorari should not issue" @87-89.

In *Miles v MAA of NSW & Ors* 12/7/13 [2013] NSWSC 927 Hoeben CJ, in a case concerning judicial review of the exercise of a power of Proper Officer to refer matter for further medical assessment, considered that "**the clear and obvious meaning of the phrase 'additional**

relevant information' as used in s62 is information which is additional to that which was before the medical assessor when the previous medical assessment was carried out. It is not a reference to information which is additional to that which may have been considered by a proper officer in a previous application for a referral for further medical assessment. Such an interpretation is consistent with the purpose of s62, which is to ensure that all relevant information is before the medical assessor to enable an accurate medical assessment to be made. What the section is designed to do is to allow a further medical assessment to occur where additional information has come to light or the claimant's position has changed since the time of the original assessment" @36-37. **P's functus officio submission rejected**. "Section 62 envisages the possibility of multiple applications for referral for medical assessment. The insurer's application of 5 October, which was successful, was not an application to reconsider or re-open. It was a separate and distinct application from that made in April 2012. The application in April 2012 consisted of 154 documents with an extensive description of each one, together with written submissions. The application of October 2012 consisted of two medical reports with short and different submissions which specifically addressed the s62(1A) issue. Although those two reports had been included in the 154 documents previously submitted to the proper officer, the applications were not the same, nor were the submissions" @50.

In *Mitrovic & Venuto v MAA NSW* 12/7/13 [2013] NSWSC 908 [64 MVR 306] P's "application was advanced on two bases: the first that Dr Sokolovic's **diagnosis of traumatic dementia and psychosocial dysfunction in 2011** which he attributed to the accident (a diagnosis relevant to the claim referable to the plaintiff's head injury) was relied upon as additional relevant information about her injuries; and, secondly, that there was a **documented further deterioration** of the plaintiff's condition in reports from Mr Milenkovic and Dr Sokolovic in 2010 and 2011. The application was also supported by a **report from Dr Beran, neurologist**, dated 2 June 2010, and **two academic articles** … entitled "Atypical psychological responses to traumatic brain injury: PTSD and beyond" and "Not just malingering: Syndrome diagnosis in traumatic brain injury litigation" upon which both Mr Milenkovic and Dr Sokolovic placed significant reliance in their reports. This material was said to constitute additional relevant information about the plaintiff's injuries" @30-31. Fulleton J found, amongst other errors, that Proper Officer failed to consider new information in reports. Matter remitted.

See *QBE Insurance (Australia) Ltd v Miller* 18/12/13 [2013] NSWCA 442 where "QBE lodged an application for a further assessment. A party to a medical dispute is entitled to seek a further assessment … 'but only on the grounds of the **deterioration of the injury or additional relevant information about the injury**': s 62(1)(a). QBE submitted that additional relevant information had become available. While the section refers to a referral 'by any party' in sub-s (1), sub-s (1B) requires that the **referral to a specified assessor be by the proper officer of the Authority**. In the present case, the **proper officer refused to make a referral for further assessment**. QBE sought to challenge that decision" @2. "QBE accepted that each of the characteristics of information as 'additional', 'relevant' and 'capable of having a material effect' had to be satisfied: on the basis that relevance was not in issue, the proper officer found that the first and third characteristics were not satisfied. It is sufficient for present purposes to uphold the assessment of the primary judge that the latter finding could not be described as manifestly unreasonable or irrational and did not otherwise demonstrate error of law" @55. Appeal dismissed.

See *Henderson v QBE Insurance (Australia) Ltd* 23/12/13 [2014] NSWCA 480 [66 MVR 69]. "A fair reading of QBE's application was, as the Acting Proper Officer considered, that **the information said to constitute the relevant ground was Dr Akkerman's revised whole person impairment assessment and his revised opinion that Mr Henderson's ongoing major depression and alcohol abuse was not caused by the accident**. The Acting Proper Officer addressed that information and considered that it was **not additional relevant information**. The primary judge erred in concluding that there was any relevant error of law on her part in doing so. The **officer was not required to do other than address the information specified by QBE in the application**. In particular, she was not required to undertake the sort of exercise undertaken by the primary judge in an attempt to discover whether there was any additional information on which the revised medical opinions were or could have been based. What the circumstances of this case emphasise is the need, in relation to such applications, to **specify clearly the additional information** about the injury which is said to be capable of

having a material effect on the outcome of any earlier assessment. In some cases the fact of a medical opinion may be, or be part of, the relevant additional information. In the present case, however, the information which was capable of having a material effect on the outcome of the earlier assessment was not the fact that the revised opinions were held but that the underlying symptoms or assumptions by reference to which those opinions were expressed were said to have changed" @105-106 per Meagher JA.

[Bouveng] "7 The right conferred on the parties to refer a matter for further medical assessment is exercisable only if the preconditions set out in s 62(1)(a) are met. S 62(1A) imposes a further condition requiring that the deterioration of the injury or additional relevant information be *capable of having a material effect on the outcome of the previous assessment*. These conditions are not imposed in circumstances where the referral is made by a court or claims assessor.

8 In order to facilitate referrals by parties, the Authority has established a procedure for an application to be made by the party seeking further referral, a reply by the other party and a determination by the proper officer of the Authority of the question of whether the preconditions for further referral have been met.

9 The [D] sought to limit the application of s 62(1)(b) to circumstances where, in the course of the substantive hearing of a claim, a court considered that further referral was warranted. I do not think that restriction can be imposed since s 58(2) requires only that proceedings be before a court. In this case a statement of claim was filed and proceedings commenced on 5 March 2007. In my view the commencement of proceedings in that fashion was sufficient to bring the current application within Part 3.4.

10 It was accepted by the [D] that s 62(1)(b) conferred discretion on the court that was not fettered by the conditions imposed upon a party wishing to refer a matter for further medical assessment.

11 In those circumstances, I have concluded that the court has the power to grant the relief sought by the [P]. …

12 In my view the objects of the Act and the context in which the provisions referred to appear in the Act indicate that, in addition to the requirement that there be proceedings before the court, the principles to be applied in determining whether the relief sought should be granted require that the court keep in mind that a certificate issued by a medical assessor is intended to be conclusive except to the extent that it is established that there is a real basis upon which the court should exercise its discretion to refer a matter for further assessment.

13 This principle necessarily involves a requirement to satisfy the court that further referral is likely to produce a different outcome of some substance. I do not consider that it would be sufficient for a party to rely, for instance, only upon an opinion of a medical expert that differed from that of a medical assessor. …

26 The [P] claimed to have suffered significant orthopaedic injuries. Dr Gill treated him for those injuries. Dr McLeod, examining the [P] from the point of view of his speciality of neurology, took issue with some of the claims of injury made by the [P] at a time when he did not have access to the records of the [P's] treatment immediately after his accident, including the treatment provided by Dr Gill.

27 The only evidence of an orthopaedic specialist before the court on this application was the report of Dr Ghabrial in which he assessed the [P's] Whole Person Impairment in relation to his orthopaedic injuries at 27%, not taking into account the head injury. The [D] placed no reports of orthopaedic specialists before the court.

28 There were references in all the reports that were provided to the court of the [P's] continuing complaints of considerable pain and discomfort arising out of the claimed orthopaedic injuries.

29 In the circumstances, and in the absence of contravening evidence relied on by the [D], I am satisfied that assessment by an orthopaedic specialist could result in an outcome that is substantially different to the assessment of the [P's] Whole Person Impairment. I am satisfied that it is appropriate that the medical dispute between the parties be referred for assessment by an orthopaedic specialist."

Bouveng v Bolton 26/2/09 [2009] NSWDC 19 Sidis DCJ

s62(1A)

See s62(1) above

s63 – Review of medical assessment by review panel

In *Ackling v QBE Insurance (Australia) Limited & Anor* 28/8/09 [2009] NSWSC 881Johnson J rejected the "submission that a Medical Assessor (under s.61) or a Review Panel (under s.63) has no jurisdiction to consider and determine whether an injury was caused by the motor accident in question"@81.

In *Meeuwissen v Boden & Anor* 25/2/10 [2010] NSWSC 106 Latham J considered the **meaning of 'material'** in s62(1A) and s63(3). Appeal allowed in [2010] NSWCA 253. Latham J found to have misconstrued the legislation.

Section **63(3)** considered by Hulme J in *Crnobrnja v MAA NSW* 17/6/10 [2010] NSWSC 633

Section **63(2)** considered in *Trazivuk v MAA of NSW & Ors* [2010] NSWCA 287.

In *Allianz Australia Insurance Ltd v MAA & Ors* 3/3/11 [2011] NSWSC 102 [57 MVR 319] Hidden J considered pre-existing permanent impairment pursuant to **clause 1.33 of the Permanent Impairment Guidelines** in a case where **Mr Cha suffered physical and psychiatric injuries in two accidents from which claims arose involving different insurers**. "For the purpose of each claim, it was necessary to determine whether Mr Cha had suffered the degree of permanent impairment required to enable an award for non-economic loss, that is, more than 10%" @2. "The panel determined that it could not make an **apportionment** for each accident … [and found that the] first accident had caused the condition of major depression with melancholia. However, Mr Cha told his treating psychiatrist that he was starting to recover until the second accident, which exacerbated his condition. Nevertheless, in the days immediately prior to the second accident the psychiatrist observed him to be depressed and commenced him on what the panel described as 'new and specific psychiatric treatment'. As a result, the condition had not stabilised prior to the second accident and the degree of Mr Cha's permanent impairment at that time could not be determined. Accordingly, his whole person impairment was assessed on the basis of the injuries suffered in the second accident" @6. Hidden J held that the Panel erred as "[c]learly, the first accident contributed to Mr Cha's impairment as it was assessed at the time of the review. The panel found that that accident had caused his depressive condition and that the second accident had exacerbated it. If the panel had assessed the permanent impairment caused by the first accident, it would have been in a position to apportion the whole person impairment it found between the two accidents. Clause 1.33 (and, if applicable, clause 1.36) required it to do so" @31.

See also *GIO General Ltd v Smith & Ors Insurance Australia Ltd t/as NRMA insurance v Smith* 5/8/11 [2011] NSWSC 802 (59 MVR 69) where Hoeben J applied *Allianz Australia … v MAA* above in similar circumstances where the first **D suffered physical injuries in two successive accidents, but his depressive disorder did not occur until after the second accident**. Hoeben J concluded that "error of law on the face of the record is established and that the orders sought by GIO and NRMA should be made. The errors are clear. The two Certificates issued, to the extent that they assert in the case of each motor accident, that the major depressive disorder caused by it is greater than 10 percent WPI are inconsistent with the Review Panel's assessment of the total WPI [17%] caused by both motor accidents. To the extent that the Review Panel took into account concepts of 'fairness' and 'unfairness' in their interpretation of the Guidelines this was an irrelevant consideration. The extent to which the Review Panel's interpretation of the ratio in *Ackling* contributed to the conclusion in the Certificates is not clear, but its interpretation of that decision was clearly wrong. Finally, the Review Panel's interpretation of **Guideline 1.36** was incorrect which led to a wrongful application of that Guideline. That error played a major part in the Review Panel's reasoning and conclusions" @59.

In *Lewis v MAA & Ors* 14/2/12 [2012] NSWSC 56 Adams J stated that "**it is the potential for material error that unfairness might cause which is the crucial issue, not the unfairness *per se***. Accordingly, the assessor was correct to decide that the claim of procedural unfairness was not a matter for him to determine. It may be that he should have gone on to consider the possible significance of the alleged unfairness on the assessor's conclusions. However, the matter was not put to him in that light" @7-8. **'Material contribution' test** compared with

'substantial contributing factor' test when assessor mistakenly referred to the applicant motorist as a 'worker'. Assessor did not err in law in determining whether there was reasonable cause to suspect that the assessment was incorrect in a material respect.

See *Jaksic v Insurance Australia Ltd/NMRA* 20/8/13 [2013] NSWSC 1141 where Rothman J found that panel erred by **not giving applicant sufficient opportunity to address their concerns about inconsistency in her physical presentation.** The certificate and medical assessment quashed)

s66(2) – 'Full and satisfactory explanation'
See also s109(2) & (3) below

Section 66(2) and s109(3)(a) considered in *Stratton v Kairouz* 2/2/09 [2009] NSWDC 7 by Levy SC DCJ

See *Howard v Walker* 13/5/08 [2008] NSWSC 451 where Hoeben J considered whether a **mentally incapacitated claimant** had given a 'full and satisfactory explanation' to the court for the delay in accordance with s109(3)(a). Section 66(2) also considered. **Appeal dismissed** in *Walker v Howard* 16/12/09 [2009] NSWCA 408. The COA extensively canvassed various authorities on the operation of these provisions in an attempt to reconcile conflicting approaches. Claimant's explanation considered 'full' and 'satisfactory' in this case. **Parent's inability to pay for investigation** considered. Mentally incapacitated person still remained as the **'claimant'**. Meaning of **'the conduct'** in s66(2) considered. See full decision for authoritative interpretation of these provisions. See also *Nominal Defendant v Harris* [2011] NSWCA 70 where similar issues discussed in relation to a P with intellectual disabilities, and where extension granted.

See also *Staggs* at s36 above.

In *Tan v Basaga* 11/10/10 [2010] NSWSC 1143 **McCallum J accepted Dr Tan's explanation for his long delay** in bringing his claim for injuries sustained in a motor accident. Dr Tan's explanation was that he was **unaware he could claim**, he was focussed on recovering, he was working extremely long hours and was focussed on advancing professionally. It wasn't until he heard a P.I. Lawyer's advert on radio that he became aware he could claim for his injuries, which he now was not so optimistic about in terms of his recovery prospects. Dr Tan's cultural background (**coming from a far less litigious society**) factored heavily in the court accepting his explanation.

In *Mortimer v Moon* 25/2/11 [2011] NSWDC 53 Johnstone J, in circumstances where he **had to infer an explanation for P's delay** in commencing proceedings, found that their was no full and satisfactory explanation for failing to bring proceedings in time.

In *Keen v Nominal Defendant* 10/11/11 [2011] NSWDC 173 Johnstone J found their was a 'full and satisfactory explanation' for P not making his claim within six months of the accident **where information from the police subsequently came to light that suggested to P's legal representatives that he had an action against a person he was unaware he could claim against**.

In *Lawrence v Mills* 3/2/12 [2012] NSWDC 4 Johnstone J found that P had a full and satisfactory explanation for delay due to **reliance on his solicitors**.

In *Atie v Tonacio* 5/3/12 [2012] NSWSC 156 [60 MVR 221] Grove AJ satisfied that P had given a full and satisfactory explanation for delay. P was working on a road when a truck hit a power pole and the power lines struck him. P had **limited education** and it **never occurred to him that he had rights other than in the workers compensation sphere**.

See *Parker v Nominal Defendant* 5/3/13 [2013] NSWDC 15 where Levy SC DCJ found there was a full and satisfactory explanation for delay when the **P was an unsophisticated person who had suffered a minor injury and accepted triage nurse's words at Geelong hospital that she couldn't make a claim**. There was also some delay by P's solicitor.

See *Bano v Lucic* 19/11/13 [2013] NSWDC 224 where P was **injured in a car accident in November 2008 and filed her claim in January 2013**. D sought dismissal of P's claim for being a late claim for which no full or satisfactory explanation had been provided as per s 73 of the MACA. Levy SC DCJ considered such explanation had been provided as: "*First*, in May 2009, because a CTP claim form had not been lodged, her claim was necessarily a late one from that time onwards. *Secondly*, it was not until her conversation with Mr Hodges of QBE in July 2010, when it was suggested to her she could pursue a CTP claim, that she had any inkling that such a claim might be available to her. *Thirdly*, in her subjective circumstances, absent any awareness of urgency in pursuing such a claim, she was **distracted by her accident-related ill health, her domestic troubles, and her attention to her religious observances [Ramadan], meant she restricted her outings to essential matters**. *Fourthly*, being a relatively unsophisticated person, it was not surprising that **when she ultimately sought legal advice, she was confused by it**, and sought clarification by seeking out alternative legal advisors. *Sixthly*, once she obtained legal advice that was given to her in terms she understood, she acted in accordance with that advice" @34.

See *Orilla v Chown* 22/11/13 [2013] NSWDC 226 where P's significant long term psychiatric condition, foreign background and low level of education combined with her prior **solicitor's failure to properly advise her and progress her claim** were considered sufficient by Letherbarrow SC DCJ to provide a full and satisfactory explanation for her delay in bringing claim.

See *Sweetman v Ritter* 23/5/14 [2014] NSWDC 110 where Taylor SC DCJ considered the meaning of **"*conduct of persons additional to the claimant must feature if relevant*"**. "There can be no debate that the conduct must be '*relevant*' and it must be relevant to what is required by s 109, an explanation for the delay in commencing proceedings. In many cases, the conduct after commencing proceedings but occurring before the explanation is proffered, although within the ambit of the period stated in s 66(2), is simply not relevant to the delay in commencing proceedings. I do not doubt that in some cases that conduct in the post-commencement period could be relevant. This case is not one of them. Similarly, conduct well before the three-year period, although it again is within the s 66(2) period, might not be relevant to explain the delay beyond three years in commencing proceedings, the focus of s 109" @21-22. "In the present case, Ms Sweetman gives a full history of her conduct, beliefs and knowledge up to the time of lodging the claim soon after she consulted her solicitor. Thereafter, the relevant conduct to explain the delay is provided by the solicitor. In circumstances where the plaintiff has no familiarity with the litigious process, I do not see anything unusual or unreasonable in this" @25. It was **reasonable to delay commencing court proceedings whilst following the CARS procedure**. It was also **reasonable for the plaintiff to postpone commencing proceedings whilst pursuing settlement proposals**. Reasonableness of **P relying on solicitor** discussed and confirmed.

s69 – Effect of apology on liability

See *Watson v Meyer* 16/4/12 [2012] NSWDC 36 per Gibson DCJ from paragraph 242. Matter remitted for retrial 2/8/13 on all issues in *Watson v Meyer* [2013] NSWCA 243.

s73(3) – Late making of claims

In *Gudelj v MAA of NSW* 14/5/10 [2010] NSWSC 436 McDougall J considered the interrelationship between s73(3)(c) and s92(1)(a) and s92(1)(b). Appeal allowed in [2011] NSWCA 158 [58 MVR 342]. The COA accepted the original assessment of the CARS assessor Ms Boyle where she stated that: "By Mr Gundelj's admission his pain, though prevalent from the beginning, worsened over time since the accident, warranting numerous visits to the doctor. He underwent treatment in the form of physiotherapy, and was prescribed numerous medications, all of which he presumably had to pay for. In my view a reasonable person in Mr Gundelj's position, suffering ongoing symptoms from the date of accident and paying medical expenses, would have sought information as to his legal rights … I cannot be satisfied that a reasonable person in the position of the claimant would have failed to seek legal advice sooner or would have failed to have complied with the duty or would have been justified in experiencing the same delay" @25. Various issues considered.

s74 – Form of notice of claim
See *Gudelj v MAA of NSW* 24/6/11 [2011] NSWCA 158.

s81 – Duty of insurer re admission or denial of liability
See *Gudelj v MAA of NSW* 24/6/11 [2011] NSWCA 158 [58 MVR 342]from paragraph 60.

See *Smalley v MAA of NSW* 2/11/12 [2012] NSWSC 1456 where Rein J concluded that: "**s 81(2)** deals with **partial admissions** and it is not limited in effect to partial admissions under **s 81(1)** [and] that **s 81(4)** permits the insurer to admit liability to the same extent that it is permitted to do so pursuant to s 81(2), even if it has wholly denied liability previously by notice or is deemed to have wholly denied liability by its failure to issue a notice" @24. "I can see an object that is promoted by the construction which I favour - namely the encouragement of early resolution of compensation claims. To permit insurers to make admissions will reduce the scope for conflict and delay" @29. "[T]he letter of [21/9/11] … which accepted that the accident occurred due to the fault of the insured driver but denied liability 'for this late claim' was a notice which complied with the requirements of s 81(4)" @34. **Appeal allowed** 26/9/13 in [2013] NSWCA 318. COA did not agree with trial judge's interpretation of s81. **See COA's in depth analysis of s81**.

s82 – Duty of insurer to make offer of settlement
In *Paice v Hill* 7/7/09 [2009] NSWCA 156 [(2009) 53 MVR 114] Ipp JA at paragraph 53 stated that "an insurer would not be entitled to avoid its duty to make an offer of settlement under s 82 on the basis that a full and satisfactory explanation for the delay had not been provided. Under s 82, the duty of an insurer to make a reasonable offer of settlement arose within one month after the injury had stabilised (s 82(1)(a)) or within two months after the claimant had provided the insurer all relevant particulars about the claim (s82(1)(b)). The duty of an insurer under s 82 was not predicated on the existence of a claim that was not a late claim or on the provision of a full and satisfactory explanation for any delay in making a claim". Further Ipp JA stated at paragraph 55 that "a claimant might experience difficulties if an insurer disputed that the claimant had provided all relevant particulars about the claim (as s 82(1)(b) requires). Assessments under s 96(1)(d) – as to whether the insurer is entitled to delay the making of an offer of settlement under s 82 on the ground that any particulars about the claim are insufficient – were binding on the parties: *Hayek v Trujillo* [2007] NSWCA 139 at [47]. This is to be contrasted with an assessment of a dispute as to whether a full and satisfactory explanation for making a late claim has been given. Such an assessment was not binding on the parties: *Hayek v Trujillo* at [48]". Note legislative amendments subsequent to this decision. Note: *Hayek* also considered in *Gudelj v MAA of NSW* 24/6/11 [2011] NSWCA 158 [58 MVR 342].

s85(4) – Duty of claimant to co-operate with other party
Proceedings were dismissed in *Emerton v McDonald* 19/2/09 [2009] NSWDC 26 by Sidis DCJ as P failed to provide certain information as per the requirement of s85(4).

s92(1) – Claims exempt from assessment
In *Gudelj v MAA of NSW* 14/5/10 [2010] NSWSC 436 McDougall J considered the interrelationship between s73(3)(c) and s92(1)(a) and s92(1)(b). Appeal allowed in [2011] NSWCA 158 [58 MVR 342]. The COA accepted the original assessment of the CARS assessor Ms Boyle where she stated that: "By Mr Gundelj's admission his pain, though prevalent from the beginning, worsened over time since the accident, warranting numerous visits to the doctor. He underwent treatment in the form of physiotherapy, and was prescribed numerous medications, all of which he presumably had to pay for. In my view a reasonable person in Mr Gundelj's position, suffering ongoing symptoms from the date of accident and paying medical expenses, would have sought information as to his legal rights … I cannot be satisfied that a reasonable person in the position of the claimant would have failed to seek legal advice sooner or would have failed to have complied with the duty or would have been justified in experiencing the same delay" @25. Various issues considered.

s94 – Assessment of claims
In *Insurance Australia Ltd (trading as NRMA Insurance) v Helou* 7/10/08 [2008] NSWCA 240 the COA considered whether the decision of an assessor in the Claims Assessment and

Resolution Service (CARS) should be set aside for **jurisdictional error or error of law**. Decision not set aside.

In *Paice v Hill* 7/7/09 [2009] NSWCA 156 Ipp JA at paragraph 54 agreed that "it would always be open to a claimant to cause time under s 109 to be suspended by making a general application for an assessment of the claim under s 94 (that would be irrespective of whether the dispute concerning the provision of a full and satisfactory explanation for the delay had been resolved)".

In *Allianz Australia Insurance Ltd v Ward* 24/7/09 [2009] NSWCA 264 McCallum J considered s94(5) & (6) and s95(2) in the case where the A **challenged an assessor's award because of minor errors**, and where A sought an adjustment. The consequences of jurisdictional error by an administrative body were considered.

In *Allianz Australia Insurance Ltd v Kerr* 29/5/11 [2011] NSWSC 347 Hislop J from paragraph 10 discussed the **obligation in s94(5) to state reasons**. Appeal dismissed [2012] NSWCA 13.

s96 – Special assessments of certain disputes re claims

In *Paice v Hill* 7/7/09 [2009] NSWCA 156 the COA per Ipp JA at paragraph 72 stated that the "application that the [P] made under s 96 for the assessment of the dispute as to whether she gave a full and satisfactory explanation for the delay in making her claim was not an assessment under s 109(2) and did not suspend time running under that section".

s109(2) – Time limitations

See also s66(2) above

In *Paice v Hill* 7/7/09 [2009] NSWCA 156 the COA per Ipp JA at paragraph 54 agreed that "it would always be open to a claimant to cause time under s 109 to be suspended by making a general application for an assessment of the claim under s 94 (that would be irrespective of whether the dispute concerning the provision of a full and satisfactory explanation for the delay had been resolved)". The "application that the [P] made under s 96 for the assessment of the dispute as to whether she gave a full and satisfactory explanation for the delay in making her claim was not an assessment under s 109(2) and did not suspend time running under that section"@72.

In *Keller v Keller* 29/6/09 [2009] NSWDC 172 Williams DCJ refused to grant leave to P to commence proceedings more than three years after the motor accident. **P's age (18) and ignorance of her rights no answer to why she did not seek legal advice earlier than she did**. D would also suffer prejudice re investigating the medical aspects of the claim if leave was granted.

See *Ageyeman-Badu v The Nominal Defendant* [2012] NSWDC 35 where Gibson DCJ refused to grant leave to the P to commence proceedings out of time. P was an **English speaking Ghanaian immigrant**. P alleged that she was struck by an unknown car on a pedestrian crossing in 2007. She was out of time for the purposes of s109 of the Motor Accidents Compensation Act 1999 (NSW). His Honour found there to be real questions as to whether the accident involved a vehicle at all. D was materially prejudiced by the inability to make further enquiries. D's application to dismiss the action for want of a "full and satisfactory explanation" for the delay per s73 MACA was also upheld. His Honour accepted that due to cultural differences P may not have understood her right to make a claim but **once she had consulted solicitors she behaved in a tardy fashion**. Court also considered **when a notice is 'issued' per s109(2)**. D printed a certificate in May but didn't send it until June. P was in time for June but not May. His Honour found that 'issued' meant the day that the formal administrative decision was made i.e. May and not the date of posting which he described as part of the 'consequential office procedure'.

s109(3)(a) & (b) – Time limitations

See also s66(2) above

See *Howard v Walker* 13/5/08 [2008] NSWSC 451 where Hoeben J considered whether a claimant had given a 'full and satisfactory explanation' to the court for the delay in accordance with s109(3)(a). Section 66(2) also considered. **Appeal dismissed** in *Walker v Howard* 16/12/09 [2009] NSWCA 408 [55 MVR 9]. The COA extensively canvassed various authorities on the operation of these provisions in an attempt to reconcile conflicting approaches. Explanation considered 'full' and 'satisfactory' in this case. **Parent's inability to pay for investigation** considered. Mentally incapacitated person still remained as the **'claimant'**. They were not required to give evidence. See full decision for authoritative interpretation of these provisions.

In *Stratton v Kairouz* 2/2/09 [2009] NSWDC 7 Levy SC DCJ found there was a full and satisfactory explanantion for the delay in bringing proceedings due to **solicitor's tardiness** and the fears of the P due to her receiving **death threats from the D discouraging her from suing** for her personal injuries. Section 66(2) and s109(3)(a) considered.

In *Ruiz-Diaz v Aroyan & Ruiz-Diaz v Antal* 6/10/09 [2009] NSWDC 252 Levy SC DCJ found that P had a demonstrated a real chance of meeting the statutory threshold.

See *Sinclair v Darwich* 5/8/10 [2010] NSWCA 195 from paragraph 8 re **onus of proof**. Meaning of **'likely'** in s109(3)(b) considered. It means that there is a 'real chance' or a 'real prospect' that the relevant damages threshold will be exceeded. It does not mean 'more likely than not'. See also *Orilla v Chown* 22/11/13 [2013] NSWDC 226 from paragraph 76.

In *Ellis v Reko P/L* 10/11/10 [2010] NSWCA 319 Young JA stated that the "word 'full' is a word that must be given its semantic significance and it means that **the explanation must be set out and it is not sufficient that the Court should be asked to draw inferences from correspondence**, et cetera, at least where that is not obvious" @19. COA held there was no 'full and satisfactory explanation in this case.

See Sharif Zraika (by next friend Halima Zraika) v Rebecca Jane Walsh 20/12/11 [2011] NSWSC 1569 [60 MVR 17] where Rothman J confirmed **leave to commence proceedings out of time must not be granted unless the claimant provided a full and satisfactory explanation to the court for the delay**. P was injured (in utero) in 2002 as a result of a motor vehicle accident. Pursuant to s109 of the *Motor Accidents Compensation Act 1999* leave was sought to commence proceedings out of time. The test was objective - whether a reasonable person in P's position would have been "justified in experiencing the delay". His Honour accepted that due to his medical condition and his age P could not have acted any sooner. His Honour found that there was some prejudice to D. This could be overcome, however, if proceedings were commenced on the condition that P also commenced proceedings against any other party nominated by D. See from paragraph 15 the **High Court's analysis of the term 'full and satisfactory explanation'** in the case of *Russo v Aiello.*

See *Ageyeman-Badu v The Nominal Defendant* [2012] NSWDC 35 where Gibson DCJ refused to grant leave to the P to commence proceedings out of time. P was an **English speaking Ghanaian immigrant**. P alleged that she was struck by an unknown car on a pedestrian crossing in 2007. She was out of time for the purposes of s109 of the Motor Accidents Compensation Act 1999 (NSW). His Honour found there to be real questions as to whether the accident involved a vehicle at all. D was materially prejudiced by the inability to make further enquiries. D's application to dismiss the action for want of a "full and satisfactory explanation" for the delay per s73 MACA was also upheld. His Honour accepted that due to cultural differences P may not have understood her right to make a claim but **once she had consulted solicitors she behaved in a tardy fashion**.

In *Eades v Gunestepe* 4/7/12 [2012] NSWCA 204 [61 MVR 328] the COA found that s109(3)(b) involved a discretionary exercise and conducted a **review of the discretion** on a *House v King* basis (despite this not being entirely clear). The lower court was "obliged to apply the section correctly, but did not do so. What his Honour was required to decide was whether there was a 'real and not remote chance or possibility' that the [R's] contributory negligence would be assessed at 24 percent or less. He was not required to make a specific assessment of contributory negligence. The task which his Honour had to undertake was that described in

Sinclair v Darwich. As his Honour did not apply the correct test, it is necessary for this Court to re-exercise his Honour's discretion and carry out the evaluative process which is required by the section" @45-46. **R discharged his onus that there was a real chance or possibility of contributory negligence being assessed at 24% or less**. This case involved a **P changing lanes just before an intersection to go through an amber light and striking a car which turned across his path**. Hoeben JA stated that he could "see no reason in principle why a court in applying s 109(3)(b) cannot make its own predictive assessment of **'likely' damages for non-economic loss** even though an assessment of permanent impairment of more than 10 percent has not been made by a Medical Assessor in accordance with ss 131 and 132 MAC Act" @59.

In *Aeiveri v Boland* 10/9/12 [2012] NSWDC 141 & [2012] NSWDC 155 Levy SC DCJ considered that P had provided a full and satisfactory explanation in circumstances where English was P's third **language** and when he was unaware of his right to claim under the MAC Act. Further, P was **receiving workers' compensation benefits** for his treatment expenses and **still working in his pre-accident employment**.

In *Lyu v Jeon* 21/12/12 [2012] NSWCA 446 trial judge found to have erred by finding that claimant (R) had provided a satisfactory explanation for delay in bringing action for an injury caused in a motor vehicle incident. R had **delayed bringing claim because she did not want to get her friend (A) into trouble, and because A had promised to meet her medical expenses**. R's parents had been advising her to make appropriate claim. A and R were both Korean students studying in Australia. R also had **made a false insurance claim**, which was providing her with some compensation. When A ceased supporting R, R brought claim against her. A reasonable person in R's position would have notified insurer of claim in time and would not have delayed for two years. Reasons for delay not satisfactory.

> [Taylor] "43. The question of what constitutes a full and satisfactory explanation for delay has been more recently revisited in *Walker v Howard* [2009] NSWCA 408. In cases where the plaintiff has full mental capacity, the relevant inquiry is the explanation for the delay, not the explanation of the actions of those acting on the authority of the plaintiff : [52 – 53]. The purpose of the need for the plaintiff to provide an explanation is to enable the court to evaluate the reasons for the delay : [57]. This is in order to determine whether or not the explanation is satisfactory : [58]. If part of the explanation for delay is that the matter was in the hands of the solicitor for the plaintiff, it is also relevant to examine the solicitor's explanation for the delay after the receipt of instructions : [99]. In evaluating the explanation for the delay it must be recognised that since the provisions of s 109(3)(a) and 66(2) of the *MAC Act* are aimed at controlling late claims, the initial part of the evaluation must favour the insurer : [103], following *Smith v Grant* [2006] NSWCA 244 : [2006] 67 NSWLR 735, [10] – [11]. …47. In the circumstances, I consider that the plaintiff has provided a full and satisfactory explanation for the delay between 29 October 2007 and 29 March 2010. In that time it is clear that the solicitor for the plaintiff was attempting to put forward an application supported by documentation to demonstrate the merit of the application. I consider that in that period, **a reasonable person in the position of the plaintiff, would not have acted differently and would have left the matter in the hands of a solicitor** to do just that." **Taylor v Chown** 28/4/10 [2010] NSWDC 63 Levy SC DCJ

s110 – Insurer may require claimant to commence court proceedings

In *Kalazich v Yang* 17/10/12 [2013] NSWDC 261 Neilson DCJ held that a s110 notice did not have to be served personally on the P prior to the commencement of the proceedings. P was legally represented. Service on legal representative appropriate. "[T]he notice here given was defective in that it gave the wrong information as to when the [P] as claimant was required to commence the proceedings" @28. Notice was therefore of no effect. Motion for dismissal of P's statement of claim failed.

s112 – Presumption of agency

In *Ralston v Bell & Smith t/as Xentex Patch & Grout* 31/3/10 [2010] NSWSC 245 Hislop J considered s112 from paragraph 25.

s118 – Remedy available when claim fraudulent

See *Checchia v Insurance Australia Ltd t/as NRMA Insurance* 29/9/09 [2009] NSWSC 1005 where Rothman J considered s118 in some depth and concluded on the facts that P did not engage in knowingly false or misleading conduct to obtain a financial benefit. **Appeal allowed** in *Insurance Australia Ltd … v Checchia* 28/4/11 [2011] NSWCA 101 - **meaning of 'purpose', 'a financial benefit' and 'the financial benefit' considered**. In *Checchia v Insurance Australia Ltd t/as NRMA Insurance* 30/5/13 [2013] NSWSC 674 Hall J calculated the financial benefit to which P was not entitled in terms of s118(2). See further proceedings before Hall J re costs in *Checchia v Insurance Australia Ltd t/as NRMA Insurance (No 2)* 6/6/14 [2014] NSWSC 748.

s122(3) – Damages in respect of motor accidents

In *QBE Insurance (Australia) Ltd v Durkin & Ors* 22/3/12 [2012] NSWSC 72 Hall J stated that in "*Insurance Australia Limited v Hutton-Potts* Schmidt J at [32] observed that while s122(3) of the Act required that an Assessor undertake an assessment of damages in the same way as a court, assessors were not obliged to provide reasons for the conclusions reached, in the way that a court was obliged to do given the provisions of s 94(5): see *Insurance Australia Ltd v Helou* (2008) 52 MVR 446; [2008] NSWCA 240 at [61] … [W]hilst elaborate reasons were not required to be given for the conclusions reached by an Assessor in relation to the assessment of future economic loss, he or she was subject to the obligation of identifying the assumptions on which the damages awarded were awarded for future economic loss. The reasons, her Honour stated, could be given concisely but they have to be given" @50-51.

s125 – Damages for PEL or FEL (maximum for loss of earnings)

See *Fkiaras v Fkiaras* 27/5/10 [2010] NSWCA 116 where the meaning of 'earnings' in s125(2) was considered. 'Earnings found to be "a reference to income earned by the exercise of the injured person's earning capacity"@46.

See *Tuohey v Freemasons Hospital* 4/5/12 [2012] VSCA 80 where the COA considered this section and its equivalents (s125 of MAC Act, NSW and s51 PIP Act, Qld) and decided that it was "to disregard that portion of the plaintiff's without injury earnings as exceed 3 times the average weekly earnings at the date of the award" @36.

s126 – Future economic loss (claimant's prospects and adjustments)

See also s13 of the Civil Liability Act 2002 which is in identical terms.

See *State of NSW (NSW Police) v Nominal Defendant* 31/7/09 [2009] NSWCA 225 where the COA from paragraph 81 considered the construction of this section. Held that the trial judge should have found pursuant to s126(1) that Senior Constable Moore intended to stay in the police force. The trial judge should also have considered making an adjustment pursuant to s126(2) when assessing future economic loss because of the fact that Senior Constable Moore may not have remained in the police force.

In *Amoud v Al Batat* 14/10/09 [2009] NSWCA 333 [54 MVR 167] the COA stated that the section is not a code, but **assumes the continued operation of common law principles**.

In *QBE Insurance (Australia) Ltd v Cowan* 24/8/10 [2010] NSWSC 933 Hislop J stated at paragraph 45 that the use of the **buffer** renders compliance with s126(2) unnecessary.

In *Allianz Australia Insurance Ltd v Kerr* 29/5/11 [2011] NSWSC 347 Hislop J from paragraph 19 discussed the appropriateness of the assessor's award of a buffer sum of $200,000. Hislop J stated, "the claims assessor has adequately complied with the requirements of s 126. As Giles JA observed in *Parks* : '**The occasion for a buffer is when the impact of the injury upon the economic benefit from exercising earning capacity after injury is difficult to determine**.' This is such a case" @26-27. Appeal dismissed [2012] NSWCA 13.

In *Nominal Defendant v Livaja* 17/5/11 [2011] NSWCA 121 the COA discussed the **meaning and purpose of s126(1) & (2)** in some depth from paragraph 39.

See *Allianz Australia Insurance Ltd v Sprod & Ors* 29/9/11 [2011] NSWSC 1157 where Hoeben J did not consider that the assessor erred re assessing future economic loss. **Appropriate test for reviewing reasons of claims assessor discussed**. Hoeben J stated "I do not see why the approach of the claims assessor to the award of future economic loss should not be treated as the award of a buffer. It is true that he **did not specifically refer to a buffer** (although he did so in relation to past economic loss). Nevertheless, his methodology and approach is the same as that used in the buffer cases. The only difference is that instead of specifying a lump sum, he specified a percentage of the claimant's earnings, by reference to which he calculated a lump sum" @30. The **assessor's award did not offend the 'compensation principle'**. **Appeal allowed** 12/9/12 at [2012] NSWCA 281. "There is no explicit explanation of why a residual working life of 18.3 years was chosen or, more precisely, what assumption was made in that respect … Nor is there any reference to the assumption that gave rise to the allowance of 15% for vicissitudes … More significantly, there was no statement by the assessor of the assumption or assumptions underlying the figure of $250 net per week as lost earnings for the balance of the working life … There was … a **failure of the assessor in these respects to engage with and perform the tasks prescribed by s 126**. Once the assessor embarked on a process of calculation, the duties imposed by s 126 were enlivened (they would also have been enlivened, but required potentially very much less by way of explanation of assumptions, had the circumstances exhibited such uncertainties and imponderables as to justify the broad evaluative 'buffer' approach) ... **nothing I have said is intended to suggest that assessors must prepare elaborate statements of reasons and explanations of assumptions**" @33-42.

In *Allianz Australia Insurance Ltd v Cervantes* 8/8/12 [2012] NSWCA 244 Basten JA stated that "It is **not necessary to decide whether, as a matter of law, an upper limit can be placed on the amount of an award of future economic loss by way of a 'buffer'**. Certainly the analysis of principle in the present case did not suggest whether or how that exercise might be undertaken. Any such exercise would have to take into account the large differences in earning capacity which exist amongst individuals. In *Allianz v Kerr*, the claimant was a nursing assistant who undoubtedly had a far lower earning capacity than the **claimant in the present case, who was a general physician** with a speciality in renal disease. The exercise would also need to take into account the cap on damages for economic loss which, at the time of the assessment, was a little under $4,000 per week net: *Compensation Act*, s 125, the figure having been adjusted pursuant to s 146, allowing for changes in average weekly earnings" @48.

In *NRMA Insurance Ltd v Pham* 3/5/13 [2013] NSWSC 468 Hall J stated that "The claim, whilst premised on the fact that Mr Pham had been for many years self-employed and intended, but for the accident, to continue to do so, was assessed upon the hypothesis, for which there was no evidence, that he would be forced by economic circumstances to change and to work for wages in an employed capacity. The decision, and the certificate of assessment accordingly, was made and issued on a basis contrary to the statutory requirements in s 126 of the *MAC Act*" @131. R's tax records suggested his business was very unprofitable, but this was unlikely to be the case. **Evidential onus on claimant where tax records are not a reliable indicator of actual income discussed**. **Appeal allowed** 19/2/14 in [2014] NSWCA 22 (66 MVR 152). Hall J found to have erred by concluding that assessor had "assessed damages on the basis that Mr Pham would have been forced to take up salaried employment" @18. Rather **assessor was simply recognising the utility of having regard to salaries of employed tradesmen where there was a need to assess the future economic loss of a self-employed tradesman**. Hall J's "conclusion that the requirements of s 126 of the MAC Act were not complied with cannot be sustained. In accordance with s 126, the Assessor did identify her assumptions as to Mr Pham's 'most likely future circumstances but for the injury': that is, that he would conduct his contemplated Meadowbank business" @19. **Assessor's obligations in giving reasons** discussed.

In *Allianz Australia Insurance Ltd v Shamoun* 17/5/13 [2013] NSWSC 579 [63 MVR 498] **McCallum J did not consider that the assessor had erred by adopting a buffer approach in relation to assessment of FEL** stating that "Indeed, it is difficult to see how he could have taken any other approach without deluding himself as to the measure of accuracy attained. Had he embarked on any calculation by reference to the available financial information, scant as it

was, he would have exposed himself to the criticism expressed by Barrett JA in *Sprod* at [37] … that, having embarked on such a process, 'the duties imposed by s 126 were enlivened', requiring calculation to a degree of precision not warranted or even available on the evidence" @27. "At the time of the accident, Mr Shamoun had recently established a new business, called Hopscotch. The financial material before the assessor as to the operations of that business was confined to a period of about six months. Any projection of that experience into the future was necessarily speculative. By the time of the assessment Mr Shamoun had, after a period of incapacity attributable to the accident, accepted the failure of that business but applied his evidently considerable business skills to the establishment of a different business, better tailored to his post-accident condition" @29. *Sprod* and *Cervantes* considered.

See *QBE Insurance (Australia) Ltd v Volokhova* 10/6/14 [2014] NSWSC 726 where, in the case of Mrs Volokhova, who was 33 and had worked as a solicitor in the Ukraine, the "**CARS Assessor made a finding that Mrs Volokhova would have had a future earning capacity prior to the accident but did not accept it was a certainty that she would have worked as an employed solicitor as she had claimed**. After the accident, the CARS Assessor made a finding there was some possibility that Mrs Volokhova may recover sufficiently to recommence studies or alternatively, undertake some form of work involving a lesser skill. The assessment of future economic loss was made on that basis. In my view, the CARS Assessor has complied with s 126(1) and (3). Section 126(2) does not have application here" @54. Harrison AsJ confirmed the award by way of buffer of $500,000 for future loss of earnings. CARS assessor had adequately taken into account uncertainties and given adequate reasons.

[Kallouf] "89 Section 126, as Giles JA observed in The Nominal Defendant v Lane [2004] NSWCA 405 (at [61]) '"enshrines in legislation **the method for asserting an uncertain career path** that was adopted in Norris v Blake (No 2)" [as] has been noted by Professor Luntz in *Assessment of Damages for Personal Injury and Death*, 4th ed (2002) para 1.28 [sic, 11.2.8]'.

90 The combined effect of s 126(1) and s 126(3) is to require the Court to identify and state the 'assumptions about future earning capacity or other events on which the award [of damages for future economic loss] is to be based', while s 126(1) requires satisfaction that these assumptions 'accord with the claimant's most likely future circumstances but for the injury'. Section 126(2) requires an adjustment of the 'amount of damages for future economic loss that would have been sustained on those assumptions' by reference to the 'percentage possibility that the events might have occurred but for the injury'; and s 126(3) requires the Court to state 'the relevant percentage by which damages were adjusted': Macarthur Districts Motor Cycle Sportsmen Inc v Ardizzone [2004] NSWCA 145 (at [3]) per Hodgson JA (Stein AJA agreeing); see also Bryson JA (at [52]) (speaking of s 13 of the *Civil Liability Act* which is in identical terms to s 126).

91 These requirements were, no doubt, inserted in the legislation to which we have referred to require courts to make clear the basis on which awards for future economic loss are founded." **Kallouf v Middis** 11/4/08 [2008] NSWCA 61 Full Court

s127 – Damages for FEL (discount rate)

See *Richards v Gray* 2/12/13 [2013] NSWCA 402 [66 MVR 16] where Bathurst CJ stated that "The provisions of s 127 relevantly provide damages referable to loss of earning capacity or a liability for future expenses to be discounted at the prescribed rate. In that context the issue which arises for consideration is whether or not fund management on fund income and fund management on fund management can be classified as a liability to be incurred in the future, their present value to be calculated by reference to the proscribed discount rate or, alternatively, are in fact costs which are taken into account in discounting the sum awarded for fund management fees. It does not seem that s 127 alters the common law so far as recovery of damages is concerned, apart from varying the 3% discount rate laid down by the High Court in *Todorovic v Waller* to a rate of 5%" @97-98. "the discount rate applied in respect of damages awarded is referable to the matters referred to in s 127(1)(a)-(d) of the Act and was designed to take into account the effect of inflation and notional tax on income earned from the fund. Neither the Act nor the cases to which I have referred lend support to the proposition that for all purposes a constant rate of diminution to the fund is to be assumed or that interest will be earned at a constant rate throughout the life of the fund, although these assumptions underpin the calculation of the discount rate. By contrast, the cases recognise that in times of high inflation the plaintiff will be protected by the high interest rates and yields that can be earned,

as compared to a time of relatively low inflation. The discount rate takes account of this factor as well as notional tax on investment" @112. See also precis at Managing Fund – General principles.

s128 – Damages for economic loss (attendant care services)

See *Kaszubowski v McGuirk* 12/9/08 [2008] NSWCA 219 from para. 82 and *Tu Tran v Dos Santos (No 2)* 1/5/09 [2009] NSWSC 336 per Smart AJ from para. 21.

In *Allianz Australia Insurance Ltd v Roger Ward & Ors* 30/11/10 [2010] NSWSC 720 [57 MVR 327] Hidden J stated that **claims under s15B and s128 of the MAC Act must be separately assessed** and that "[b]efore a future claim can succeed it must be shown that the threshold will be met in the future" @21. "It is now clear that a claimant cannot recover damages for gratuitous services unless they are, or are to be, provided for at least 6 hours per week and for a period of at least 6 months. (The use of the term 'consecutive' in subs (3)(b) makes it clear that that period must be a continuous one.) Accordingly, the approach in *Geaghan v D'Aubert* has been restored, and it is applicable to **s 15B(2)(c)** of the CL Act" @32.

In *Thiering v Daly* 11/11/11 [2011] NSWSC 1345 [60 MVR 42] Garling J considered the following questions: (1) "Has the right of an individual who is catastrophically injured in a motor vehicle accident, and who becomes a lifetime participant in the LCS Scheme, to damages in accordance with s 128 of the *Motor Accident Compensation Act* 1999, been completely abolished; and … (2) If not, who, as between the LCS Authority and a motor vehicle tortfeasor (in reality the CTP insurer) is responsible for paying the appropriate compensation either by way of damages, or other payments, for the provision of services which are otherwise gratuitous as that expression is to be understood from G v K" @13. … [and] (3) Does the second defendant (LCS Authority) have an obligation under the Motor Accidents (Lifetime Care and Support) Act 2006 (NSW) to pay for **gratuitous care and assistance provided by the second plaintiff ('the mother') to the first plaintiff** ('the injured person') up to the date of judgment?" @169. **Griffiths v Kerkemeyer damages not found to be abolished**. Section 128 carefully considered in the above context. Appeal dismissed in *Daly v Thiering* 20/2/13 [2013] NSWCA 25. **Appeal allowed** 6/11/13 in [2013] HCA 45 (65 MVR 376). High Court concluded that "On the proper construction of s 130A of the MAC Act, Mr Thiering has **no entitlement to recover damages in accordance with s 128 of the MAC Act with respect to the provision of gratuitous attendant care services** from Mr Daly or his CTP insurer" @46.

> [Ridolphi] "11 Section 128(3) in its current form was inserted by the *Civil Liability Legislation Amendment Act* 2008, s 4, Sch 2. The amendment was given retrospective effect (Sch 1, cl 32) and thus applies to the present case.
> 12 Section 128(3) raises difficult questions of construction. In *Hill v Forrester* [2010] NSWCA 170, this Court unanimously held that the requirement that services be provided (or are to be provided) for at least six hours per week is ongoing (at [1], per Tobias JA; at [26], per Handley AJA; at [98], per Sackville AJA). Thus the appellant in the present case is not entitled to recover damages in respect of any period during which gratuitous services were not provided (or are not to be provided) for at least six hours per week.
> 13 *Hill v Forrester* also decides that a claimant cannot recover compensation for attendant care services unless such services have been provided for at least one period of six consecutive months: at [2], per Tobias JA; at [105], per Sackville AJA. The question of whether the qualifying period of six months is satisfied if services are provided throughout that period, albeit at a rate of less than six hours per week, was not decided in *Hill v Forrester*: see at [4]-[11], per Tobias JA; at [106]-[108], per Sackville AJA. …
> 27 Although it is not necessary to decide, I would accept the respondent's submission that the evidence does not establish that the appellant is likely to acquire attendant care services on a commercial basis. The appellant's submissions do not identify any evidence indicating that he is likely to take that course. His apparent reluctance to envisage being elsewhere than with his sister suggests that he is unlikely to utilise commercial care services in the future. No submission is made that an award should be made by reference to the chances that the appellant may require and utilise attendant care services in the future: cf *Miller v Galderisi* [2009] NSWCA 353, at [14]-[24] …
> 28 For these reasons, I do not think that the damages awarded to the appellant should include compensation for attendant care services." **Ridolph v Hammond (No. 2)** 4/4/12 [2012] NSWCA 67 Sackville AJA, CA.

s130A – Lifetime Care & Support Scheme (repealed)

See *Wood v McKenzie* 3/6/13 [2013] NSWDC 89 per Murrell SC DCJ

s131 – Impairment thresholds for awards of damages for NEL

In *Nguyen v MAA NSW & Anor* 3/5/11 [2011] NSWSC 351 Hall J concluded that "There is … no warrant for reading the words *'the degree of impairment of the injured person'* as an impairment of and only of the particular part of a person's body injured in an accident. The reference to *'permanent impairment'* is expressed as related to the injured person (*'of the injured person'*) as a result of the injury caused by the motor accident" @98. "[T]he medical assessment undertaken pursuant to s.60 of the Act was affected by legal error, in that the medical assessor proceeded upon a different basis, namely, that there needed to be a causal connection between the motor accident and a *'primary and isolated'* injury to the right and/or left shoulder(s)" @120.

In *Devic v NRMA Insurance Ltd* 15/9/11 [2011] NSWSC 1099 McCallum J reviewed a medical panel's decision that A's degree of permanent impairment was less than 10%. McCallum J stated she would not entertain one of A's key submissions because "the submissions in effect invite the Court to second-guess the performance of a medical examination. Such a request should be approached with circumspection … **The measurement of range of movement in a body joint is essentially a clinical task. I do not think there is any basis for thinking that my armchair judgment as to the proper approach to such a task could sensibly be relied upon in preference to the judgments of a panel of medically qualified assessors** employed by the Authority" @34.

s134 – Maximum amount of damages for non-economic loss

[Kendirjian] "[I]t must always be borne in mind that the assessment of non-economic loss is an evaluative process in respect of which minds may reasonably differ: Woolworths Ltd v Lawlor [2004] NSWCA 209 (at [14]). An appellate court will not interfere with a trial judge's assessment of damages 'simply because it would have awarded a different figure had it tried the case at first instance': Precision Plastics Pty Ltd v Demir [1975] HCA 27; (1975) 132 CLR 362 (at 369) per Gibbs J. in Khan v Polyzois [2006] NSWCA 59 Hislop J (with whom Mason P agreed) said the Demir principle applies to the assessment of non-economic loss under s 16 of the *Civil Liability Act* 2002, and, *a fortiori*, they would apply , too, to the assessment of non-economic loss under s 134 of the MAC Act.

175 In short, an appeal from an assessment of damages for non-economic loss in relation to personal injuries from a judge sitting without a jury is to be determined in the same manner as an appeal from the exercise of discretion by a trial judge. An error within the terms of House v R [1936] HCA 40; (1936) 55 CLR 499 (at 504 – 505) must be identified: Franklins Limited v Burns; Burns v Franklins Limited [2005] NSWCA 54 (at [49]) per McColl JA (Beazley and Tobias JJA agreeing).

176 Accordingly, an appeal court may only alter the trial judge's decision if the judge acted on a wrong principle of law, misapprehended the facts or made 'a wholly erroneous estimate of the damage suffered': Moran v McMahon (1983) 3 NSWLR 700 (at 719 and 723) per Priestley JA (with whom McHugh JA agreed); Jones v Bradley (at [117]) per Santow JA (with whom Meagher and Beazley JJA agreed); see also Diamond v Simpson (No 1) [2003] NSWCA 67; (2003) Aust Torts Reports ¶81-695 (at [15]–[17]); Ghunaim v Bart [2004] NSWCA 28; (2004) Aust Torts Reports ¶81-731 (at [100])."

Kendirjian v Ayoub 14/8/08 [2008] NSWCA 194 McColl JA, Full Court

s136(4) – Mitigation of damages

In *Choy v Arnott* 4/3/09 [2009] NSWDC 17 Levy SC DCJ was satisfied that P had taken reasonable steps to mitigate his loss of earning capacity. See from para. 39. **Appeal allowed** in [2010] NSWCA 259 [56 MVR 390], but not re mitigation. Mitigation considered from paragraph151.

In *Saleh v The Nominal Defendant* 15/5/09 [2009] NSWDC 1 Levy SC DCJ, from paragraph 278, considered whether P had unreasonably failed to mitigate his damages when he failed to follow medical advice. He had not. P did not adequately understand the advice. [note: Appeal allowed in *Nominal Defendant v Saleh* 17/2/11 [2011] NSWCA 16]

s137(4) – Payment of interest

Section 137 and the issue of interest considered generally in *Helou v NRMA Insurance Aust. Ltd* 26/3/09 [2009] NSWSC 197 by Hulme J

This sub-section regulates the payment of pre-judgment interest on damages and is considered in detail from paragraph 8 of *Najdovski v Crnojlovic (No. 2)* 30/10/08 [2008] NSWCA 281 Basten JA, Full Court

In *Tu Tran v Dos Santos (No 2)* 1/5/09 [2009] NSWSC 336 Smart AJ did not consider that the requirements of s137(4)(a)(i) were satisfied to establish an entitlement to **interest on past economic loss**.

s149 – Regulations fixing maximum costs recoverable by legal practitioners

See *Najjarine v Hakanson* 8/7/09 [2009] NSWCA 187 where Hodgson JA and COA consider this provision.

s222 – Service of documents generally

In *Kalazich v Yang* 17/10/12 [2013] NSWDC 261 Neilson DCJ considered that s222 was facultive rather than mandatory or directory. See from paragraph 16.

Motor Accidents (Lifetime Care and Support) Act 2006

s9 – Acceptance as a participant

See *Cruse v Lifetime Care and Support Authority* 25/10/13 [2014] NSWSC 1546 [65 MVR 329] where Harrison J stated "There is nothing in s 9 of the Act or clause 7 of the Guidelines, or anywhere else, which precludes or prohibits **more than one application being made by a person for lifetime participation in the Scheme**. If the expiration of a period of interim participation in the Scheme does not prevent subsequent acceptance of the person as a lifetime participant in the Scheme, it must follow that it cannot prevent subsequent applications by the person made for the purpose of achieving that result" @49. "NRMA was entitled to make, and the Authority was entitled to treat, its 15 August 2012 application as a **'new' application for lifetime participation** in the Scheme" @64. "It is difficult to construe NRMA's 15 August 2012 application as anything other than a new application. The suggestion that the word "new" is redundant if the 2012 Guidelines are intended to apply to all or any applications made after the date of gazettal does not in my view lead to the result that the 15 August 2012 application is not governed by the 2012 Guidelines. It is reasonable to infer from the fact that the 2012 Guidelines apply to participants already in the Scheme at the date of gazettal that they were intended to apply to applications made after that date as well" @77.

s16 – Determinations to be binding

See Cruse v Lifetime Care and Support Authority 25/10/13 [2014] NSWSC 1546 [65 MVR 329] where Harrison J stated "Section 16 is … clearly limited or restricted to the question of whether a motor accident injury satisfies criteria specified in the Guidelines for eligibility for participation in the Scheme. The motor accident injury either does so or it does not. The nature and extent of the injury, and whether it satisfies the criteria for eligibility, is all that is final and binding. The section has nothing to say about, and does not operate in relation to, the question of whether or not a person is or should be a lifetime participant in the Scheme. Section 16 is limited to the anterior question of eligibility in the Scheme as a person who has suffered from a qualifying injury referred to in the relevant portion of the Guidelines" @80.

Permanent Impairment Guidelines (1/10/07)

cl. 1.9 – Causation of injury

See *Nelkovska v MAA of NSW* 26/7/12 [2012] NSWSC 819 where Harrison AsJ considered that the Medical Assessor erred in applying the test of causation when he "concluded and determined that the request for domestic assistance was not directly caused by the motor accident. … [T]he Medical Assessor has sought to apply a higher test of 'directly causally related' and has therefore fallen into jurisdictional error by asking himself the wrong question. Furthermore, the Medical Assessor has sought to determine whether the request for domestic assistance was causally linked to the subject accident, rather than determining whether the plaintiff's *injury* was caused or materially contributed to by the motor accident, and then

assessing whether the proposed assistance relates to that injury, and is necessary and reasonable" @48.

cl. 1.19(i) – Evaluation of impairment

In *Nguyen v MAA NSW & Anor* 3/5/11 [2011] NSWSC 351 [58 MVR 296] Hall J from paragraph 48 considered the meaning of **'in the part being assessed'.**

cl. 2.5 – Approach to assessment of upper extremity and hand

See *Sadsad v NRMA Insurance Ltd* 5/9/14 [2014] NSWSC 1216 per Hamill J, where inadequate reasons given for assessment of 10% impairment and decision therefore declared void and of no effect.

Uniform Civil Procedure Rules 2005

r28.2

In *Andrews v State of NSW* 1/10/08 [2008] NSWSC 1034 Harrison J considered it appropriate to order separate hearings re liability and quantum, including also leaving certain causation issues to the quantum hearing. Costs and corresponding time advantages were important factors in this decision.

Workers Compensation Act 1987

s151G – Only damages for past and future loss of earnings may be awarded

Sidis DCJ considered this provision in *Luke as Tutor for Luke v Workers Compensation Nominal Insurer* 17/2/10 [2010] NSWDC 18 finding that it permitted compensation for loss of capacity to manage funds.

See *Wilson v State Rail Authority of NSW* 16/8/10 [2010] NSWCA 198

s151H – No damages unless permanent impairment of at least 15%

See *Wilson v State Rail Authority of NSW* 16/8/10 [2010] NSWCA 198

s151Z(1) – Recovery against both employer and stranger

This section considered by Full Court in *Cai v Zheng* 25/2/09 [2009] NSWCA 13. The judge below had erred by failing to deduct from R's damages the compensation A had paid to the workers compensation insurer. But see High Court appeal which was allowed in *Zheng v Cai* 9/12/09 [2009] HCA 52 [52 MVR 427].

In *Abdulle v QBE Insurance (Australia) Ltd* 1/4/10 [2010] NSWCA 60 the COA held that pursuant to s151Z(1)(b) a worker may recover both compensation and damages.

s151Z(4)

In *Abdulle v QBE Insurance (Australia) Ltd* 1/4/10 [2010] NSWCA 60 the COA held that this "section does not operate where an award of damages covering future loss or expenses 'includes a lump sum, *or* other provision for making payments', as stated in *Tamerji*, but rather applies where an award includes a lump sum *and* other provision for making payments. The difference in language is small but significant"@23.

References to recent general damages assessments

Aggravated & Exemplary damages

See also *Elliott* at Dental below.

Abdomen

See *McMaster v State of NSW …* 13/12/13 [2013] NSWDC 244 where P was **shot by a police officer in the stomach** in 2011 when he was 19. The officer mistakenly thought P was one of the criminals involved in the violent home invasion they were attending. P "**underwent two surgical procedures. On the night of his admission he underwent a laparotomy and small and large bowel resection. The following day he underwent a further laparotomy and end to end transfer colon anastamosis and wash out with removal of a bullet fragment from his left buttock**" @214. P had a mid-line scar of 22cm on his abdomen. "[P]ain and bloating in the plaintiff's stomach were indicative of a kink in the small intestine due to adhesions or an anastamotic stenosis, which was related to the surgery he underwent" @217.

P's bowel function was disrupted and he was sensitive to the cold. There "was a life-long risk of recurrent adhesions and small bowel obstruction" @217. P suffered a **PTSD**, but has recovered quite well from this. He was scared of leaving his house for a few months. He did not feel able to get psychological treatment. P "has significant interference with his capacity for the fundamentals of life, eating, toileting and moving of the lower torso" @228. Mahony SC DCJ assessed P's general damages at $175,000. P "suffered indignity and outrage from the deliberate and unjustifiable conduct of Constable Fanning shooting him" @242. He was therefore awarded **$25,000 for aggravated damages**. "Justin McMaster was not a direct threat to Constable Fanning or Constable Kleinman, and the use of the pistol to shoot Justin McMaster in the circumstances was entirely disproportionate to any risk to the Police" @246. P awarded **$50,000 in exemplary damages** among other heads. P's mother and sister awarded $85,000 and $80,000 respectively for general damages for their psychological reactions from P's shooting. They had otherwise suffered significantly from the home invasion.

Achilles tendon

In *Karabay v Malcolm Carr t/as Forshaws Neill Solicitors & Anor* 7/11/12 [2012] NSWSC 1386 P **ruptured his right Achilles tendon** when tripping on an uneven surface while playing basketball. P has a significant loss of muscle in his right calf, experiences cramp and has reduced strength in his right leg. This has limited him in his career as a pilot which causes him significant disappointment. Hidden J notionally awarded P $120,000 in general damages, among other heads. Appeal allowed in part, but not on the issue above, on 8/5/14 in [2014] NSWCA 143.

Ankle

See Foot

P retiree fell and fractured her left fibula above her ankle joint. P "does have a disabling condition from the … fall which is chronic but stabilised; her subsequent weight gain clearly would not assist weight bearing on the left ankle and she continues to use a walking stick. … Only a relatively small amount of domestic assistance was required … The injury itself was of a **minor fracture** which was successfully treated but with **ongoing disabilities in the left ankle affecting her mobility and day-to-day domestic activity**. Her condition does not require further treatment, other than perhaps some physiotherapy to the ankle and Panadol for pain, although the complaints of pain and numbness will persist for at least two years from the date of the fall into the foreseeable future"@46-48. P assessed at **22% of a most extreme case**, but D not liable. *Vasilikopoulos v NSW Dept. of Housing* 5/6/09 [2009] NSWDC 114 Hungerford ADCJ

In *Kay v Murray Irrigation Limited* 11/12/09 [2009] NSWSC 1411 P (farmer), in a fall in September 2004, suffered "**complex fractures of the left ankle**, including a fracture of the medial malleolus, comminution and compression of the surface of the tibia and displacement of the lateral malleolus … Three days later he underwent surgery to fix the fractures and to realign the ankle joint. He was discharged after one week with his leg and foot in plaster. He was effectively bed ridden for eight weeks, unable to weight bear on his left ankle because of the complete disruption of the structure of the ankle joint … Eight weeks after the initial surgery part of the internal structure fixing the fractures was removed after which his ankle was permanently fixed with two screws on the medial malleolus and a plate on the fibula. He was required to wear a protective boot and to utilise crutches for eight weeks after this procedure. He was able to weight bear on his ankle by increments and was free of all walking aids by January 2005. He has the permanent need for orthopaedic footwear as he is unable to walk with his heel on the ground, and even with orthopaedic footwear, to the extent that he needs to weight bear on his left leg, he walks on the ball of his foot. From March or April 2005 he resumed some farm work. He purchased a motorised mustering device which he could drive without using his left ankle at all and endeavoured, albeit with only moderate success, to modify the tractor to avoid using his left ankle … [P's disabilities include] Difficulty in bending the left foot … Needing to walk on the outside of the left foot with his left leg externally rotated … Difficulty in walking any lengthy distance, particularly on uneven ground … Difficulty in standing for any lengthy period of time … Intolerance to walking with bare feet …The deformity and persistent ankle swelling has led to a difference in feet size meaning that the plaintiff has to purchase boots and shoes in a size suitable for the larger size and then pad the boot or shoe for the smaller size … Permanent limp when walking … Difficulty in carrying out many household activities … Difficulty in driving

motor vehicles for lengthy periods of time …Constant need to take Panadol and other pain relief mediations … [and] Depression and loss of confidence"@26-28. Fullerton J assessed P at **35% of a most extreme case**.

In *Davies v George Thomas Hotels P/L* 21/4/10 [2010] NSWDC 55 Murrell SC DCJ assessed P's ankle injury at **30% of a most extreme case**. He suffered a **serious trimalleoler fracture** in a fall and was on crutches for five months. He has had two operations. The ankle has been infected and is sensitive to knocks. There is scarring. P's employment, domestic and social life has been significantly affected and he can't stand or walk for ten minutes without it aching. It is unlikely to improve. P has become depressed. He has a life expectancy of 30 years. Other heads also assessed and a total award made of $317,354.

In *Hamilton v Duncan* 26/5/10 [2010] NSWDC 90 Murrell SC DCJ assessed the consequences of P's **ankle and knee injuries** from tripping at **30% of a most extreme case**. The "plaintiff underwent left knee arthroscopic partial lateral meniscectomy and medial femoral chondroplasty … the disabilities associated with the accident caused depression and disappointment. This psychological state was the result of pain, limited capacity to undertake domestic responsibilities, and inability to work and financially support his family. He referred to diminished interest in sexual relations and arguments with his wife because he was unable to undertake household chores and assist with the care of the couple's seriously disabled daughter … the plaintiff continues to suffer from some pain and instability in the ankle"@35-38. P was 45 in 2006 when the incident occurred.

In *Kaiser v Johnston* 11/6/10 [2010] NSWDC 103 P, a 65 (68 at judgment), was hit by a car while walking. He suffered a "**severe traumatic brain injury** resulting in impairment to his cognitive functioning and negative emotional and behavioural consequences [and] … **[c]ompound fracture of the left ankle** with ongoing pain and discomfort and restriction in range of movement" @128. Sidis DCJ awarded, among other heads, $200,000 in general damages.

In *Wakeling v Coles Group Ltd* 4/4/11 [2011] NSWDC 20 the P "sustained a **twisting and swelling injury to his right ankle, followed by a blow to the medial aspect of the ankle** as he fell [in a supermarket]. He also suffered some minor **bruising** type injury to his right knee, wrist, elbow and shoulder. He also suffered a low back injury, which did not become symptomatic for him until several days after the fall. … [He has] a broad **based L5/S1 annular disc bulge with some similar findings at the level L4/L5**" @47. P has been "left with **persistent pain in his right knee and ankle**, including the experience of sharp pain, which he described as being mild, occurring 2 to 3 times a week. His low back problems remain intermittently troublesome for him, depending for severity on his level of activity, and he has difficulty laying on his back when sleeping. He experiences difficulty getting out of bed in the mornings due to back pain" @ 48. He has gained significant weight and has **difficulty walking, which was a favourite activity of his**. He experiences chronic pain in his right lower leg, an inability to 'tinker' with wrecked cars to salvage saleable parts (a hobby of his) and anger and stress which he says has caused him to start smoking again. It's unlikely that P will ever be asymptomatic. P was 22 when injured and 23 at judgment. Levy SC DCJ awarded P $90,000 for NEL, among other heads.

In *Nemeth v Westfield Ltd & PT Ltd* 11/5/12 [2012] NSWDC 76 P suffered a **fracture of the tip of the right lateral malleolus** when she fell over in shopping centre car park in 2009 when she was 34. P still "has **chronic right ankle pain associated with subtle instability of her ankle joint … [and] she is likely to have ongoing ankle pain** … [F]ull recovery could take several years" @71. P "did not achieve a good resolution of her injury and has suffered continuing pain and swelling in her right ankle. She is restricted in terms of her mobility to walking no more than 500 metres, and has trouble on stairs and uneven ground. She has not returned to any of her pre-accident recreational activities and has been restricted in what she can do in terms of heavy cleaning and domestic chores" @70. P has had to double her medication for her pre-existing psychological condition. P assessed at **25% of a most extreme case** and awarded $34,000 for NEL among other heads. P's appeal dismissed 9/9/13 in [2013] NSWCA 298.

In *Moor v Liverpool Catholic Club Ltd* 25/6/13 [2013] NSWDC 93 Levy SC DCJ found the D breached its duty of care to the P who fell in 2009 and **injured his ankle while descending stairs wearing ice skates whilst on his way to the ice arena**. P was 19 at the time and "suffered a very painful fracture with swelling to his right ankle. This was later defined by an x-ray examination to involve an oblique fracture of the distal right fibula with some dorsal displacement of a major distal fragment, with the fracture line extending a few centimetres above the ankle joint, with some ligament disruption, evidenced by the x-ray findings of widening of the ankle joint" @26. P "continues to experience pain in his ankle and cramping on waking each morning. It takes him some time to ease this problem by moving about. He experiences difficulty with stiffness, mobility and agility with his right leg. He finds difficulty lifting, squatting and bending" @38. P has scarring to his right lower leg, walks 'like an old man' and experiences ankle pain every day. Currently, he works 40 hours a week as a **truck driver**. P **28% of a most extreme case** and awarded $75,000 for NEL among other heads.

In *Aldred v Stelcad Pty Limited* [2014] NSWDC 63 P, at work in 2009 when he was 28, suffered an "**inversion injury to his left ankle with joint sprain. He had subsequently developed a DVT** which was treated appropriately. He had increasing pain in his left ankle with features of a **complex regional pain syndrome**. He underwent three sympathetic neural blocks. He was treated for a burning sensation in his foot with constant pain, swelling, redness and sweatiness in the foot with a cracking sensation. His treatment included the spinal cord stimulator from which he suffered a dural leak and was admitted to … Hospital" @68. P "has continued to suffer pain and swelling in his left ankle, particularly after work … [H]is symptoms have become chronic and that it is unlikely that full recovery will occur" @76. Mahony SC DCJ assessed P at **25% of a most extreme case** and assessed P's NEL damages at $36,000, among other heads.

See *Schultz v McCormack* 20/6/14 [2014] NSWDC 67 where P, now 59, in 2010 **slipped on wet tiles outside her friends place**. The **risk of slipping was an obvious one**. D not liable. Damages nevertheless assessed. P sustained a **tri-malleolar fracture of her right ankle**. "The prognosis for the plaintiff's problems remains poor and guarded. She faces the prospect of further surgery to her right foot and ankle for removal of indwelling screws and to further attempt correction of the equinus deformity in that foot. The plaintiff feels her ankle has not become more stable since the most recent surgical procedure, and she feels that the pain in her ankle is becoming worse rather than better. The effects of the plaintiff's disabilities have had a considerable curtailing effect on her ability to pursue he leisure activities, and she also suffers from sleep disturbance resulting from her disabilities" @42. Levy SC DCJ assessed P at **38% of a most extreme case**. No psychological injury involved.

See *Krstin* at Pelvis

> "26 By reference to *Owners – Strata Plan 156 v Gray* [2004] NSWCA 304, the appellant noted that **an assessment of 33% of a most extreme case, with respect to an injury limited to the plaintiff's left ankle, 'was so unreasonable and plainly unjust** that it must be inferred that in some way his Honour failed properly to exercise the discretion reposed in him in making the determination he did': at [41] (Sheller JA, Gzell J agreeing). Such a case may undoubtedly arise: but in the present case, where the defendant accepted at trial a figure of 24% or 25%, the argument cannot run." **Bon Appetit Family Restaurant Pty Ltd v Mongey** 11/2/09 [2009] NSWCA 14 Basten JA, Full Court

Arm

In *McDonald v Moama Bowling Club Ltd* 23/9/08 [2008] NSWDC 230 (per Sidis DCJ) a **76 y.o. (80 at judgment) fell and fractured her 'greater tuberosity of her right humerus with slight displacement and an undisplaced fracture of the surgical neck of the humerus'**. The fractures have healed, but P experiences right shoulder pain and restricted use of her right arm. P **nowhere near as active and independent as she was** before her fall. She can now only care for her husband in a limited way. Assessed at 30% of most extreme case and awarded $101,500 for NEL among other heads.

In *Williams v Twynam Agricultural Group Pty Ltd & Anor* 16/9/11 [2011] NSWSC 1098 Hoeben J found farm owner (1st D) and P's employer (2nd D), a contractor to the farm owner, liable for P's injuries caused by an **accident on an internal road on the farm in 2006**. **P hit a culvert and his vehicle overturned causing injury to his neck and right arm. P was given**

insufficient warning of the hazard. Liability apportioned 75% to 1st D and 25% to 2nd D. P was 35 and working as an irrigator checking and maintaining water levels. P will suffer pain in his neck and right arm for the rest of his life. It is also likely that he will be dependent on social services and very limited in the types of employment he can do for the rest of his life. P assessed at **45% of a most extreme case** and awarded $225,000 in general damages among other heads.

In *Awad v Diamond Marble Granite Pty Ltd* 21/6/12 [2012] NSWDC 89 a granite slab fell on P's arm and he "suffered a **serious crushing injury to his left forearm** which caused internal bleeding causing a compartment syndrome requiring surgical intervention by way of a fasciotomy, removal of the haematoma and repair of the flexor muscle bellies. That procedure required a skin graft for the purpose of wound closure, following which the plaintiff's left arm was encased in plaster for two months and he underwent physiotherapy from a hand physiotherapist. The plaintiff has been left with a functional deficit of his left upper arm, which was his non-dominant hand, with diminished grip strength of 50% and some lifting restrictions. He also has an **unsightly disfigurement** of his left forearm, albeit on the ulnar and volar aspects, but which are cosmetically unsightly. The plaintiff has suffered a chronic pain syndrome and still requires analgesics some five years following his injury. … [P] has suffered an **adjustment disorder with mixed emotion, together with his chronic pain syndrome**" @98-99. P **28% of a most extreme case** and Mahony SC DCJ awarded him $73,000 in general damages among other heads.

In *Pavlakis v Medical & Fitness Centre Pty Ltd* 19/10/12 [2012] NSWDC 193 P slipped and fell in 2011, when she was 49, and **fractured her left humerus**. "A complicating feature of the plaintiff's injury is that the location of the fracture to her left humerus coincided with the site a previously unrecognised lytic bone lesion, which created a weakness in the bone and thus vulnerable (sic) to fracture. This was subsequently revealed to be due to an **underlying condition of multiple myeloma**" @4. P suffers from "**pain, discomfort and restriction of movement of her left arm, especially involving the elbow and shoulder**. As a result of sustained favouring of her left upper limb, the plaintiff **has developed pain, discomfort and restriction of movement in her right shoulder and arm**. She has developed abnormal sensations involving a feeling of pins and needles in both hands. She has a reduced capacity to lift, bend and carry and has restrictions in her ability to reach, especially at the extremities of movement of her arm, and especially overhead. Her leisure and dancing activities have also been curtailed. She also feels uncomfortable driving a motor vehicle. The plaintiff has been left with a **disfiguring scar** on her left upper arm. That scar is widened and pigmented. She would rather that it was not there. She also faces the prospect of further surgery to remove the indwelling fixation hardware in her left upper arm, with the prospect of further scarring. … [Consequently] the plaintiff has developed frustration, distress and a degree of psychological withdrawal" @32-34. P has been unable to continue her career as an **early childhood teacher**. P is substantially impeded in doing housework, gardening and lawnmowing. Levy SC DCJ assessed P at **23% of a most extreme case and awarded $26,000 for NEL** among other heads.

In *Le v Heatcraft Australia Pty Ltd and Le v Heatcraft Australia Pty Ltd & Anor* 31/5/13 [2013] NSWDC 75 P, a process worker, was injured in 2005 when he was 43. "The principal injury sustained by the plaintiff comprised a **deep laceration to the upper forearm of his right arm**. This occurred when he **lost balance after being bumped by the forklift causing him to fall forward onto a sharp newly cut piece of sheetmetal**. The plaintiff's other injuries, which comprised a graze to the tip of the right middle finger, and a crushing injury to the right foot, resolved relatively quickly" @24-25. "The plaintiff has scarring to his right forearm from the initial laceration. He also has **surgical scarring to both of his wrists following several attempts at remedial surgery**. He has developed chronic regional pain syndrome which affects both of his upper limbs. He has been left with reduced manual dexterity, strength and reduced capacity to lift and carry objects. He has pain in both arms, shoulders, wrists and in his neck. His tolerance for manual activity, sitting and standing before the onset of pain is about 10 - 15 minutes. He has developed a psychiatric disorder, with **severe and chronic depression**, associated with his chronic pain syndrome. This is against the background of a perfectionistic character trait and self-reliance, attributes he feels he can no longer fulfil" @79. The **MAC Act held to apply rather than the Workers Compensation Act**, as P's injuries a result of the

"failure of the second defendant, and vicariously, the first defendant, … to use the beeper or other means to warn the plaintiff of the approach of the forklift, and failure to ensure that a proper lookout was maintained in order to avoid contact with the plaintiff" @84. No contributory negligence found on P's part who was working at the time of injury. Levy SC DCJ awarded P **$200,000 in general damages** among other heads.

Asbestos-related illnesses

See Dust Diseases

Back

[See also Spine (Multiple)]

A 27 y.o. male P "suffered **disc lesions at L4/5 and L5/S1**. The plaintiff underwent surgical treatment, being two laminectomies in 2001 … [T]he plaintiff had had significant alcohol abuse problems prior to the accident and also obesity problems. … [T]here had been a severe aggravation of these matters along with severe depression extending over almost the entire period since the accident. The laminectomies had alleviated to a large extent his leg pain, but he was still troubled with low back pain which caused him pain on a daily basis and interfered to a significant extent with his leisure pursuits and amenities of life" per Allsop P. Appeal court would have assessed general damages at **40% of most extreme case**. *Coastwide Steel & Metal Work P/L v Douglas* 5/8/08 [2008] NSWCA 173 Full Court

In *Woodward v Byrnes* 7/11/08 [2008] NSWDC 257 Sidis DCJ assessed inter alia general damages between **$40,000-$55,000** for a truck driver injured in a motor vehicle accident who suffered a **compression fracture of his fifth thoracic vertebra**. As a result P has serious ongoing pain, sleep disturbance, depression, problems socialising. The pain restricts P's mobility.

P, a labourer, was 32 y.o. when in a work accident he suffered facial scarring, damage to teeth, and **aggravation of his lower back and psychological problems**. He has significant continuing disability re his back (which significantly affects his work capacity) and psychologically (PTSD and depression). Found to be **30% of a most extreme case** and awarded $101,500 for NEL among other heads of damage. *Vosebe Pty Ltd v Bakavgas; Vosebe Pty Ltd v Vapore* 22/5/09 [2009] NSWCA 117

In *Kocev v Toh* 9/7/09 [2009] NSWDC 169 Hungerford ADCJ considered that **chiropractic treatment** given to P (a QL stretch) did not breach the chiropractor's standard of care. Nevertheless, damages were still assessed. P was 56 y.o. and had argued that "as a result of the treatment received from the first defendant … [he received an] **aggravating injury to the lower back, radiation of pain into the left leg, psychological injury and weakness in the right leg**. Disabilities were claimed to include pain and discomfort in the areas injured, sleeplessness, reduced ability to stand and/or sit, anxiety and frustration, reduced trust of the medical profession and reduced ability to engage in social and/or recreational, work-related and domestic activities"@15. Notionally he was assessed at **20% of a most extreme case**.

In *Duncombe v Riverina Meat Processors Pty Ltd* 20/10/09 [2009] NSWDC 272 Levy SC DCJ assessed a 39 y.o. boning room packer (and qualified enrolled nurse) who **injured her degenerative lower back at work** at **35% of a most extreme case** (entitling her to $157,500). P's **depression and alcohol problems were also exacerbated**. P has been left with fairly constant lower back pain radiating to her legs which has **significantly limited her capacity for a wide range of jobs**. Various other heads of damages awarded and a total of $718,934.

See precis of *Chandra* at Knee. **28% of a most extreme case with serious knee injury**.

In *Alzaway v CPT Custodian Pty Ltd* 30/10/09 [2009] NSWDC 304 Hungerford ADCJ assessed the P, who in a fall **aggravated for about three months her pre-existing back and shoulder problems**, at **8-10% of a most extreme case**. No award for NEL as threshold not met.

In *Jovanovski v Billbergia Pty Ltd* 31/3/10 [2010] NSWSC 211 Davies J found P to be **45% of a most extreme case** and awarded, among other heads $213,000 for general damages. P suffered **disc herniation at the L4/5 level and psychological issues** as a result of a fall from

his truck in 2004 when he was 51 y.o. He has lower back pain radiating down to his legs. He "experiences ongoing chronic pain which is relieved to some extent by the injections into his spine. He has an ongoing need for these. I find he has ongoing pain and restriction of movement in the neck and headaches. … [He has] psychological and psychiatric symptoms including the depression and anxiety. All these matters interfere with his ability to sleep, they restrict his ability to do many physical tasks, including household tasks"@126. P not likely to return to work as a truck driver, but has a residual earning capacity. **Appeal dismissed** *Jovanovski v Billbergia Pty Ltd* 2/6/11 [2011] NSWCA 135.

In *Firth v Sutton* 30/4/10 [2010] NSWCA 90 the COA confirmed the following comments of the trial judge re non-economic loss: "The plaintiff … had the stated **pre-existing condition [pars defects) in her spine**. However, it was asymptomatic and she was able to engage in the usual teenage activities, attend school and participate in sport. … Due to the nature and conditions of the work [at Go-Lo] over a period of a few years with the lifting of heavy boxes, stooping and bending she sustained **disc protrusions in her spine at three levels** which, in February 1998 at age 16 years, caused her to cease the work. Later that year as a consequence of the continuing back and left leg pain she left school and stopped participation in sport. The medical evidence demonstrated a future incapacity with the back condition to engage in such lifting work or to hold a job requiring prolonged standing or sitting as there was a need for her to be able to adjust position as required from time-to-time. A job in a sedentary type occupation was identified as suitable such as office work and the career ambition of becoming an airline hostess was lost. … [T]hat was a great disappointment to her and she has experienced feelings of anxiety and a depressed mood in adjusting to her condition. In the future, she faces continuing problems with her back and with the likelihood of surgery to excise the disc protrusions and to have a spinal fusion at two levels. … At the notional trial in July 2000 she was aged **19 years with a life expectancy of 69 years**. I would assess non-economic loss at **35 of a most extreme case**, that is, $79,327.50. … I emphasise that the **plaintiff's school and teenage years, young adult life, career ambitions and prospects for the future have been most seriously affected by this injury**"@142. In *Firth v Sutton* 30/4/10 [2010] NSWCA 90 Allsop P stated that "Ms Sutton is **not entitled to damages merely because of the loss of an opportunity to consider what she might have done had Mr Govan properly fulfilled his duties**: *Tabet v Gett* [2010] HCA 12. Rather, to succeed, it was necessary for her to prove that on the balance of probabilities she would have given instructions to pursue a common law action and to elect not to proceed under the WC Act. Forensically, to satisfy the court of the likelihood of that choice, it was necessary to prove what advice would, or could reasonably, have been tendered by a reasonably prudent solicitor"@103. **Appeal allowed** in *Firth v Sutton (No 2)* 14/5/10 [2010] NSWCA 109 on issue of **interest** only. Held that "[t]he calculation of compensation for the comparatively worse position of not having a lump sum payment under the lost common law action should not only take into account what benefit under the Workers Compensation legislation was received, but also when it was received" per headnote.

In *Leonhardt v Hosford* 9/7/10 [2010] NSWDC 176 Cogswell SC DCJ assessed **general damages at common law** in the case of a law practice manager, who suffered a **tear in her L5/S1 disc and chronic pain syndrome with associated depression** as a result of a motor vehicle collision, at **$200,000**. Othe heads also awarded.

In H*awkins v Donaldson Coal P/L & Ors* 9/9/10 [2010] NSWDC 196 Sidis DCJ assessed a **truck driver** who was involved in a rollover at **30% of a most extreme case**. He suffered fractures of ribs 4 – 9 on the left side, lacerations to his face, head and neck, **fractures of the transverse process at T8 and T9**, soft tissue injury to the back, right hip and left knee, shock and reactive anxiety. P returned to work after 18 months but "continued to be affected in his day to day life with moderate levels of pain in the thoracic and lumbar areas of his spine. I accepted that his condition was permanent. He was 46 years old at the time of the accident and [is] now 50 years old … " @185. P has suffered and continues to suffer significant pain during and after work. Other heads also awarded.

See *Jajieh v Woolworths Ltd* 26/10/10 [2010] NSWDC 239 per Levy SC DCJ. "The plaintiff is only 27 years of age. She has a **post-traumatic mechanical derangement of the lumbar spine with resultant right-sided sciatica from an L5/S1 disc injury, as well as having a disc injury at the level L4/5**. … [T]hese problems have rendered her permanently unfit for a

range of every day and commonplace work tasks. This condition, whilst chronic and stable, nevertheless has … had a long-term adverse impact on her occupational, recreational and day-to-day activities. … [P's] back disability, which comprises disc bulges causing symptoms which will permanently cause fluctuating symptoms for her, depending upon whether and to what extent she participates in commonplace aggravating movements, in someone so young, represents a serious impairment of the amenity of her life. … [P] has suffered a **chronic major depression and a chronic pain disorder**, the continuation of these conditions being dependent upon her underlying orthopaedic condition. There is no suggestion that these underlying orthopaedic conditions are other than permanent" @148-149. P assessed to be 37% of a most extreme case and awarded $185,000 for NEL among other heads.

In *Glover v Australian Ultra Concrete* 10/9/10 [2010] NSWSC 1006 Harrison J found P, who injured his back at work in a fall in 1994, to be at least **50% of a most extreme case**. P was a factory manager. He is 65 y.o now. P suffered **disruption to his lumbo-sacral spine and 'moderate to large disc herniation on the right posterior aspect of the L5-S1 level**'. P's injury has disabled him significantly for 15 years and will do so indefinitely.

In *Dargham v Kovacevic* 31/1/11 [2011] NSWSC 2 a 24 y.o. P fell down a stairwell in July 2005 and "suffered **soft tissue injuries to the sacro-coccygeal, lumbo sacral and neck regions**. These injuries occasioned him significant pain and marked disability for about three months. The pain and disability gradually decreased thereafter and by 23 November 2005 he was fit to resume limited part time work though he continued to have some ongoing symptoms, the effect of which was exacerbated, to some degree, by an **adjustment disorder and depressed mood**. The plaintiff has no clinical findings of major physical impediment and … would have been able to upgrade to his pre-injury level of work after three or four months of a gradual return to work. … [Hislop J stated that] he effects of the injury had largely subsided by December 2009 and no future problems resulting from the injury are to be anticipated though the plaintiff may have some intermittent low level pain for some time to come" @94-95. P was **30% of a most extreme case** and was thereby awarded $115,000 for NEL among other heads.

In *Harris v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor* 10/11/11 [2011] NSWDC 172 P suffered **fractures to his spine in a fall whilst skiing**. He was 16 at the time. Whilst he can work full-time in sedentary employment, he has lost the capacity to engage in occupations involving manual labour, such as plumbing (which had been his goal). Small possibility P might go back to school and become an accountant. P has made a good recovery, but still has pain doing certain activities and this is likely to be permanent. Elkaim SC DCJ assessed P at **33% of a most extreme case** and awarded $171,500 in general damages, among other heads.

In *Andrews v Westpac Banking Corporation* 16/2/12 [2012] QSC 22 P, in 2006, when she was 41, fell from a chair at work and suffered a **soft-tissue injury to her lower back** resulting in about 5% impairment. "Despite … a level of pain in her back with some radiation and consequent care with lifting too heavy a weight, twisting, bending, and sitting and standing for too long … the plaintiff is capable of a life without too much in the way of restriction" @95. McMeekin J awarded P **$35,000 in general damages** among other heads.

In *Geyer v Redeland Pty Limited t/as Barbehire and Sydney Site Services Pty Ltd* 21/3/12 [2012] NSWSC 245 the P, a confined space officer, **fell down stairwell** (approx. 15-20 stairs) in 2004 when he was 27. He initially received workers compensation. P "suffered **injury to the lumbar spine, bruising, psychological injury and left sciatica**" @97. P's continuing disabilities include "pain and restriction of movement of the back requiring surgery in the form of a laminectomy and diskectomy; referred pain down the back of left leg; referred pain down the right leg; numbness in both feet; loss of balance; inability to sleep due to pain; inability to walk up or down stairs; inability to squat; inability to walk for long distances; inability to run; inability to sit, stand or lie for long periods; inability to attend to gardening and lawn mowing; inability to drive for long distances; inability to care for his horses; inability to attend to any household chores; inability to participate in pre-injury recreational activities particularly horse riding; inability to lift, push, pull or bend; anxiety and depression; and inability to return to pre-injury employment" @98. He is unemployable. Were it necessary to make an award of damages

Rothman J would have awarded P **$175,000 in general damages (35% of a most extreme case)** among other heads.

In *Hourani v Insurance Australia Group t/as NRMA* 6/11/12 [2012] NSWDC 202 the P, who was 37 in 2008, **slipped on water in her home** due to storm damage. P suffers "from significant recurring low back pain from her **lumbar disc injury** … difficulty maintaining certain postures due to back pain, and difficulty with bending, sitting, standing and walking for prolonged periods … [and] radiated pain into her left leg and ankle … [The] plaintiff has gained weight due to her resultant inactivity, and also probably due to her related psychological difficulties consisting of **anxiety, insomnia, headaches, fatigue and depression**" @81. P has been unable to work since her injury and has been unable to carry out her normal domestic activities. Liability not established, but Levy SC DCJ assessed P at **30% of a most extreme case**. $119,500 for NEL assessed among other heads.

In *Keys v A & A Lederer Pty Ltd, CB Bensley & J Bensley* 13/11/12 [2012] NSWDC 208 P slipped at a mall in 2009 when she was 56 and "sustained **multiple jolting injuries to both arms, her right hand, her left lower jaw, her left hip and her lower back**. She was also psychologically shocked by the circumstances of her injury" @12. She "**aggravated her left sided sciatica**, which had been quiescent for some time before the injury" @12. "Since her fall, the plaintiff's complaints have comprised headaches, low back pain, related left sided sciatica, and left sided jaw pains. Her back pains and sciatica adversely affect her ability to sustain activities such as prolonged sitting, standing, and walking. Her ability to lift and bend, and to carry objects has become impaired. She estimates her level of pain to be 7 out of a maximum scale of 10. She has reduced physical strength and dexterity. She is no longer able to drive her manual car because of difficulties with gear and clutch changes. She has reduced manual dexterity in her right hand, which was jarred in the fall" @20. P cannot attend to her normal domestic duties. Levy SC DCJ assessed P at **27% of a most extreme case** and awarded her $53,500 for NEL, among other heads.

In *Humphries v Shoalhaven City Council* 23/11/12 [2012] NSWDC 216 P, in 2008 when he was 44 injured himself at work while lifting an object. P's "ongoing physical problems comprise **pain, discomfort and restriction of movement in his thoracic spine and in his right shoulder**. This pain is aggravated by sitting in an awkward position, standing for prolonged periods, or when leaning forward and carrying out lifting and bending movements. His pain is also aggravated by jolting movements when seated in motor vehicles that are poorly sprung or being driven on an uneven surface. He is no longer able to drive trucks. He also has intermittent paraesthesia in his right arm. His thoracic pain becomes aggravated by relatively minor activities. He is unable to carry out the normal outdoor activities of a domestic nature that he did without difficulty before he was injured. He is unable to resume full physical, social and leisure interaction with his children. The plaintiff's ongoing disabilities of an emotional and psychological nature include anger, disappointment, frustration, palpitations, insomnia, disturbed sleep, irritability, impatience, anxiety, lowered mood, social withdrawal, and depression. The perpetuation of these symptoms is linked to the ongoing physical complaints, and the severity of those complaints. There is no end in sight for these problems" @129-130. Levy SC DCJ assessed P at **32% of a most extreme case** and awarded him $160,500 for NEL, among other heads. Appeal allowed 22/11/13 in [2013] NSWCA 390 in relation to out of pocket expenses only.

In *Kissun v Coles Supermarkets* 9/8/13 [2013] NSWDC 134 P in 2011 when she was 27 slipped in Coles and "suffered an injury to her low back involving a **small disc protrusion at L5/S1 level with nerve root impingement** on the left side which caused her **chronic low back pain** with left-sided sciatica for some time. … The plaintiff had restrictions in all of her work, domestic and recreational activities and has suffered a reactive depression diagnosed … as a **Post Traumatic Stress Disorder**. … The plaintiff has enjoyed some improvement in her condition following her move to Melbourne in the middle of 2012" @91. Mahony SC DCJ assessed Pat **25% of a most extreme case** and was awarded $35,000 in general damages among other heads.

In *Downie and Anor v Jantom Company Propriety Ltd, Ex-Government Furniture Propriety Ltd and Anor* 29/8/13 [2013] ACTSC 171 P, who is 51, was injured in 2002 when the **chair she**

was sitting on collapsed. P suffered a **disc bulge at L4-5, with the disc in contact with the L5 nerve root**. "She has had considerable treatment, including a lumbar fusion which did not … solve her problems. … [S]he has been left with **permanent and often severe low back pain**, and **permanent sciatica down the left leg**. … [T]he pain is debilitating and has caused a substantial interference with the plaintiff's working life, home life and personal relationships. She continues to suffer from **depression and anxiety**, and there is apparently not much room for optimism that she will ever recover from her psychological condition although some further improvement may be expected over time" @200-201. Master Harper awarded P **$140,000 in general damages**, among other heads.

Bowel

See *McMaster* at Abdomen.

Brain

[See 'Head' below]

As a result of a motor vehicle accident when P was 52 y.o. (57 at judgment) P "suffers from the effects of a significant brain injury with cognitive and memory deficits. She has diplopia, a slight paralysis of the left side of the face and left hemiparesis. Her left arm is completely paralysed and she suffers neuropathic pain in that limb. She is right handed. She has a limited capacity to walk using a quadstick and generally uses a wheelchair to mobilise outside the house. She suffers bouts of despondency and depression and at times becomes angry, moody and uncooperative. She does not, however, engage in antisocial or risk-taking behaviour" @4. The award was as follows:

Non economic loss $381,000.00; Past out of pocket expenses $986,149.39
Past economic loss $100,000.00; Future economic loss $235,000.00; Past superannuation $11,000.00; Future superannuation $25,850.00; Past care $170,000.00
Future care $2,959,451.60; Other future care $4,000.00; Future medical management $109,401.00; Future special equipment $72,500.00; Future medication $83,940.00
Accommodation $600,000.00; Future travel $110,000.00; Future computer $5,000.00
Future motor vehicle $135,000.00; Case management $30,993.23; Domestic cleaning $30,218.40; Funds management $466,314.80; Verdict and judgment **$6,515,818.42**

Moran v Nominal Defendant 13/8/08 [2008] NSWSC 804 Hislop J

P, **a baby**, as a result of an assault suffered **severe spastic quadriparesis**. "This means that he is essentially wheelchair bound, although he can use a walker for short periods. He suffers from cerebral palsy and is severely intellectually disabled. He has limited understanding of what is said to him and is unable to speak. The damage to his eyes has rendered him almost blind. He has no dexterity in the left arm. He is entirely dependent on others for care. He has persistent seizures which will require anti-epileptic medication for the rest of his life." The Civil Liability Act did not apply to the case as the injuries were a result of an intentional act. Hence **assessment made at common law**. The assessment was as follows:

General damages $ 400,000.00; Interest on general damages $ 24,000.00;
Past out of pocket expenses $ 3,275.45; Economic loss $ 727,239.00;
Superannuation $ 82,351.00; Past care $ 1,301,559.00; Future care $ 9,449,276.00;
Case manager $ 85,305.00; Future medical expense $ 59,000.00;
House modifications $ 164,000.00; Transport $ 584,500.00;
Computer $ 19,000.00; Funds Management$ 50,000.00; **Total $12,949,505.45**

BJ by his next friend … Jones v Wilcox & Anor 11/12/08 [2008] NSWSC 1332 Hoeben J

P was 19 (23 at judgment) when he suffered facial scarring (which remains), **frontal lobe brain damage**, neck, shoulder and other injuries in a motor vehicle accident. He worked as a junior in his family's food supply business and part time as a pizza delivery driver. His neck and shoulder pain caused by the accident resolved after a year, but he has **ongoing psychological/behavioural problems that will mean he will never manage the family business and that will adversely hinder him in exercising any future earning capacity for the rest of his life**. His personality has changed and his high I.Q. makes him acutely aware of his problems and fuels his frustrations. $225,000 awarded for NEL. P's "ongoing cognitive, emotional and behavioural problems, together with his depression will in combination preclude him from properly attending to and carrying out his day to day housework, shopping, cooking and attending to ordinary household tasks and home maintenance tasks that he would normally

have attended to himself without prompting if he were not injured"@155. The award also comprised the following:

> Past loss of earning capacity $175,951.00; *Fox v Wood* $12,800.00; Future loss of earning capacity $760,185.00; Past loss of employer funded superannuation contributions $19,354.00; Future loss of employer funded superannuation contributions $83,620.00; Past domestic and attendant care services $91,358.00; Future domestic care services $284,900.00; Future treatment $54,562.00; Case manager $247,252.00; Drop-in supervision by Case Manager $463,369.00; Respite care $16,727.00; Gymnasium membership and personal trainer $38,156.00; Additional vacation expenditure $79,657.00; Independent living, training and support $14,000.00; Past out-of-pocket expenses $125,773.54; Total $2,692,664.54.

Choy v Arnott 4/3/09 [2009] NSWDC 17 Levy SC DCJ. **Appeal allowed** in [2010] NSWCA 259 [56 MVR 390]. No change to NEL assessment, but care, case management, PEL and FEL affected. Total to be adjusted.

In *Ehlefeldt v Rowan-kelly* 1/5/09 [2009] NSWSC 331 Hoeben J regarded a 33y.o. P who suffered **hypoxic brain damage** to be an example of **a most extreme case** and awarded her $450,000 for non-economic loss. P can move around her house balancing on walls etc, but does very little of her own accord due to a number of physical disabilities and seriously disabling mental disabilities. P had a history of serious drug addiction and a poor employment record and was awarded nothing for past economic loss and only $175,000 for future loss of earning capacity due to signs she was tackling her addiction and taking into account the prospect that her lifestyle might have led her to an early death in any event.

In *De Beer v State of NSW & Anor* 11/5/09 [2009] NSWSC 364 Schmidt AJ assessed at **40% of a most extreme case** a P, who whilst in year 11 suffered an electric shock resulting in "**neurocognitive injuries …, headaches and problems with memory, concentration and fatigue … [and] dysthymia**"@225. P continues to suffer such problems. The economic loss assessment concentrated on P's **prospects of becoming a primary school teacher and subsequently a principal**. P has no real chance of recovery. Although he works three days a week his whole life has been dramatically affected in many ways. He sees a psychiatrist regularly.

P was **shot in the head** in 2002 when he was a **24y.o. stable hand** working 24 hours a week with prospects of being promoted to foreman or becoming a trainer. P "suffered an **extremely severe traumatic brain injury, associated comminuted skull and orbital fractures, consequential deficits of higher cognitive function and behaviour, and physical neurological impairment**. His **left eye was totally destroyed**, and he has a **severe cosmetic deficit** as a result. He has extensive and obvious scarring to the forehead. He has a **right-sided hemiplegia** with the loss of use of his right upper and lower limbs. His power of speech – particularly word-finding – his sense of smell, his balance and his executive cognition are impaired. His hemiplegia and impaired balance greatly restricts his mobility and agility. He is unable to walk unaided, is vulnerable to falls (in which case he is unable to get himself up from the floor). He also has post-traumatic **epilepsy** – with nine seizures of varying severity since his discharge from hospital, on eight of which occasions he has been hospitalized"@99. P "suffered his injuries and disabilities for six years before trial, and will continue to do so for a further 55 years. Today … [P] has **achieved a remarkable level of independence** with many activities of daily living. He can now stand on his own and get into and out of his wheelchair unaided, so long as he has something onto which to hold, but he is at considerable risk of falling, which frightens him. He can manoeuvre himself from his bed into his wheelchair unaided, requiring assistance only to be transferred to and from the commode chair for a shower. He can boil a kettle and make a cup of coffee, make sandwiches for lunch and grill a steak. He can wash, shower and shave, and dress and undress himself. He can 'nearly' change the sheets on his bed, wash them and hang them out on the line. He can use a mobile phone, and has learnt to use a computer. He follows rugby league, rugby union and racing with enthusiasm, and demonstrates current knowledge in those fields"@105. "**A brain-damaged plaintiff retaining a restricted ability to walk but with an exceptionally limited capacity for an independent life has been held to qualify as 'a most extreme case'** [*Marsland v Andjelic* (1993) 31 NSWLR 162, 169-70]. **So too has a low-level paraplegic who adapted remarkably well to her disabilities** [*Dell v Dalton* (1991) 23 NSWLR 528, 532]. On the one

hand, I accept that Luke's hemiplegia is more disabling in various respects than a paraplegia, and that this is exacerbated by the loss of an eye, the epilepsy, and the intellectual impairment. On the other, Luke retains substantial although somewhat impaired intellectual function, and has achieved a remarkable degree of independence with activities of daily living; and, to some extent, his ongoing disabilities are the sequelae not of the shooting but of the **earlier motorcycle accident** – his left leg, though it is now his better leg, continues to cause him trouble. Nonetheless, without the disabilities that result from that accident, he would still be an intellectually-impaired hemiplegic. I assess his non-economic loss at **90 percent of a 'most extreme case'**, which is $397,800"@107. Multiple other heads awarded. **Total award $6,610,385** plus funds management. *Quintano v B W Rose Pty Ltd & Anor* 26/5/09 [2009] NSWSC 446 Brereton J

In *Dixon v Chaffey & Anor (No. 4)* 23/10/12 [2012] NSWSC 1277 P, a handyman/carpenter, as a result of an **unlawful assault** in 2007 "underwent surgery which either included or consisted of a **right frontal temporal craniotomy with drainage of a haematoma**" @5. P "**suffered a severe traumatic head injury** … Upon his release, he has suffered reoccurring seizures. His memory, concentration and speed of brain functioning have been and continue to be significantly impaired. He has difficulty in speaking and decision-making and all other aspects of cognitive functioning. His ability to care for himself is significantly affected, ranging from matters affecting his personal hygiene to managing his financial affairs. He is depressed, unhappy and has become socially withdrawn. He is listless, prone to headaches and has difficulty sleeping. … Prior to the assault, he was a person of reasonably good health. He was aged fifty and could have looked forward to enjoying a significant number of years of an active and healthy life, with satisfying personal and family relationships. The prospects of all of this are now extremely bleak" @26-28. CLA did not apply. P awarded **$500,000 in general damages**, among other heads.

In *Wood v McKenzie* 3/6/13 [2013] NSWDC 89 P, in 2009 when he was 46, suffered a **severe traumatic brain injury** in a car accident whilst working. In 2012 he became an interim participant in the Lifetime Care and Support Scheme (LTCS). "He suffered a decompressed skull fracture, an extradural haematoma, a subdural haematoma and an intra-cerebral haematoma. He experienced post-traumatic amnesia for 31 days … While hospitalised he underwent a left frontal craniectomy and a cranioplasty. Initially he experienced right-sided paralysis but he recovered well from that condition. The plaintiff is now left with an obvious deformity to the left side of his skull" @8. He has a major visual impairment. P also fractured 15 ribs, a punctured lung and "as a consequence of his cognitive and memory impairment … qualified for participation in the LTCS" @11. P's cognitive impairment is such that he has no residual earning capacity. His personality has changed. He's largely dependent on his partner, rarely socializes, has lost the enjoyment of most of his previous recreational activities, including his sexual relationship. In light of P's many deficits, not all of which have been listed here, Murrell SC DCJ awarded P **NEL of $425,000**, among other heads, including fund management.

Breast cancer

In *O'Gorman v Sydney South West Area Health Service* 29/10/08 [2008] NSWSC 1127 the **D failed to act appropriately on a suspicious breast screen and P lost the chance of early intervention which may have saved her life**. "[T]he **delay in diagnosis increased the risk of metastasisation by 10%**. This was not a case where metastasisation was likely in any event and the plaintiff had merely lost the chance of a better outcome. The events which occurred, i.e. the development of tumours in the plaintiff's lungs and brain, occurred within the very area of risk which had been increased by the delay in diagnosis"@150. P would have had to endure many of the treatments she did whether D was negligent or not. Hoeben J had "regard to the series of emotional shocks and psychological set backs which the [P] commenced to suffer from 13 May 2008 when she first learned that she had multiple tumours in her lungs … [and] to the sadness and loss … the [P] … [experienced] … [and] the increasing disability … as a result of the progression of the disease, and the drastic treatments … in order to control it. … [He also had] regard to the frustration … the [P] feels because of her dependence on others and her complete inability to do things now which used to be well within her capacity … [and] the strains which her illness has placed on her relationship with her partner … [P] is afraid of what is to come. The effects of her condition will gradually increase and she will need to be given large doses of painkillers with an ever-increasing reduction in her

quality of life. The [P] realises and is trying to come to terms with the fact that there is no hope of a cure and that she must live her life as best as she can between now and the end of December when medical opinion assesses that she will die. … As the disease follows its inevitable course, the [P's] level of pain will increase despite the benefit of painkillers. Her final weeks will involve considerable pain and suffering. … Despite these considerations … I place the [P] in a different category to those persons who suffer recalcitrant pain and suffering over many years, such as paraplegics, quadriplegics, burn victims and those others, who are correctly classified as being very serious cases. The [P] does not satisfy the requirement of a most extreme case. Her suffering though intense will mercifully be of comparatively short duration. "@157-161. P assessed at **55% of a most extreme case** and therefore allowed $247,500 for NEL.

Breasts

In *Jurkovic v Hubbard* 21/3/13 [2013] NSWDC 21 **P's breast implant was displaced by D, a chiropractor, who performed a lumbar roll on P in a non-standard and inappropriate way** that "forced her breasts to be pushed into the top of the table on which she was lying" @54. As a result, P suffered a breast prolapse, her marriage broke down, she has lost confidence and needs a rectification operation. P is 30. D's "failure to inquire about the plaintiff's health and whether she had undergone any operations … was negligent, since the risk of harm from treatment as carried out by him was foreseeable, was not insignificant and in the circumstances, a chiropractor in his position, applying the standards of a reasonably competent chiropractor would have taken the step of inquiring before engaging in a form of treatment that involved compressing breasts onto a table" @58. Finnane J assessed P at **25% of a most extreme case**.

See *Appleton v Norris* 9/9/14 [2014] NSWCA 311 where the A had **unsuccessful breast reconstructive surgery** in 2009 when she was 26 and was assessed at **30% of a most extreme case** and awarded $123,000 for NEL, among other heads. "On 21 September 2009 the respondent performed **bilateral mastopexies and simultaneous augmentation of her breasts by the insertion of implants**. A few days later, the appellant noticed that her right breast felt more swollen than the left. Shortly afterwards there was a discharge from the right breast. An ultrasound showed fluid collection around both breasts. The appellant returned to the respondent on four occasions and, on 19 November 2009, he performed a surgical revision … and adjusted the right implant. The inflammation continued. The incision in the right breast had broken open, exposing the underlying prosthesis" @10. A had subsequent procedures and was "**left with significant scarring and breast asymmetry as a result of the repeated surgeries and delayed healing**. … [A]lso extensive pitting of the skin on the lower part of the right breast" @11. A consequentially suffered an **adjustment disorder** for a year. It is likely A will have further reconstructive surgery which will be successful. Appeal dismissed.

See *Thompson* at Scarring below.

Bruising

In *Van Der Poel v Hall & Ors* 26/3/09 [2009] NSWDC 50 Sidis DCJ made the following common law award in the case of a 38 y.o. plaintiff (33 at date of injury in Sept. 2004) suffering only **bruising and some level of trauma as a result of a deliberate assault** where no claim was made for economic loss. General damages $10,000; Aggravated damages $5,000, Exemplary damages $10,000. Appeal allowed and new trial ordered in *Hall v van der Poel* 24/12/09 [2009] NSWCA 436. Quantum not revised.

Carpal tunnel syndrome

See *Schneider* at Multiple injuries sub-heading below.

Coccyx

In *Alvarenga v Mirvac Real Estate Pty Ltd & Anor* 28/3/13 [2013] NSWDC 26 P slipped at work on a travelator when she was about 36. She suffered an **undisplaced fracture of the coccyx** and continues to suffer **pain in both her tailbone and her low back**. Elkaim SC DCJ accepted "that a degree of her psychological condition has been produced by the accident … [and] that she is likely to continue to suffer pain for a number of years into the future, perhaps

permanently, although probably at a lessening degree" @94. P assessed at **30% of a most extreme case** and awarded P $123,000 for NEL among other heads.

Dental

In *Elliott v Kotsopoulos* 2/7/09 [2009] NSWDC 164 Levy SCDCJ assessed damages at **common law** in the case of a **27 y.o.** woman who suffered a **terrifying assault** at the hands of her her ex-boyfriend. He stated that P "has **significant residual and disfiguring scarring to her face and lower lip** which causes her stress and embarrassment. … She is **very self-conscious** of her cosmetic defect. … She has a **dental implant** and is in the process of arranging to have an artificial tooth cemented onto the post that has been implanted into her upper jaw. There is some evidence that the implant is in the process of being rejected which gives rise to the prospect that it may have to be replaced at some stage. Her remaining upper central incisor tooth is mobile. Her **two maxillary central incisors have been permanently splinted together**. Her **left mandibular central incisor is undergoing necrosis and both of her lower incisors are chipped**. … She has **chronic pericoronitis of the mandibular third molars**. She has **anterior periodontitis of the gingiva of her maxillary incisors**. These problems all combine to cause her **significant loss of masticatory ability and efficiency**. … The prognosis for her damaged maxillary central incisor tooth is poor and dental opinion is that she will probably lose this tooth over time. She obviously has a lot of remedial dental treatment ahead of her. … [T]he front of her face is painful and this is exacerbated in cold weather conditions. She has **lost feeling in the areas of her injured teeth and gums**. Her lower lip feels numb and she has the sensation of drooling and feels embarrassed in front of clients. Testing has shown she has a 1cm area of paraesthesia and anaesthesia around the external scars on her lower lip. She has sustained **damage to the seventh cranial or facial nerve**. This has adversely affected her muscles of facial expression. She has been recommended to have an attempted repair of this facial nerve. Her embarrassment over her appearance has precluded any further involvement by her in sporadic photographic modelling activities in which she had participated since childhood. … She has **lost confidence** generally and has lost trust in men. She does not go out on dates and had not bothered with relationships. … She is less outgoing than she used to be … is largely housebound and is in a low mood. She is anxious. She fears losing her teeth. She has been damaged psychologically and suffers from a **significant and persistent post-traumatic stress disorder**. … She is **scared** that the defendant will turn up and harm her. … She has recurring nightmares and impaired sleep since the defendant assaulted her. Simple events trigger her bad memories of the events. She feels her life is out of control. … [M]ost of the activities of her daily life have been adversely affected. A wide range of her activities have been restricted. … [T]he quality of her life and the enjoyment of life has been severely and significantly reduced and this will continue for some significant time into the future. … She is intending to pursue further cosmetic surgery on her facial scars and she plans to pursue psychological counselling that had been recommended to her for the post-traumatic stress disorder from which she undoubtedly suffers". P awarded, among other heads, general damages of $120,000, exemplary damages of $30,000 and aggravated damages of $25,000.

In *Garzo v Liverpool/Campbelltown Christian School Limited & Anor* 15/4/11 [2011] NSWSC 292 Garling J assessed P at **35% of a most extreme case** for injuries she sustained in a slip and fall incident in November 2007. The dental evidence was that "**Tooth 21 suffered root fracture**. Endodentis intervention ... proved unsuccessful so that tooth/root of the tooth **required extraction**. **Tooth 22 remained intact but was extremely painful to palpation or percussion** … Mrs Garzo may require future dental work. An implant and crown is appropriate to replace the partial denture which presently substitutes for Tooth 21. Root canal therapy may be required in the future for Tooth 22. An estimate for all of that work is in the order of $7,750" @273-274. P also suffered a **comminuted fracture of the right radial head of her right elbow** with minimal displacement. "The fracture ultimately healed, although Mrs Garzo continues to have symptoms of ache and pain in the elbow, crepitus and residual stiffness. Her range of motion is restricted to between 30 degrees and 130 degrees. Her rotation is full" @278. She is likely to develop arthritis. P's elbow causes her pain and discomfort and restricts her in many ways. Her teeth cause her to worry about how she looks. Appeal dismissed 25/5/12 [2012] NSWCA 151.

In *Dean v Phung* 30/6/11 [2011] NSWSC 653 Hislop J found that **unnecessary "procedures performed by the defendant subjected the plaintiff to considerable inconvenience, apprehension and pain**. They resulted in malocclusion of the jaw and the crowns and bridges were so badly constructed that they harboured food and other debris which caused the plaintiff mouth infections. All of the procedures required redoing. As a result of the defendant's treatment, the plaintiff suffered pain in the teeth, jaw, neck and shoulders. He suffered headaches, his sleep was affected and he was restricted to eating soft foods in the main" @32-33. "The plaintiff had an initial period of significant pain, concern and disruption of his life from January 2002 to 2006. Thereafter, by reason of remedial treatment and his move to the country, he has **greatly improved both physically and mentally**. He faces additional disruption of his life with the need for further dental intervention. This will occasion him, in all probability, some degree of pain from time to time. However, he is able to, and will continue to, carry on a normal life and engage in normal activities. He has no discernible scars or disfigurement and his teeth will be aesthetically satisfactory once the remainder of the new crowns are in place" @50. The P had to endure a very substantial amount of treatment with associated pain and was assessed at 55% of a most extreme case and awarded $275,000 for NEL among other heads. **Appeal allowed** in *Dean v Phung* 25/7/12 [2012] NSWCA 223. "So far as the operation of **s 3B** is concerned, it would have been sufficient for the appellant's purposes to establish that the dentist knew at the time of giving the relevant advice that the treatment was not reasonably necessary" @30. D found to be at least reckless as to whether the treatment proposed was either appropriate or necessary. P "did not consent to the proposed treatment, because it was not in fact treatment necessary for his condition. As a result, the **treatment constituted a trespass to the person**" @66. **Damages reassessed at common law**. Award for NEL increased to $327,000 including interest. D remained unjustly enriched or his fees to the tune of $73,640. Exemplary damages of $150,000 warranted.

In *Li Fu v Owners of Strata Plan 75626* 7/6/12 [2012] NSWDC 85 P, in 2008 when she was 52, "was looking in front of her, but did not realise there was a glass barrier and she collided with the glass. The plaintiff felt numbness around her mouth and upper lip, which was very painful and when she put her hand to her mouth she felt blood and could feel that her teeth were loose. In fact, her left front upper tooth came out and she noticed three other front teeth were loose. The plaintiff also suffered a laceration to her upper lip" @9. "Whilst it is not responsible for ongoing treatment caused by the plaintiff's lack of oral hygiene, the defendant is liable for the **loss and loosening of the plaintiff's four front teeth**" @72. P has experienced much pain and continues to have difficulty eating. Cosmetically, she is okay. Mahony SC DCJ assessed P at 22% of a most extreme case and awarded her general damages of $23,500 among other heads.

In *Andrews v Allianz Australia Insurance Limited* … 17/7/12 [2012] NSWDC 97 Elkaim SC DCJ assessed P at **22% of a most extreme case** for her serious dental issues since being injured in a car accident in 1980 when she was 10. A minor leg injury was also factored in. P "suffered an **injury to three top teeth at the front of her mouth and one bottom tooth, also at the front**. The medical reports generally refer to the upper teeth as 12, 11 and 21 and to the lower tooth as 32" @9. "[O]ver the last four years or so the plaintiff has noticed that her gums have receded and there is a black border between her teeth and her gums. She says it is quite ugly" @12. "[T]he three relevant upper front teeth should be removed and replaced with prosthetic teeth following a carefully planned treatment regime" @14. P "no doubt suffered embarrassment at various times since the accident. In addition, she suffered the pain and discomfort associated with the dental work she has endured so far. A good deal more pain and suffering, arising from dental work, lies in the future" @30. P awarded $23,500 for NEL amongg other heads.

See *McMorrow v Todarello Pty Limited trading as The Fruit House Faulconbridge* 28/4/14 [2014] NSWDC 75 where P, in 2009, **tripped over pallet, the base of which, protruded onto a busy walkway in a fruit shop**. The base of the pallet was not easy to see. P hit her mouth on the concrete floor. She continues to suffer pain over the upper front teeth, headaches, blurred vison, and aching jaw. "The accident has also had a **negative impact on her sexual relationship with her husband** - it would appear that arises because of her pain and discomfort around her mouth and the negative impact on her confidence. Mrs McMorrow will have to wear a top retainer plate and requires the removal of temporary fillings in the two dead

teeth including associated and consequential teeth bleaching. That impending treatment has caused her anxiety because it has led to difficulties in speaking: effectively needing to learn to speak again. She anticipates her bottom teeth will be permanently wired, requiring a canal to be cut into the rear of her lower teeth to accommodate the wire" @31-32. Knox SC DCJ found D liable and assessed her at **25% of a most extreme case** "[g]iven the **pain of the broken teeth, surgery and recovery, together with the ongoing weakness, pain, altered sensations, discomfort, and potential need for future operations to remove plates or to address the nerve damage, grief and embarrassment about her appearance, as well as any psychological or emotional upset surrounding those matters**" @172. P awarded $36,000 for NEL, among other heads.

Depression

In *Morris v Karunaratne* 27/11/09 [2009] NSWDC 346 Johnstone J assessed damages in the case of a 36 y.o. P suffering **depression as a result of a number of assaults and batteries on her by her husband, ongoing litigation, and as a result of her marriage breakdown**. P's depression is severe, but her prognosis optimistic. $75,000 awarded in general damages and $10,000 in aggravated damages. Nothing awarded for economic loss, as P continues to be able to work as a radiologist. $75,000 also awarded for **violation of dignatary interest**. Future treatment expenses of $15,000 allowed, and other heads too.

In *Hollier v Sutcliffe* 23/4/10 [2010] NSWSC 279 Hulme J considered a 37 y.o. P, who suffered a **depressive reaction** with a range of reactive symptoms, and requires ongoing treatment (as a result of the alleged medical negligence surrounding a contraceptive device), to be **30% of a most extreme case** and assessed $109,000 in general damages among other heads.

Dog attack

See Dog attack

Dust diseases

See also Dust diseases

Dysthymia

In *De Beer v State of NSW & Anor* 11/5/09 [2009] NSWSC 364 Schmidt AJ assessed at **40% of a most extreme case** a P, who whilst in year 11 suffered an electric shock resulting in "**neurocognitive injuries …, headaches and problems with memory, concentration and fatigue … [and] dysthymia**"@225. P continues to suffer such problems. The economic loss assessment concentrated on P's **prospects of becoming a primary school teacher and subsequently a principal/headmaster**. P has no real chance of recovery. Although he works three days a week his whole life has been dramatically affected in many ways. He sees a psychiatrist regularly.

Ear infection

See *Harris v Sydney Local Health District* 28/3/14 [2014] NSWDC 21 where the R had inserted an earwick into P's ear which needed to be removed. P failed to attend an appointment regarding the said removal. P developed a serious ear infection in July 2011 when she was 50. P was a heroin user. Mahony SC DCJ stated that "the **plan for removal of the ear wick should have been communicated to the plaintiff in no uncertain terms, not only to the need for compliance, but the consequences of non-compliance** in circumstances where the hospital knew that she had a vulnerable personality. There was a further **deviation from that standard of care by failing to follow up with the plaintiff when she failed to attend** on 20 July 2011" @141. Following removal of the ear wick on 28 September 2011, the plaintiff received appropriate treatment and has had no reoccurrence of the **infection in her right ear**" @146. P's "claim for damages for non-economic loss is therefore confined to a period of months involving a recurrent infection, removal of the foreign body from her ear and resolution of the infection. She was also required to undergo the procedure for removal of the purulent wick, from her infected ear" @146. P assessed at **18% of a most extreme case** and awarded $14,000 for NEL among other heads.

Elbow

In *Garzo v Liverpool/Campbelltown Christian School Limited & Anor* 15/4/11 [2011] NSWSC 292 Garling J assessed P at **35% of a most extreme case** for injuries she sustained in a slip and fall incident in November 2007. The dental evidence was that "**Tooth 21 suffered root fracture**. Endodentis intervention ... proved unsuccessful so that tooth/root of the tooth **required extraction**. **Tooth 22 remained intact but was extremely painful to palpation or percussion** … Mrs Garzo may require future dental work. An implant and crown is appropriate to replace the partial denture which presently substitutes for Tooth 21. Root canal therapy may be required in the future for Tooth 22. An estimate for all of that work is in the order of $7,750" @273-274. P also suffered a **comminuted fracture of the right radial head of her right elbow** with minimal displacement. "The fracture ultimately healed, although Mrs Garzo continues to have symptoms of ache and pain in the elbow, crepitus and residual stiffness. Her range of motion is restricted to between 30 degrees and 130 degrees. Her rotation is full" @278. She is likely to develop arthritis. P's elbow causes her pain and discomfort and restricts her in many ways. Her teeth cause her to worry about how she looks. Appeal dismissed 25/5/12 [2012] NSWCA 151.

See *Ryland v QBE Insurance (Australia) Ltd* 28/5/12 [2012] NSWDC 136 where P, who was 61 in 2009, slipped over in a clothing store and suffered a **fracture through the left olecranon extending to the articular surface of the elbow joint** with four millimetres of displacement. She also either **aggravated or exacerbated the preexisting fracture of the right olecranon**. She also sustained some … soft tissue injury to her left knee" @90. P required **surgery to each of her olecrana**. As a result, P has some ongoing limitation of movement and weakness and was assessed at 20% of a most extreme case. P awarded $18,000 for NEL among other heads.

See *Ryland v QBE Insurance (Australia) Ltd* 28/5/12 [2012] NSWDC 136 where P tripped in a shopping centre. "In the fall on 31 October 2009 [when P was 61 she] … suffered a **fracture through the left olecranon extending to the articular surface of the elbow joint** with four millimetres of displacement. She also either **aggravated or exacerbated the preexisting fracture of the right olecranon**. She also sustained some … soft tissue injury to her left knee" @90. P required surgery to each of her olecrana and she has ongoing weakness and limitation. P assessed at **20% of a most extreme case** which would have entitled her to $18,000 for NEL if liability had been established.

See *Parker v City of Bankstown RSL Community Club Ltd* 11/6/14 [2014] NSWSC 772 where P, who is 42, was injured in 2007 in a fall at D's premises and "**lost some use of her right arm**. Although she can, and still does, use it for many tasks, the use is compromised by lack of flexibility and pain. I accept that the pain and **relative immobility** has caused her to become moody and at times frustrated. I am not satisfied that she has suffered any psychiatric illness as a result of her fall" @94. P has had **three operations on her elbow/arm and has experienced considerable pain**. Adamson J did not find D negligent, but assessed P at **35% of a most extreme case**.

Face

P was **assaulted by the police** in 2003 and suffered "compound fracture of the right cheek bone with some facial nerve paraesthesia; compound fracture of the right jaw bone; fracture of the neck of the right ulnar bone; fracture of the neck of the right fourth metacarpal bone; fracture of the lateral wall of the right orbit (eye socket); bruising, without fractures, to knees; lacerations to the soles of the feet" and nightmares(@210. P "undoubtedly suffered a **significant injury to the face, to the arms, and to the legs, as a result of which he has experienced significant pain and will continue to do so**"@225. General damages of $65,000 awarded. P, who was 39 and unemployed at the time he was assaulted, had a sporadic work history mainly in market gardening. He has had difficulty doing the work he has been able to obtain since the assault and was awarded $30,000 for economic loss. P also awarded $100,000 in exemplary damages for the assault and $100,000 in exemplary damages for malicious prosecution. *Hathaway v State of NSW* 23/4/09 [2009] NSWSC 116 Simpson J

See also *Elliott* at Dental above and *Machado* at Cosmetic surgery

Fingers

See *Zeng v Zeng* 5/8/11 [2011] NSWDC 84 where Elkaim SC DCJ assessed P, a 50 y.o tiler, to be **28% of a most extreme case** which equated to $70,000 for NEL for **losing part of his left index finger** and suffering a laceration to his middle finger and across his palm. P has a deformity which is embarrassing to him and affects his social activities to a limited extent. He has numbness and restriction in the use of the hand and a fear of using machinery.

See *Annas* at Hand

Foot

See Ankle

In *Ross v Nominal Defendant* 19/7/13 [2013] NSWDC 110 Levy SC DCJ awarded P, an academic lawyer, $200,000 in general damages, among other heads, for his **foot injury sustained when mini-bus ran over his foot** in 2008 when he was about 68. P "has surgical fusion hardware remaining in his right mid-foot, and he has related, but well healed surgical scarring. He has residual stiffness and weakness of the right foot. He has a fusion of the medial 3rd tarsometatarsal joints of the right foot. He has subluxation of the 3rd, 4th and 5th toes of the right foot. His foot is deformed and mal-aligned. He has swelling, pain and discomfort in his right foot. He has degenerative changes and arthrodesis in metatarsophalangeal joint and the interphalangeal joint of his right great toe, with some flexion deformity. …The plaintiff is at risk of developing osteoarthritis in other areas of his right foot. He has pain and restriction of movement of his right foot, as well as reduced physical dexterity. Long term, the plaintiff must wear orthotics and specially made footwear. As a result of alterations to the plaintiff's gait, and after the surgery to his right foot, he has developed **pain and stiffness in his left hip** and in his right knee. He has difficulty with prolonged standing, walking and with going up and down stairs. He experiences a pressured feeling in his right foot when he walks. He has difficulty negotiating uneven ground and easily loses his balance. … The plaintiff has gained weight … He has reduced mobility and agility, and he has difficulty getting up because he is less able to pivot on the toes of his right foot. He is less able to sit and concentrate for prolonged periods due to discomfort and swelling in his right foot. This has had some adverse impact on his work productivity. He has been described by someone who knows him well as bring frustrated by his accident related physical limitations. … [P's] ability to lead a normal life … has been significantly impaired. He needs assistance with his domestic tasks indefinitely. … He faces the possibility of future surgical treatment, as well as the need for medical and allied treatment" @53-57.

In *Wurth v Sampco Pty Ltd t/as The Knickerbocker Hotel* 13/9/13 [2013] NSWDC 173 P injured her foot and knee (**torn meniscus**) in 2011 when her **foot got caught in a broken grate** as she walked in the driveway of the D's car park. D was negligent. There was no contributory negligence on P's part. P was about 50 at the time and working as a hospital administration clerk. P "sustained a **slightly displaced fracture of the base of the 5th metatarsal bone in her right foot and a proximal fracture of the 4th metatarsal bone**. She had significant swelling of her right foot. She was diagnosed as having a **Grade I sprain of her anterior talofibular ligament and a sprained talonavicular joint**. This was productive of significant pain and swelling in the right foot" @18. P "experiences ongoing pain, discomfort and restriction of movement in her right foot in the region of the fractures. … This causes her difficulties with prolonged walking and restricts her ability to use stairs. … [S]he has reduced agility of her right leg. She also experiences difficulty when driving long distances and with some social activities including standing and dancing. The plaintiff's right foot pains became aggravated by walking, standing for long periods, driving and when wearing high-heeled shoes. Her footwear choices are now restricted. The plaintiff's left knee has been hurting her virtually since the accident and it has been getting progressively worse. The plaintiff has difficulty negotiating stairs because of her knee problems. She restricts her use of the treadmill to walking and no longer jogs. She has difficulty squatting. Her knee movements are restricted. Her ability to perform her pre-accident domestic tasks has become markedly restricted. The plaintiff also has pain, discomfort, restriction of movement and reduced agility in her left knee due to injury-related mechanical problems. She has crepitus in that knee and it is difficult for her to squat. She has a clicking sensation in her right knee. The torn meniscus of that knee will most likely cause her to

develop osteoarthritis in that knee, and that development will be likely to be accelerated if the plaintiff undergoes surgical trimming of the torn meniscus of that knee" @55-57. P "has 25 per cent loss of the efficient function of her right foot as well as 25 per cent loss of the efficient use of her left leg at or above the knee as was stated by Dr Conrad. These are very significant permanent restrictions for someone like the plaintiff who was very fit and active before the subject accident." @60. P has been able to continue in her job, but may not be able to for much longer. Levy SC DCJ assessed P at **28% of a most extreme case** and awarded P $75,000 for NEL, among other heads.

Gall bladder

See *Goddard*, *Belokozovski* and *Cox* at Medical negligence – Gall bladder operations

Hand

See *Websdale v Collins* 5/3/09 [2009] NSWDC 30 where P's claim for **laceration to her left thumb involving nerve and tendon damage was assessed by Sidis DCJ at 12% of a most extreme case**. P's symptoms included "changed sensation in various areas of the thumb, in some places causing numbness and in others a sensitivity described as a feeling of pins and needles; restricted abduction of the first web space causing reduced thumb span on the left hand; stiffness in cold or humid weather; difficulty gripping with the left hand and reduced grip strength. … These symptoms affected the plaintiff's every day life by reducing her capacity to use her left hand to lift heavy items, do up buttons or clips on clothing, put on earrings, open cans or jars and play her guitar" @46-47.

In *Hope v Hunter* 27/11/09 [2009] NSWDC 307 P suffered a **surgical division of the digital nerve and digital artery of his left middle finger** due to D's negligence in performing an operation to remove a ganglion. "The lasting physical problems for the [P] include the experience of **ongoing numbness** to the radial side of the middle finger of his left hand extending from the tip of the finger down to the proximal metacarpo-phalangeal joint or the first knuckle on that finger, near the palm of his hand. His circulation in the injured area is also affected … The [P] has developed a lump around the area of the operation site which has been identified to be a neuroma or abnormal aggregation of nerve tissue in the form of a scar. The [P] has noticed that the lump gradually continued to grow and has become increasingly more painful to touch and vibration when the hand is touched, used or bumped in the course of ordinary everyday activities. The pain he describes has been identified as neuropathic pain. …The [P] described the pain as becoming worse whenever he flexed his hand back, and stated this would produce a straining sensation around the nerve and up his arm. The [P] described there being times when he feels that there is a burning sensation in the limb and finger which he likens to a phantom sensation and which feels like someone holding a cigarette lighter and running it up and down his affected finger. … [H]e also carries a scar from the unsuccessful attempt at restorative surgery. He has a surgical deficit and interruption to the digital nerve of the left middle finger. … [P has] an uncomfortable feeling in his hand when he grips things. He feels an electric shock-like sensation when this occurs, including when he hangs his hand down by his side or places his hand in certain positions. He feels unable to hold his girlfriend's hand. … ."@198-202. P has consequently suffered **major psychological problems** including depression with suicidal thoughts. Levy SC DCJ assessed P, who was 25 y.o. at trial, at **36% of a most extreme case** entitling P to $142,000 for NEL among other heads. Total award of $525,511

See *Quick* at general 'Dog attack' heading.

In *Hunt v RTA of NSW & Anor* 25/5/10 [2010] NSWDC 88 Levy SC DCJ considered a case where P "sustained a **lacerating injury to his dominant right hand, wrist and forearm**, including, to the muscles, nerves and tendons of that forearm. Specifically, the plaintiff suffered lacerations which involved traumatic dissection to the right median nerve, a branch of his right radial nerve, the radial artery and the flexor tendons of his right forearm. These comprised the flexor digitorum profundus, the flexor digitorum sublimis, the flexor carpi radialis, the brachio radialis and the flexor pollicis longus tendons. The plaintiff also suffered lacerations to the muscle bellies of the deep flexor tendons on the radial side of his forearm"@367-369. The consequences for P have been severe physically, functionally, cosmetically, and mentally. P's employment prospects have also been significantly harmed. P was 35 y.o. at trial and 31 y.o.

when injured. P assessed at **40% of a most extreme case** and awarded $189,500 for NEL, among other heads.

In *Burton v Allen* 24/11/10[2010] NSWDC 265 Sidis DCJ assessed damages in the case of a right hand dominant 42 y.o. police officer who suffered significant post-surgical problems with his left hand. P had to leave the police force. He suffered pain in his palm and fingers, sleep deprivation, and various psychological issues, and was assessed at **33% of a most extreme case**.

In *Annas v Gidaro Constructions Pty Ltd* 25/5/12 [2012] NSWDC 79 P fell over in 2010 and "suffered a **fracture to her right little finger, an injury to her wrist and right hand which aggravated pre-existing degenerative conditions in her right shoulder and neck**. She underwent a surgical procedure to stabilise the fracture and suffered a post-surgical infection. … [S]he may have suffered a minor psychological reaction to ongoing pain" @86. P "required domestic assistance for a period of two years following her injury in total, on an average of seven hours per week for that period" @87. P assessed at **20% of a most extreme case** and notionally awarded (liability not established) $18,000 in general damages among other heads.

In *Simon v Condran* 6/2/13 [2013] NSWDC 32 P, a part-time care worker, was **bitten while attempting to break up a fight between her and her neighbour's (D's) dogs**. Neilson DCJ did not find D liable, but assessed damages notionally. P suffered "a **2 centimetre puncture wound to the flexure of the wrist, which would appear to have been 5 millimetres deep … [and] multiple other small wounds** which were cleaned but none of them was deep. The impression recorded by the doctor was of multiple wounds from a dog bite with **no obvious tendon or nerve damage** but … some neurapraxia, no doubt to account for the hypo aesthesia in the fourth and fifth digits of the left hand. The plaintiff was prescribed Augmentin and Panadeine Forte and one suture was placed in the plaintiff's wrist" @79. P developed **complex regional pain syndrome** for about 10 months. She had pre-existing psychological issues which were exacerbated by the attack and was thrown off her perceived path of progress at a critical time of her life between the ages of 20-24. P now works close to full-time. P assessed at 20% of an extreme case which would have attracted NEL damages of $18,500. Appeal dismissed 20/11/13 in [2013] NSWCA 388.

Head

[See 'Brain' above]

P, in a fall, suffered '**serious head injuries, probable fracture to his thoracic vertebra, fractured wrist, and cuts and abrasions**'. P had a pre-accident history of learning difficulties, drinking problems, and a potential for aggressive/violent behaviour. After the fall P's behaviour deteriorated and he began to isolate himself socially. P's brain trauma and amnesia were serious, but he did make a significant recovery. P's condition regarded as **35% of a most extreme case**. P had limited education and skill, but the court regarded $50,000, which had been awarded for economic loss, way too low for a **31y.o. with** such a **restricted skill base**. A global sum of $100,000 awarded on appeal. *Jackson v Lithgow City Council* 24/11/08 [2008] NSWCA 312 by Allsop P, Full Court.

In *Thomas v Shaw* 26/6/09 [2009] NSWSC 510 Kirby J assessed damages in the case of a 10 y.o. (15 at judgment) injured when he fell whilst descending from a bunk. P was a normal happy child with promise who would probably have gained tertiary qualifications. He still may complete a TAFE course in animal husbandry. P **fractured his skull, dislocated his nose and suffered permanent brain damage, including frontal lobe damage**. P's "**personality changed**. He became aggressive. He suffered from mood swings. He could not concentrate. He was angry and disruptive. He lost friends and became reclusive, spending many hours at home at his computer … He was also acutely aware of these changes and bewildered by them … [H]e felt that life was not worth living and threatened suicide"@273. P has difficulty with planning, organizing and following through with things. **50% of a most extreme case**. Therefore $225,000 in general damages awarded. $396,435 awarded for future loss of earning capacity among other heads. Total award of $853,396. Appeal re liability allowed in [2010] NSWCA 169.

In *Kassam v ACN 075092232 Pty Limited (in liquidation)* 17/8/09 [2009] NSWDC 262 a 34 y.o. (41 at judgment) P suffered, as a result of an incident with security guards at a nightclub, "**quite severe head and facial injuries which required three operative procedures** from a neurosurgeon; he was hospitalised for two periods of two weeks and then for four days. The injuries were clearly **life-threatening** and the plaintiff, fortunately, has no recollection of the incident but the immediate consequences of his condition, intensive care procedures, the **need to wear a skull cap** and appearance had their effect on him. Longer term, the plaintiff remains **embarrassed about his appearance and experiences headaches, lack of concentration, dizziness, memory loss and cognitive impairment**. His family and social life have been adversely affected, particularly with the children from his first marriage. However, the fact he has married for the second time since the incident and now has a baby daughter is seen as encouraging for him. … [P experiences] consequent feelings of anger and frustration with his condition and of its various effects on his usual life" @132. P will also need ongoing psychological counseling to help him to cope with depression. P's general damages assessed, among other heads, at $225,000.

In *Emvalomas v Bradley* 9/2/12 [2012] NSWDC 7 P was awarded **$325,000 for NEL, among other heads, for an horrendous de-gloving injury to her scalp** as a pedestrian. Levy SC DCJ considered that "the factors that merit an upper range award in that amount are the plaintiff's relatively very young age [19] and long life expectancy, her permanently disfiguring scars, the entrenched and **chronic nature of her PTSD** with associated depression, a condition that became chronic in the period of delay before the plaintiff was able to obtain timely access to appropriate treatment, the absence of any reasonable scope for any significant amelioration in any of her physical, cosmetic and psychological disabilities, and her persisting diminished sense of self-worth. These matters are bound to adversely impact upon her ability to lead a fulfilling personal and working life, and represent obvious barriers to her finding a partner in life, which would have been her ordinary expectation, had her injuries not occurred" @392. P also "has physical impairments in the form of constant pain and discomfort in her lower back in association with lumbar disc lesions. She also has ongoing problems with her lower jaw, which has resulted in her finding it difficult to eat an ordinary range of foods, and having to endure a restricted diet" @387.

In *Crilly v Bumble Group P/L t/as My Security* 30/1/12 [2012] NSWDC 3 P was the victim of an unprovoked assault in 2008 when he was 22. He hit his head on the concrete pavement and suffers from "**hearing loss, balance problems, behavioural changes, depression and other emotional and personality changes**" @34. Levy SC DCJ awarded P $200,000 in general damages and $20,000 aggravated damages among other heads.

In *Orcher v Bowcliff Pty Ltd* 12/9/12 [2012] NSWSC 1088 P was assaulted and "sustained a **fracture to the base of his skull with minor subarachnoid bleeding over the left frontal lobe and bilateral subfrontal contusions**. He also sustained a **minor contusion in the left temporal lobe** and there was evidence of hypodensity in the left occipital lobe" @233 - P "was very seriously injured. He suffers from **continuing physical and cognitive deficits of a most disabling and distressing nature**. These are permanent. Mr Orcher is 33 years of age. His social, domestic, sporting and recreational activities have been fundamentally interfered with and significantly curtailed. His cognitive impairments intersect on a daily basis with his efforts to lead a normal life. He is prone to dizzy spells and he is vulnerable to epileptic incidents for which lifelong medication will be required. The prospect of safety from these episodes when adequately and properly medicated is itself vulnerable to the effects of his memory problems and the ever-present prospect that he will fail to maintain his medication regime. He is a young father, and the prospect of him being able successfully to care for his children or to contribute to their lives in a way that is mutually beneficial and enjoyable must be in grave doubt" @253. Harrison J assessed P at **75% of a most extreme case** and awarded P $390,000 for NEL, among other heads. Appeal allowed only re liability in *QBE v Orcher; Bowcliff v Orcher* 23/12/13 [2013] NSWCA 478.

In *Ryan & Anor v A F Concrete Pumping Pty Ltd & Anor* 26/2/13 [2013] NSWSC 113 P suffered **perfusion deficits in his Frontal lobes** when hit by concrete coming from a concrete pipe in 2008 when he was 43. P ran a company that constructed swimming pools. "As a result of the accident the plaintiff sustained a traumatic brain injury as well as **injuries to his face and**

head, teeth and shoulder. He has substantially recovered from the shoulder injury. He also suffered post-traumatic stress disorder; however … he **no longer suffers from a psychiatric disorder**. The plaintiff … still suffers from flashbacks and also finds it difficult to go onto construction sites" @105. "Although his face bears some scars, his appearance is substantially unimpaired. He can converse and express himself in an apparently coherent way. … I consider him to be significantly impoverished as a result of his injuries and that **he has lost almost everything of importance to him**. This loss is all the greater because he has not been deprived of insight into the effect of the change in him on his wife, his children, his family, his friends and his former colleagues" @130. Adamson J assessed P at **65% of a most extreme case** and accordingly awarded him $347,750 for NEL among other heads.

See *Fuller-Lyons v State of NSW (No. 3)* 15/11/13 [2013] NSWSC 1672 where a **seven year old boy in 2001 became trapped between the doors of a train and then fell from the train** suffering serious injuries including "a **compound frontal skull fracture** with missing bone. He had an exposed dura … It was cleaned, debrided and sutured. He also suffered a **compound fracture of the right olecranon** ... He had **loose teeth which were splintered and periorbital oedema** (swelling around the eyes). He had **multiple abrasions and lacerations** over his body. He received internal fixation using a screw of his olecranon fracture. In April 2003 Corey underwent surgical repair of his skull. As part of that operation a plate was inserted into his skull" @157. P also suffered scarring to his head, but his prognosis is good and he won't need surgery for it. Beech-Jones J stated that the "accident would have been terrifying and he was no doubt in considerable pain and discomfort in the aftermath. In the medium term he has had operations and scarring. He had to watch his friends and classmates pursue physical activities that he could not [P can't play contact sports] … Corey was vulnerable prior to the accident but his opportunity for a full life was substantially impaired by the accident. **To inflict frontal lobe syndrome on a young boy with delayed development is to cause very significant damage indeed**. It will affect him for the remainder of his life" @181-182. P awarded $477,000 in general damages, among other heads.

See *Schoupp v Verryt* 14/4/14 [2014] NSWDC 28 per Levy SC DCJ, where P **school boy (nearly 13 y.o.) was not wearing a helmet whilst riding a skateboard and holding on to D's car (skitching) in 2007**. He hit his head on the road and suffered "a closed head injury with an undisplaced occipital fracture and an inferior frontal contrecoup contusion of the brain" @184. "He had a Glasgow Coma Score of 14/15 … [and] extracranial haematoma and bilateral frontal contusions" @189. P had post-traumatic amnesia for six days. P's "injuries have resulted in the plaintiff sustaining **permanent frontal lobe brain damage** with associated interference with his executive functioning in the areas of insight, planning, organisation, control of his emotions and cognitive functioning. The plaintiff also has a mild form of residual left-sided hemiplegia, which has resulted in a slight weakness of co-ordination of his left arm, along with what has been diagnosed as being an intention tremor of the left arm. He appears to have eventually recovered his senses of smell and taste, which were either lost or impaired for a time. The … plaintiff has been permanently and adversely affected in his day-to-day functioning. This has occurred in the areas of planning, organisation, his judgment as to some of the detail of what is required of him insofar as some aspects of his work tasks are concerned, and he has a tendency to perseverate obsessively on some tasks. His behavioural restraints are affected, as are some aspects of his socialisation, which has limited his social opportunities. The plaintiff has also been rendered vulnerable to exploitation, not just in the financial sense" @325-327. P awarded $325,000 for NEL among other heads.

See *Hall v Yang* 17/4/14 [2014] NSWDC 36 where P in a 2008 motorcycle accident suffered "a serious head injury resulting in a **traumatic and hypoxic brain injury with a Glasgow Coma Score of 3**; a related cardiac or ventriculo-pulmonary arrest at the accident scene requiring CPR and DC version; a fracture to the left side of the chest, an associated pneumothorax, and bilateral lung contusions; a fracture of the left ulna with displacement of the mid-shaft of that bone; degloving injury to the palmar aspect of the right hand; a cruciate ligament tear of the right knee; Multiple lacerations in unidentified locations on the plaintiff's body" @38. P was 43 at the hearing. P "has pain, discomfort and restriction of movement of his left shoulder and left elbow. He has reduced strength and grip in his right hand. He also has skin grafting and associated adherent skin to his right hand. He has crepitus and reduced flexion in his left knee, and his gait is adversely affected" @55. "The plaintiff has **acquired frontal lobe brain damage**

of the kind that has had a profoundly adverse effect on his life. It interferes with his enjoyment and the amenity of his life to a significant degree. His memory, cognition, and physical abilities are adversely affected" @221. Levy SC DCJ awarded P NEL of $350,000, among other heads.

Heart

P was a 57 y.o. truck driver in June 2003 when his **GP failed to diagnose his ischaemic heart disease or acute coronary syndrome**. "On 22 July 2003 the plaintiff presented to the Emergency Department … where an acute myocardial infarction with left ventricular failure was diagnosed. … 81 percent of the left ventricle in the heart was destroyed by blockage. He underwent urgent coronary angiography and angioplasty. While that was occurring, he suffered a cardiac arrest and required resuscitation. A stent was put into the left anterior descending coronary artery"@6. In April 2005 P had a **successful heart transplant operation**. P required extensive treatment. He suffered the shock of hearing he only had two years to live. The transplant, however, gave him a life expectancy of 12.5 years. P suffers some memory loss and no longer is the bread winner carrying out a job he loved. P is often dependent upon his wife. He has to restrict his physical activities and his quality of life has been significantly diminished. P assessed at **65% of a most extreme case** and awarded $307,450 in general damages, among other heads. *George v Survery* 9/12/09 [2009] NSWSC 1348 per Hoeben J

Hip

In *Perrett v Sydney Harbour Foreshore Authority; Wine & Vine Personnel Pty Ltd v Sydney Harbour Foreshore Authority* 30/9/09 [2009] NSWSC 1026 the P "sustained **fractures to his left hip, his left femur and two ribs**. The injury to his hip required the replacement of a pre-existing hip prosthesis. Following that operation, an infection developed and it was discovered that the prosthesis was loose and had to be replaced by yet another prosthesis. … [P] remains stiff in his left hip and continues to experience pain. He requires a walking stick when moving about, which he did not require before the accident. He also suffers from depression as a result of the injuries he sustained. He was, before the accident, extremely fit and active. His ability to participate in the activities he then enjoyed, such as golf, swimming and gardening, has been substantially impaired"@97. McCallum J assessed P at **35% of a most extreme case** awarding general damages, among other heads, of $157,500.

In *Haleluka v Coles Supermarkets Australia P/L* 23/6/11 [2011] NSWDC 47 P was struck by a trolley operated by one of D's employees. She suffered "a **derangement in the region of her right hip - a gluteal tendinosis and a cleavage tear of the labrum of the hip joint**" @35. She also suffered an **aggravation of her pre-existing degenerative change in her lower back**. Her condition is chronic and it has stabilized and is not likely to improve in the foreseeable future. P cannot work in her field of nursing. Elkaim SC DCJ assessed P at **30% of a most extreme case** and awarded her $115,000 for NEL among other heads.

In *Cobcroft v Aggcon Pty Ltd & Anor* 3/11/11 [2011] NSWSC 1287 P in 2006 "**sustained multiple compression fractures to his thoracolumbar spine and lumbar spine and a fractured pelvis which also involved the left hip joint** (although undisplaced) after landing primarily on his left side and leg when the **front end loader tipped over and he fell heavily onto the internal wall of the cabin**" @137. P also developed a haematoma in the left buttock and thigh. His surgical scar is aggravated when he wears a seat belt. P has not returned to work and his "debilitating and generalised pain in the back, groin and hips and marked restriction makes it difficult for him to carry out general household duties" @169. P suffers disabling psychiatric sequelae, but antidepressant medication helps. He has **weight issues** which are difficult for him to address due to his mobility limitations. "[A]lthough his injuries have resolved and he has reached the maximum level of medical improvement, the generalised and unremitting pain he suffers as a direct result of the injury, and the degree of generalised restriction in movement he suffers as a consequence, renders him incapable of resuming his pre-accident employment as a plant operator or operator of any heavy equipment. Fullerton J assessed P to be **40% of a most extreme case**.

In *Cocks v Blacktown City Council & State of NSW* 27/8/12 [2012] NSWDC 189 as "a result of his fall [in 2009], the **plaintiff struck his head and fell onto his right hip area, breaking the neck of the right femur with displacement**. He underwent surgery and had a total hip

replacement. For 5 weeks he was partially weight bearing on crutches and thereafter for 5 weeks, he walked with the aid of a walking stick. Thereafter, he has been able to walk around but gets pain from time to time in the area of the right hip and finds it difficult to walk up and down stairs without pain" @55. P, who is 64, cannot continue working as a courier. Finnane QC DCJ assessed P at **33% of a most extreme case**.

See *Lange v O'Carrigan* 4/10/13 [2013] NSWDC 183 where D found not negligent in perfoming **hip replacement** on P in 2011 when she was 46 which **resulted in leg lengthening** and the need for **remedial surgery**. Levy SC DCJ nevertheless assessed damages and found P to be **29% of a most extreme case** amounting to $96,500 in general damages. "[A]s a result of the second operation, the plaintiff has some restriction of movement in her left hip. She has pain in her left groin and in her lower back. She is restricted in her ability to lift due to pain in her left leg. She finds it necessary to rest her leg at the end of the day. She is no longer able to power walk. She finds sitting for prolonged periods more uncomfortable than standing. She cannot cross her legs. She must lift her left leg with her hands when getting into a vehicle. Her leg tends to turn inwards when she negotiates stairs. She experiences a paddling sensation when her left foot makes contact with the ground. She is less able or inclined to go boating and snorkelling due to access and egress issues with leisure boating. … She has reduced capacity for house cleaning and her previous domestic tasks, including lawn and garden work. She limps after she over-exerts her left leg. She has gained weight" @210-211. P also has scarring and anxiety and depression.

Knee

P was 33 **truck driver** when she fell off a tailgate loader injuring her knee. P "had **[pre-existing] bilateral patellofemoral joint arthritis that was symptomatic in her left knee**. The symptoms were worsening very gradually. Her **right knee was asymptomatic**. Some years earlier, she had experienced a back problem that had restricted her ability to lift. **Neither her left knee symptoms nor any ongoing occasional back problem prevented her from undertaking relatively heavy work as a truck driver**. She was obese, but her obesity was to some extent controlled by the heavy work that she undertook in the course of her employment. She was psychologically vulnerable but had only experienced one significant episode of depression, eight years before the accident. … As a result of the accident, Ms Richards **right knee became symptomatic, virtually immobilising her with pain, swelling and stiffness, and contributing to her left knee and back problems**. The chronic pain and loss of the ability to work in a field that she loved made her depressed. Immobility and depression aggravated her obesity. Increased obesity exacerbated her **pain and depression**. As she will continue to experience significant pain in her right knee and is **incapable of returning to her former occupation**, it is most unlikely that the cycle of pain, obesity and depression will be broken. Ms Richards physical and psychological condition has greatly impacted on her working and personal life"59-60. P assessed at **39% of most extreme case** entitling her to $171,000 for NEL**.** *Richards v Cornford* 7/5/09 [2009] NSWDC 60 Murrell SC DCJ

In *Chandra v Bunnings Group Ltd* 6/11/09 [2009] NSWDC 194 Levy SC DCJ found P to be **28% of a most extreme case**. P previously had serious problems with his back and left knee, but had recovered well enough to work steadily delivering heavy items. P suffered serious injury to his back when he slipped and fell. Now he has a **severe back problem** with pain that restricts him in various ways, so that he cannot find suitable employment. His knee causes him pain and instability and it restricts him in a number ways including climbing stairs, walking for long periods and driving. His knee condition was described as **chondromalacia patella**. He also suffers headaches, sleeplessness and is cranky.

See *Harris v Bellemore* 29/3/10 [2010] NSWSC 176 where McCallum J awarded $125,000 in general damages (among other heads) to a 30 y.o. P engineer, who, as a result of medical negligence, suffered "**scarring, pain, some loss of range of motion in the knee, very slight exacerbation of progressive degenerative change in the knee, some exacerbation of tightness of the soft tissues in the knee and … claudication symptoms**"@363. P's ability to work as an engineer impaired only to a limited extent as a result of his relevant injuries. **Appeal allowed in part** in [2011] NSWCA 196.

In *Comitogianni v Sydney Flower Market & Ors* 1/10/10 [2010] NSWDC 215 Phegan ADCJ assessed P at **25% of a most extreme case**. P slipped in the market and suffered a serious knee injury, soft tissue injuries and a psychological reaction. The knee injury was by far the most serious of her injuries. P's right leg was in a splint for two months. **Osgoode-Schlatter's syndrome** diagnosed.

In *Strike v Fiji Limited Resorts & Anor* 25/10/12 [2012] NSWSC 1271 P, a telephone receptionist, slipped on wet stairs at a resort in Fiji in October 2006 when she was 49 and "suffered **soft tissue injuries to her left knee which aggravated her pre-existing osteo-arthritis**. … [the doctors agree that] "her total knee replacement on 28 November 2007 has not been effective in providing pain relief. … [I]t is highly likely that, absent the fall, Mrs Strike would have required a knee replacement within five years of the time she fell. … [T]here are multiple medical co-morbidities contributing to her overall general state of disability, including her obesity, the rotator cuff pathology, her carpal tunnel syndrome, diabetes, depression and her pre-existing osteo-arthritis … [P suffered] **aggravation of the carpal tunnel syndrome** in her right hand occasioned by the fall … [and] some **temporary aggravation of the symptoms in her right shoulder** from the protracted use of crutches" @66-69. "The accident has taken her from the position of someone with medical difficulties with some affectation of her free movement to someone whose **ability to move freely is radically diminished**. Absent the fall she would have continued to derive enjoyment from the activities of everyday life such as shopping and participating in holidays for a considerable period, as she was doing on the day of the fall. After the fall she was robbed of any enjoyment of those activities whatsoever" @101. Beech-Jones J assessed P at **27% of a most extreme case** and awarded the corresponding general damages, among other heads.

In *Kingi-Rihari v Millfair Pty Ltd t/as The Arthouse Hotel* 19/12/12 [2012] NSWSC 1592 P, a scaffolder, slipped and fell at a hotel in 2010 and **dislocated his patella**, suffered a knee **medial ligament injury** and **soft tissue damage**. P also experienced "**various psychiatric symptoms**, including stress, loss of self confidence, intermittent depression of mood, a sense of loss about his prior physical robustness, irritability, severe at times, partial social withdrawal and significant problems when his relationship with Ms Morales broke down due to his mental state and behaviour. He was diagnosed as suffering chronic adjustment disorder with mixed features of anxiety and depression and treatment" @183. Due to treatment his mental state has improved. P hasn't worked since the accident, needs retraining and has not been able to continue his active social life. P "**no longer has the efficient use of his right leg at or above the knee**, with the result that he can no longer perform heavy manual work nor play Oztag, football, or run, all activities which he had previously engaged in and enjoyed. He has gained considerable weight, despite attending the gym regularly and his right thigh and calf are somewhat thinner than his left. He can drive for certain time periods and can walk, albeit he experiences certain ongoing difficulties and pain" @194. P has a 50 year life expectancy. In time, P is likely to require two knee replacements, but due to a **pre-existing knee condition** he would likely have required one in any event. The cost of future operations assessed at $25,000. Schmidt J assessed P at **32% of a most extreme case**.

In *Hair v Munro* 28/3/13 [2013] NSWDC 25 P, who was a few years off retiring from being a property manager, **slipped on a mat and fractured the patella of her left knee** in 2010. P "said that she suffers pain in her knee when standing for long periods. On a bad day the pain could register about six or seven out of ten, with ten being extreme pain. She felt unsteady on stairs and was very cautious on rough ground. From time to time her left knee locked and she had had a number of near falls due to instability. There was also catching and clicking in her knee. The plaintiff said that she felt her knee condition was deteriorating. She had to give up bushwalking and daily early morning walks" @42-43. P no longer does her own gardening and struggles doing housework. P suffered a PTSD which had become a **chronic phobic anxiety state**. P's evidence accepted. "The plaintiff has been through a good deal of pain, **has had surgery and continues to suffer, both from a physical and psychological aspect, from the effects of the injury. She will probably do so for the rest of her life**" @71. P continues to work and is not experiencing income loss. P assessed at **28% of a most extreme case** and awarded $75,000 for NEL among other heads. See *Hair v Munro* 28/3/13 [2013] NSWDC 25 per Elkaim SC DCJ where liability was established re P slipping on a mat left on a polished floor. Appeal re liability dismissed 26/3/14 in [2014] NSWCA 80.

See *McDonald v Australian Tourist Park Management Pty Ltd & Anor* 18/10/13 [2013] NSWDC 201 where in 2010, when P was 73, she fell when she **walked into a pot hole** at night in a caravan park where she lived. P had torch and was not found negligent. She "**fell onto her face which struck the hard road surface. She injured her nose, she sustained abrasions to her forehead, her face and to both of her knees**. She sustained a concussion as well as grazes to the palms of both of her hands. Her left knee became deformed in appearance and was swollen. … [P] **fractured her left patella in multiple places**" @27. P had "open reduction and internal fixation of her fractured left patella with the insertion of Kirschner cerclage wires" @29. There were **complications with P's treatment which caused her much pain**. She became **depressed and anxious**. P experiences ongoing pain, discomfort and restriction. She has surgical **scarring** on her left knee. P's "knee pains are worse at night and interfere with her sleep, leaving her sleep deprived. She suffers from headaches, lacks general motivation, and has suffered a diminution in her social life. She has lost her physical fitness [as no longer as active as before]. She faces the prospect of knee replacement surgery" @60. P is fearful that knee will lock or collapse, especially if she holds her grandchildren. P's projected life span is another 16 years. Levy SC DCJ assessed P at **30% of a most extreme case** and awarded her NEL damages of $127,000, among other heads.

See *Wurth* at Foot

Leg

The P, who suffered a '**severe injury involving a comminuted fracture of the lower third of his left tibia and fibular** which required surgery and immobilization', was assessed at **28% of most extreme case**. P was 44 at the date of accident in 2003. P's injury not expected to deteriorate or cause him any significant future problems.
Kipriotis v Royal Tiles P/L & Ors 26/8/08 [2008] NSWSC 871 Hall J

In *Thomson v Twin Towns Employment Enterprises Ltd* 24/9/08 [2008] NSWDC 213 P slipped and fell into a trench in September 2003 and **snapped his lower left leg and shattered his tibia and fibula**. P is now 41 and has ongoing pain and swelling in his legs which affects many aspects of his life. He cannot pursue his several vigorous sporting pursuits anymore and needs a sympathetic employer as he cannot stand for long periods. Knox SC DCJ assessed him at **28% of a most extreme case** and awarded him $62,000 for NEL among other heads of damage.

In *Tran v Nominal Defendant* 2/9/09 [2009] NSWDC 281 Johnstone DCJ assessed damages in the case of a 23 y.o. (20 at time of accident) **machine operator/forklift driver** who "suffered a major injury to his left leg, where there was a degloving of the lower part of the leg leaving **ugly scarring**, a **compound fracture of the tibia and fibula**. He also suffered **open book pelvic fractures and fractures at the L1 and L2 level of his lumbar spine …** [P] underwent intensive treatment, including a **series of operations** involving plating of the pelvic fractures, internal fixation of the left tibia and fibula with an intra-medullary nail and screws, and extensive skin grafting. The nail had to be replaced in April 2007, as the left tibia fracture had not fully united"@ 30-31. Johnstone DCJ assessed P's **NEL, among other heads, at $200,000** stating **P "is very young and is now faced with a lifetime of restricted movement and discomfort**. This will affect his general enjoyment of life and restrict him in the sporting and social activities he would otherwise have enjoyed. There is also the **scarring which is severely disfiguring** and will also be productive of discomfort, including during intimate activity with his partner, and will need constant attention by way of application of creams and the like. The plaintiff will also have to endure future plastic surgery by way of revision. There is also the embarrassment factor, which in the case of this plaintiff is significant" @80. Total assessment of $912,620. Appeal dismissed [2011] NSWCA 220.

In *Chaseling v TVH Australasia P/L* 15/4/11 [2011] NSWDC 24 P "suffered a **crushing injury to his right tibia, fibula and ankle** [in 2006 when he was 41]. This involved an open fracture dislocation of the right ankle with disruption of the inferior tibial-fibular joint. Associated with that injury was a **cartilaginous left knee injury**, which involved a complex tear of the posterior horn and body of the left medial meniscus. There was also a soft tissue injury to the plaintiff's right knee. The plaintiff was in constant and considerable pain and discomfort, after the initial shock

from the incident had receded" @18. P "continues to experience pain, discomfort, weakness and restricted movement of the right ankle. He has to wear orthotic inserts in his shoes. He experiences difficulty sleeping with his right ankle covered or restrained by covering bedclothes. He is unable to take his weight on the toes of his right foot as when reaching for high-up objects. He takes painkilling medication. The plaintiff continues to experience knife-like pain in his leg. The pain remains a constant trouble to him. He has a bone and cartilage deformity of the ankle, with unsightly, tethered and thickened scarring. The ankle has an external rotation deformity, which is more marked when walking. He experiences a clicking and grinding sensation in that ankle. He has an antalgic limping gait, by which he favours his right leg. He has reduced standing tolerance. He experiences a reduction in his ability to walk, run, kneel and squat. He has difficulties in walking on slopes, uneven ground, ladders and stairs. His right ankle swells on a daily basis. His right ankle has a tendency to give way. He has significantly reduced mobility and agility, and experiences swelling of the right ankle. He has difficulty using the footbrake when driving. He has muscle wasting of the right thigh and calf. There is also sensory loss in the distal distribution of the right sensory nerve. He experiences occasional cramping in the right foot. X-rays have revealed him to have disuse osteoporosis or osteopenia in the bones of the right ankle, and early onset of osteoarthritis of the right ankle. He has developed clicking or patello-femoral crepitus in both knees. He experiences back stiffness and mechanical lower back pain every few days due to altered gait. He also has lumbar disc bulging and lumbar facet joint arthropathy. His extended period of recuperation and reduced physical activity has led him to experience weight gain. From a psychological perspective, the plaintiff has experienced a good deal of frustration and some depression as a result of the ongoing effects of his disabilities" @59-60. Left knee problems not factored into assessment. P awarded **$225,000 for NEL**, among other heads. Appeal dismissed in *TVH Australasia Pty Ltd v Chaseling* 22/5/12 [2012] NSWCA 149 [60 MVR 535].

In *Kerney v Mead & Anor* 3/6/11 [2011] NSWSC 518 Garling J found that a senior Telstra technician/part-time farmer who was 35 (45 at judgment) suffered a relatively **minor closed head injury** without organic or structural brain injury in a serious car accident. A has a **serious ongoing permanent orthopaedic disability in his right leg**, his right leg is shortened, he walks with a noticeable limp, and he has ongoing pain for which he avoids taking what would otherwise be appropriate medication. He has an **ongoing chronic depressive disorder** which fluctuates in its intensity … He is a man who prior to his accident had a full and active life, both physically and socially. Much of that has been taken from him. He is now largely reclusive … and is unable to return to the work which he was undertaking. He has not felt able to obtain alternative employment, and to the extent that he has attempted so to do, has not been successful. His orthopaedic and psychological conditions are static. They will continue to fluctuate and he will have good and bad days, but there will be no complete remission of either of the conditions. He is **not able to return to his farming and outdoor activities and much of his enjoyment of life has been taken away from him**" @138-140 - A has endured significant medical intervention and a difficult recovery process - "He has been deprived of the ability as a third generation farmer to continue his family's farming interests ... He is able to care for himself, he is mobile and able to walk around and drive, albeit with some difficulty, he retains his full intellectual capacity. He still retains friends although in a much reduced social circle. He is often reclusive but not permanently so" @149-150 - **NEL of $275,000** awarded among other heads. On an appeal limited to the issue of economic loss in *Mead v Kerney* 23/7/12 [2012] NSWCA 215 it was contended "that the primary judge erred in concluding that, although the respondent had a theoretical earning capacity of forty per cent, that capacity was of no value because there was no prospect of him obtaining work to utilise it" @4. **Appeal dismissed**.

In *Lewis v Clifton & Ors* 29/7/11 [2011] NSWDC 79 Elkaim SC DCJ found hotel liable for not ejecting patron who had previously caused fight and who later injured P the same night in another fight. P was a 33 y.o. quarry manager and "suffered a **serious injury to his right leg (**probably damage to the common peroneal nerve exacerbated by a chronic pain syndrome)**. It has caused him constant pain over the last six years**. He has endured surgery and the side effects of a number of different drugs. The plaintiff has felt the effects of his injury in his work, in particular when driving to and from his place of employment and when carrying out extra activities. The recreation about which he was obviously passionate, boxing, has been taken from him, certainly as a participant … In the future the plaintiff will continue to suffer pain and I

have no doubt that although he will do his best to maintain employment the very act of doing so will mean that there will be more than usual amounts of pain. [The] plaintiff has not established a specific loss referable to his **inability to become a professional boxer** … [T]he disappointment to the plaintiff for his inability both to continue boxing at an amateur level and perhaps be a professional (successful or not) can be taken into account in the assessment of non-economic loss" @117-119. P assessed at 33% of a most extreme case and awarded $165,000, among other heads. **Appeal dismissed** at *Clifton & Ors v Lewis* 30/7/12 [2012] NSWCA 229 although NEL award considered to be at high end of range.

In *Doghooz v Nagy* 2/12/11 [2011] NSWDC 193 P was knocked over by D's negligent driving in a car park. P suffered a **very serious leg injury**, and less serious neck (soft-tissue) and back injuries (exacerbation of pre-existing problems). P also has resultant major depression (14% whole person impairment). Elkaim SC DCJ awarded P **$200,000 in general damages** among other heads.

In *Neate v Fox* 27/1/12 [2012] NSWDC 2 P, a 68 y.o., **whilst exiting an aeroplane fell and sustained "a sub-trochanteric fracture of the neck of the left femur as he fell on his left side … [and] an injury to his left hip and a compression fracture of the spine in an unspecified location in his back**" @71. P has prominent scarring which causes him discomfort and which he is self-conscious about. "He continues to walk with a substantial limp ... This appears to be due to shortening in his right leg. He experiences significant general discomfort in his left leg and hip. There are signs of arthritis advancing in his left hip. He is unable to walk long distances without the use of a walking cane. After prolonged walking the pain increases and becomes very bad. At night time, the plaintiff finds he cannot sleep properly and he tosses and turns in discomfort. He continues to regularly take painkilling medication. He has a constant dull aching sensation in the right thigh, and he described experiencing sharp pains on certain movements" @91-92. P has suffered **major depression**, become irritable and socially withdrawn, and has lost the enjoyment of his motor home and playing in a band as a drummer. P has difficulty with a range of personal and domestic tasks. Levy SC DCJ found P to be **51% of a most extreme case** and awarded P $265,000 in general damages among other heads.

In *Ziliotto v Dr Hakim* 24/7/12 [2012] NSWSC 610 P, in February 2008 when she was 53, went into hospital "for an **abdominal hysterectomy, left oophorectomy and abdominal lipectomy**. During the course of the operation the Defendant ligated the external iliac artery and divided and ligated the external iliac vein. The result was a **considerable loss of blood and serious permanent damage to her right leg**. The Defendant … admitted liability for the negligent way in which the operation was performed … The Plaintiff is considerably disabled as a result of the operation. By reason of a **pre-existing psychiatric condition** of the Plaintiff issues arise concerning a number of the heads of damage" @1-3. P submitted "that prior to the operation the Plaintiff was a strong, independent and outgoing woman. She was well educated and worked in a number of jobs including as a teacher for 21 years. The Plaintiff points to the fact that she completed a number of courses when she arrived in Australia including an English language course. She then worked long hours for Sydney Home Child Care. She had an active life outside work involving the theatre, galleries, museums, movies and dining out. By contrast, the Plaintiff is now said to be an **inactive and depressed woman who endures constant pain**. She is very restricted in her activities and even in her ability to look after herself. It is said that the Plaintiff has lost her working life and career, her social life, her mobility, her independence, her freedom of movement and her sexual life. In addition, she has now lost her marriage" @62-63. P's submissions largely accepted and she was assessed at **65% of a most extreme case**. Davies J awarded her $338,000 in general damages among other heads. **Appeal allowed** 31/10/13 in [2013] NSWCA 359, but general damages assessment unchallenged.

See *Egan v Mangarelli & Ors* 7/8/12 [2012] NSWSC 867 where Hoeben J made a provisional assessment in the case of a P who was hit by a bus when he was 16 in 2007. As a result, P's **right leg was amputated** above the knee and he suffered brain damage resulting in adjustment and post-traumatic stress disorders (superimposed on his pre-accident personality disorder and low range IQ). He also suffered **various other injuries** including a compound fracture of his left ankle, a left femoral fracture, pelvic fractures, left sacral, scapula and clavicle

fractures, left neck of humerous fracture, right sternoclavicular joint dislocation, right radius and ulnar fracture, bilateral rib fractures and bilateral haemopneumothorax. P assessed at **80% of a most extreme case** which attracted $360,000 for NEL. Provisional assessment also contained amounts for **C-leg Prosthesis** ($550,000), future motor vehicle expenses ($3,600), computer and environmental facilities ($72,338), future holiday care ($46,350), housing needs (difference between the cost of a conventional house and one which has been especially modified to accommodate a wheelchair dependent person) ($295,500), handyman assistance ($71,568) among other heads for a total of $6,795,055. **Appeal and cross-appeal essentially dismissed** 5/12/13 in [2013] NSWCA 413

In *Herbert v Clarendon Homes (NSW) P/L* 23/8/13 [2013] NSWSC 1158 P, when he was 53 (now 58) and working as a plasterer, suffered **proximal shaft fractures of his left tibia and left fibula** when he fell whilst at work. "Since the accident he has been hospitalised a number of times. He has suffered **repeat bouts of serious infection** with a strong likelihood that they will be repeated. … [H]e has and will continue to experience significant pain. It is likely that his **arthritis will continue to deteriorate**. Absent his **osteomyelitis** he could expect to have a knee replacement, however, for the reasons already explained, the risks posed by such an operation are so significant that it seems unlikely that it would occur. Thus the likelihood is that he will face a deteriorating knee in his later years without much relief" @75. **P was a very active man, but now is significantly restricted** in various physical activities. P is "now simply biding his time around … home with no particular purpose. In these circumstances Dr Jungfer's diagnosis of his level of **depression [major]** is not surprising" @77. P has **no residual earning capacity**. Beech-Jones J regarded A to be 55% of a most extreme case and awarded P general damages of $294,250 among other heads.

In *Ornelas v The Nominal Defendant* 21/5/14 [2014] NSWDC 83 Judge Finnane QC found P, who is 31 and was injured in a motorcycle accident in 2010, entitled to "non-economic loss, for the **fracture** of his [left] leg, the pain and suffering that resulted from it, the operative treatment that flowed thereafter and the pain and suffering resulting from that, his being **disabled for five months and being totally dependent on others** for support, the injury to his **neck shoulder and back**, the **hernia** from which he suffers, the **scarring to his left leg**. … [H]is injuries have resulted in continuing and permanent pain and suffering, such that he needs regular attendance on a general practitioner, daily medication and that he is **unable to do any work in and around his home and that will continue indefinitely**" @36. P awarded $285,000 for NEL, among other heads.

Multiple

In *Lewis v Shimokawa* 14/11/08 [2008] NSWDC 244 Levy SC DCJ assessed damages re a 34 y.o. (at judgment) sales manager with customer service duties who suffered injuries in a car accident in 2003. She injured her **neck, thoracic lumbar spine, shoulders, upper arms, chest and hip and has major depression and a chronic pain disorder**. P is unable to drive for more than 15-20 minutes and unable to do loading and unloading as she used to do as a salesperson. Since July 2004 P totally unfit for any employment. P has permanent physical, emotional and psychological problems which will always affect her enjoyment of life. She is a 'mess'. See especially paragraph 249 for good summary of her condition. P, among other heads, awarded **$265,000 in general damages**. Appeal allowed [2009] NSWCA 266 (but not re damages). See also [2012] NSWCA 300.

In *Hawes v Holley* 22/8/08 [2008] NSWDC 147 Hungerford ADCJ assessed the P's non-economic loss at 28% of a most extreme case assuming she suffered accident related "**irritable bowel syndrome, chronic moderate cosmetic disability from abdominal scarring, acute cognitive impairment with confusion, acute auditory hallucinatory phenomena and delusional beliefs, chronic post-traumatic stress disorder and major depressive illness** (my emphasis)". $62,000 awarded under this head. P was 45 and an egg collector/farm hand. The total award was $95,005.18.

P "suffered a **closed head injury**, **burst fracture of the L3 vertebra, fracture and dislocation of the left ankle, injuries to her left kidney and liver, as well as multiple lacerations and bruising**."@94. P complained "She had scarring on her back, including a scar 10 cm in length, lumpy at the top where a screw remained and indented. … She suffered from

sharp pain in her back extending from the area of the scar down her right leg and into her right foot, occurring one or two times per week. The sharp pain subsided if she rested and rubbed the affected area but was then replaced by throbbing pain and backache for an extended period. … She suffered from constantly occurring pins and needles like a belt across the top of her buttocks, generating hot stabbing pain if touched. The pain fluctuated from mild to very severe and was triggered by activity, car travel or sleep. … She complained of daily left leg pain affecting the sole of the foot, the shin, knee and ankle joint. The ankle pain was constant. In the other areas of the leg it fluctuated in its intensity. The leg suffered from hot and cold sensations, discolouration from the toes to the knee and the foot and lower leg were scarred. … She had very limited movement in the foot and ankle, reducing to nil at night when the ankle swelled. …"@108. By and large Sidis DCJ accepted P's complaints. P had a history of depression, but accident implicated in her PTSD and **adjustment disorder with depressed mood**. P has not returned to her **own business in which she did food preparation and sales**. P retains some capacity for sedentary or very light part-time work, but her employment prospects poor in her rural area. P awarded $275,000 in general damages among other heads and a total just short of **$1,000,000**. *Jones v Heaphy* 13/2/09 [2009] NSWDC 3 Sidis DCJ

P, who had a good work ethic and who had been involved in a variety of labouring and semi-skilled work throughout his life, was 32 (35 at hearing) when he was injured in a motor cycle accident. The P's "loss of amenity includes his abandonment of leisure reading due to memory and concentration difficulties, his ongoing **wrist problems** of an orthopaedic nature, to a lesser extent his **neck and left shoulder problems**, his **low back problems**, his reduced sitting and standing tolerance, his memory and concentration impairments, his **mild brain damage due to traumatic brain injury**, his anger, his **depression and his adjustment disorder**, the personality change described by his mother as well as the scarring to his wrists and forearms which causes the Plaintiff to experience embarrassment and awkwardness. The [P's] situation represents a challenge for assessment of damages for non-economic loss. This is so because a superficial analysis of the [P's] presentation would be deceptively misleading. He presents well and appears to be functioning and interacting appropriately with others, however, a closer analysis reveals the [P] is left with significant cognitive and physical problems which will permanently and adversely impact upon his existence and will significantly limit his ability to enjoy the amenity of his life."@114-115. P awarded $235,000 in common law damages for NEL among other heads totalling **$1,497,846.75**. (my emphasis) *Hofer v Brown* [2009] NSWDC 32 Levy SC DCJ

P was **assaulted by the police** in 2003 and suffered "compound fracture of the right cheek bone with some facial nerve paraesthesia; compound fracture of the right jaw bone; fracture of the neck of the right ulnar bone; fracture of the neck of the right fourth metacarpal bone; fracture of the lateral wall of the right orbit (eye socket); bruising, without fractures, to knees; lacerations to the soles of the feet" and nightmares(@210. P "undoubtedly suffered a **significant injury to the face, to the arms, and to the legs, as a result of which he has experienced significant pain and will continue to do so**"@225. General damages of $65,000 awarded. P, who was 39 and unemployed at the time he was assaulted, had a sporadic work history mainly in market gardening. He has had difficulty doing the work he has been able to obtain since the assault and was awarded $30,000 for economic loss. P also awarded $100,000 in exemplary damages for the assault and $100,000 in exemplary damages for malicious prosecution. *Hathaway v State of NSW* 23/4/09 [2009] NSWSC 116 Simpson J

In *Schneider v State of NSW* 16/10/09 [2009] NSWDC 108 P, who was 48 y.o. (51 at trial) fell into a pit. "[S]he experienced neck pain, upper back and coccyx pain, pain and associated pins and needles with numbness in both wrists, hands, arms and elbows. She then developed increasing hand symptoms with swelling and developed a burning sensation in her neck. She found she had reduced grip in both of her hands and she experienced pain in her arm muscles. … [S]he was diagnosed with and surgically treated for … **bilateral carpal tunnel syndrome**. … After … surgery for bilateral carpal tunnel decompression … [P] still experienced residual hand problems comprising upper arm paraesthesia and bilateral reduced and weakened grip. The paraesthesia causes her to drop objects. … [P suffered] increasing anxiety and depression ... [Her] pre-injury employment was terminated by her employer for the stated reason that light duties could not be made available to her [and[she experienced a worsening of her psychological condition in the form of **exacerbated depression, anxiety and mental distress**.

… [P] diagnosed with a **chronic adjustment disorder**. … [P is] unfit to return to work as a **cleaner** … [P] has suffered panic attacks of increased intensity to the pre-injury tendency she had to panic in situations. … [P's] **pain, discomfort, stiffness and restriction of movement of the neck, shoulders and her upper limb discomforts constitute significant physical restrictions for her**. … [T]hese restrictions render her **unemployable**. … [S]he has and will continue to require domestic assistance. … [S]has had to move her residence to live … in a garage annexed to the home of her parents. … [P's] post-injury situation and circumstances have led to her having a miserable existence characterised by a **chronic pain syndrome** … The prognosis for the [P's] ongoing physical and psychological problems remains guarded" @255-262. Levy SC DCJ assessed P at **40% of a most extreme case** and awarded $180,000 for NEL out of a total award of $1,204,371.

In *Ralston v Bell & Smith t/as Xentex Patch & Grout* 31/3/10 [2010] NSWSC 245 a 39 y.o (now 43 y.o.) suffered injuries to his **leg, back, knee, pelvis and ankle** when a boom lift hit him. Hislop J awarded $160,000 in general damages, among other heads, finding that "the **orthopaedic injuries were severe**, he has **made a good recovery and is quite mobile**. It is likely he, in time, will suffer the onset of degenerative changes in the knee and possibly in the hip and further degeneration of the lower back. This will be painful and will further limit his capacity to engage in various activities. There is a likelihood of future surgery for joint replacement and removal of hardware. The plaintiff will however remain mobile (save for periods of surgery and convalescence). He has some psychological reaction to his injuries and some restriction on his capacity to engage in duties of a heavier type. He has some limitations on his enjoyment of activities he had previously engaged in particularly at his country property"@176.

In *Hadaway v Robinson & Ors* 3/9/10 [2010] NSWDC 188 P "suffered **spiral fractures to his left tibia and fibula, a fractured nose, a ruptured eardrum, multiple bruises, swelling and cuts to his face, and to the inside of his mouth, and bruising and swelling to his testicles**. … [H]e suffered considerable pain, discomfort and distress associated with these injuries. … [A]s a result of these injuries the plaintiff subsequently developed **secondary wound breakdown to the repair site of his injured left leg, multi-resistant staphylococcus aureus infection [MRSA] and chronic osteomyelitis**" @521. P was 44 at the time of the assault, and is now 49. His injuries continue to significantly impact his life both physically and psychologically. He is unlikely to return to work as a **builder**. General damages at common law assessed at $150,000 and under the CLA at **35% of a most extreme case** ($154,500). Various other heads of damages also awarded. **Appeal allowed** in *Cregan Hotel Management Pty Ltd & Anor v Hadaway* 8/11/11 [2011] NSWCA 238. Levy SC DCJ **erred in finding that R had been ejected** from the hotel. **No breach of duty in failing to eject**.

In *Robson v Gould & Anor* 17/11/11 [2011] NSWDC 176 Elkaim SC DCJ awarded P $250,000 in damages for NEL , among other heads. She suffered "horrendous injuries to her person" including **legs, back, right ankle, scarring and depressive reaction**. P will continue to suffer significant pain over many years. P was about 30 when she was injured in a motorcycle accident. She was a **corporal in the RAAF**. The loss of her career in the RAAF cut her deeply, but due to her determination she is still able to work in clerical work.

In *Nicol v Whiteoak & Anor (No. 2)* 5/12/11 [2011] NSWSC 1486 Adamson J assessed P to be **50% of a most extreme case**. P suffered multiple fractures, scarring and degloving injuries in a boating accident when she was 43 in 2006. P "suffered traumatic injury to the brain which caused a subarachnoid haemorrhage and intracerebral haemorrhage. She was in post-traumatic amnesia for two weeks after the accident" @115. P has made a good recovery, but is not likely to work again. P's partner died in the accident which exacerbated her PTSD. "Notwithstanding her injuries, and scarring, she presented as a confident and articulate woman who was willing to extend herself to the extent to which she could, and who wanted to be self-reliant, as she had been before the accident" @45. P awarded $260,000 for NEL, among other heads.

In *Foreshew v Imsies & Anor* 16/12/11 [2011] NSWDC 198 P, in 2007 when he was 28, sustained **multiple fractures to the left tibia, fibula and ankle, with abrasions and pain to both hips and the abdomen** in a motorcycle accident. "The plaintiff has work, domestic,

leisure and sporting restrictions, each of which significantly and adversely affect the ability of the plaintiff to otherwise enjoy the amenity of his life" @93. Levy SC DCJ awarded P **general damages of $275,000** among other heads. P was a manual labourer who worked multiple jobs. He has had to cut back on the amount of work he takes on.

In *Cosmidis v Boral Bricks Pty Ltd* 13/9/12 [2012] NSWDC 144 P, when he was 48, was **struck and dragged along at work in 2008 by a fork-lift truck**. As a result of this terrifying incident, P has ongoing **pain, discomfort and restriction in his lumbar, thoracic and cervical areas of his spine, referred pain to his leg and internal derangement of his left knee and chondromalacia of the patella**. Such injuries were superimposed on his asymptomatic degenerative spine. P has lifting, bending, twisting, agility, walking, standing and sitting difficulties which affect him in all aspects of his life. P's **bilateral carpal syndrome, along with chronic PTSD, major depression and other psychological issues** also linked to accident. P's earning capacity effectively destroyed. P has an indefinite need for domestic assistance. Levy DCJ assessed **$200,000 for general damages at common law**. If CLA applied, P assessed at **45% of a most extreme case** entitling him to $230,400. **Appeal allowed** in *Boral Bricks v Cosmidis …* 18/12/13 [2013] NSWCA 443, but general damages assessment unaffected. On appeal in *Boral Bricks Pty Ltd v Cosmidis (No 2)* 7/5/14 [2014] NSWCA 139 **contributory negligence assessed by majority at 30%**.

In *Abrahim v Parkview Constructions Pty Ltd* 23/11/12 [2012] NSWSC 1379 a **scaffold gave way** and P, who was a 32 y.o. painter, suffered multiple injuries including "**fracture of the superior and inferior pubic rami, superiorally displaced left pubic ramus, a fracture of the left sacral ala, a fracture of the right distal radius and ulna, a fracture of the right mid-shaft humerus, right sided pelvic haematoma in relation to iliopsoas, a small tear to the right internal iliac artery** and other … widespread injuries … [P] suffers from continuing significant symptoms of pain and disabling weakness affecting his right wrist and hands, ankles and feet. He can walk but not for long distances and uses a walking stick when he is on a street or in a shopping centre because he loses his balance or fears that he might do so. When he is in a park or on a beach or where he can't hurt himself he does not tend to use the stick until he gets tired. He does not use it to walk around the home" @58-60. P's **impaired memory and concentration, depression, anxiety and PTSD** also linked to fall. P unlikely to ever return to the workforce, but he may be able to do simple tasks on a part time basis. P assessed at **65% of a most extreme case** and awarded $347,750 for NEL among other heads. In further proceedings 9/2/13 at [2013] NSWSC 95 the scaffolder was found 60% liable and the builder 40%. **Appeal allowed** 20/12/13 in [2013] NSWCA 460 and "responsibility … apportioned to Parkview as to one-half, Erect Safe as to one-third and Blue Star as to one-sixth" @118. Past and future economic loss awards to be reduced. See further consideration of matter in *Parkview Constructions Pty Ltd v Abrahim (No. 2)* 9/4/14 [2014] NSWCA 117.

In *Keys v A & A Lederer Pty Ltd, CB Bensley & J Bensley* [2012] NSWDC 208 13/11/12 P, who was 56 in 2009 when she slipped on wet tiles in a mall, "sustained **multiple jolting injuries to both arms, her right hand, her left lower jaw, her left hip and her lower back**. She was also psychologically shocked by the circumstances of her injury" @12. "Since her fall, the plaintiff's complaints have comprised headaches, low back pain, related left sided sciatica, and left sided jaw pains. Her back pains and sciatica adversely affect her ability to sustain activities such as prolonged sitting, standing, and walking. Her ability to lift and bend, and to carry objects has become impaired. She estimates her level of pain to be 7 out of a maximum scale of 10. She has reduced physical strength and dexterity. She is no longer able to drive her manual car because of difficulties with gear and clutch changes. She has reduced manual dexterity in her right hand, which was jarred in the fall" @20. P also now has difficulty doing home and garden maintenance. Levy SC DCJ assessed P at 27% of a most extreme case and awarded her $53,500 for NEL among other heads.

Neck

P **bookkeeper was 63y.o.** (65 at trial) when she suffered a fall and injured her **neck and shoulders**. "[T]he difficulties this causes for her with perseverance with her work and difficulty managing physical household tasks represents a very significant detriment to … [her] enjoyment of the amenity of her life. She continues to suffer from the inconvenience of having to do stretching exercises ... She is restricted in her daily household, domestic and gardening

activities and faces the prospect of a surgical procedure ... [She] will have that procedure in the very near future as … she has difficulty coping with her work due to pain. She will also face the prospect of a long convalescence from that procedure, of the order of 6 months"@70. P assessed at 31.5% of a most extreme case and was awarded $126,000 for non-economic loss. P would have worked until she was at least 70 years old and was also awarded, among other heads, $189,220 for FLOEC. *Walker v Portmans* 22/5/09 [2009] NSWDC 46 Levy SC DCJ

In *Hodge v CSR Ltd* 2/2/10 [2010] NSWSC 27 P, who owned his own mini-bus business and who worked as a driver of concrete agitator trucks, **injured his neck at the C6/7 level** in 2002 when de-dagging with a jack hammer. At judgment he was 41 y.o. The "plaintiff is right handed. He has **pain and impairment in the neck, left shoulder and arm** as a result of the subject injury. … [H]e is unfit for heavy work and activities involving specific stresses on his neck and left shoulder. … [H]e tends to do most things but these can cause pain. He … has been prescribed morphine patches and takes pain killers when required. Since the injury he has become, on occasions, cranky and abusive ... [H]e took anti-depressant tablets prescribed by his general practitioner but there was no evidence from the general practitioner or a psychiatrist. The plaintiff has pre-existing degenerative changes in his spine and an unrelated spondyloarthropathy"@88. Hislop J held P to be **35% of a most extreme case awarding $165,500 for NEL** among other heads.

Nervous shock

See Nervous shock

Pain disorder

In *Nair-Smith v Perisher Blue* 7/6/13 [2013] NSWSC 727 P, in an accident whilst boarding a chair lift, "suffered a **significant soft tissue injury to her lumbar spine** … Over time she has **developed a pain disorder** … The effect of the soft tissue injury was to **aggravate a pre-existing level of discomfort in the lower lumbo-sacral region**. Her further deterioration over the last few years is a result of the combination of the effect of the accident and degenerative changes in the lumbosacral region, however the accident remains an operative cause of that deterioration" @311. Beech-Jones J assessed P at **25% of a most extreme case** entitling her to $34,775 in NEL damages under the CLA. Other heads awarded. In **further proceedings at** [2013] NSWSC 1463 Beech-Jones J found that this was a breach of contract claim not governed by Part 2 of the CLA and that the appropriate award of damages for **NEL at common law was $135,000**. Common law assessments also made for other heads.

Paraplegia

See general *Paraplegia* heading.

Pelvis

See *Cobcroft* above at Hip.

In *Krstin v Krstin t/as CID Electrical Services Welana Pty Ltd; Krstin v CID Electrical Services & Edge Healthclub Weston Pty Ltd* 10/9/12 [2012] ACTSC 145 P, an apprentice electrician, suffered two work injuries in 2002 (a metre board fell on him) and 2008 (tripping incident). P was 32 at trial. P suffered **pelvic fractures** in the 2002 incident and for "three weeks he was immobilised with a leather harness placed around his pelvis. He required assistance with all movement and total personal care. He spent a further week, with the assistance of a physiotherapist, regaining some mobility … He was discharged in a wheelchair and moved about using crutches for about four weeks before graduating to a walking stick. He was unable to walk without assistance until June 2003. He received ongoing physiotherapy" @66-67. P suffers ongoing discomfort in various pursuits he enjoys. P **injured his right foot and ankle** in the 2008 fall. **Three surgical procedures have decreased his related discomfort**. P faces a life time of pain in his right ankle and foot. Completion of his electrical apprenticeship was delayed by four years. Sidis AJ awarded $100,000 for NEL among other heads.

Personality change

See *Senton by his litigation guardian the Public Advocate of the Australian Capital Territory v Steen* 9/4/14 [2014] ACTSC 63 where P was struck by a car in NSW while crossing a road in 2004 when he was 63. As a result P suffered **severe traumatic brain injury**, **fractures** to right

fibula and patella, skull fractures, fractures to facial bones, tinnitus and a reduced sense of taste. He also has undergone a **significant change of personality** which includes cognitive impairment and impairment of memory. He is not the same person as he used to be and his relationship with his wife has been severely affected. He only thinks about himself and has little awareness of the concerns of others or of his own condition. His personality change impaired his earning capacity as a commercial traveller. Master Harper awarded P $240,000 in general damages among other heads.

Psych. (general)

See *Reed* at Dog attack

P, a bricklayer, was assaulted in September 2004 when he was 55 y.o. and suffered **soft tissue injuries to his ribs and a PTSD with major depressive disorder (moderate)**. His still suffers discomfort and his psychological problems should improve with treatment. After about 18 months P returned to full time work as a bricklayer, although he works at a slower pace. Common law award included General damages $40,000; PEL $17,427; FEL $15,000; Out of pocket expenses $1,569.95; Past voluntary care $4,158; Aggravated damages $10,000; Exemplary damages $10,000 *Van Der Poel v Hall & Ors* 26/3/09 [2009] NSWDC 50 Sidis DCJ. Appeal allowed and new trial ordered in *Hall v van der Poel* 24/12/09 [2009] NSWCA 436. Quantum not revised.

In *Gregory v State of NSW* 19/6/09 [2009] NSWSC 559 Fullerton J assessed damages in a difficult case involving a P who was 30 y.o. who suffered various psychological problems including **anxiety, depression, PTSD, agoraphobia and obsessive compulsive behaviour**. Such problems were linked to prolonged mistreatment, including bullying, which he received in his school years. P was well educated, had gone on to work as a teacher, but required a 'safe' working environment to exercise his work capacity. P awarded NEL of $247,500 and FLOEC of $196,378 among other heads.

In *Lee v Fairbrother* 10/7/09 [2009] NSWDC 192 Johnstone DCJ considered that **unprofessional conduct by a medical practitioner, namely having a sexual relationship with a client**, fell into the category of 'other sexual misconduct' in s3B(1)(a) of the Civil Liability Act 2002 (NSW). P's **obsessive compulsive disorder was temporarily aggravated**. P "has had a psychiatric condition, from which she has suffered since early 2005 to the present time. This has affected her general enjoyment of life and other amenities, and in particular has affected her ability to have meaningful social relationships, and she has an aversion to general practitioners which affects her ability to obtain appropriate medical advice for herself and her son. It is **difficult, however … to separate out the psychiatric components of her situation that can be attributed to the defendant's breach of his duty to her as a doctor and those that stem from other contributing factors** such as her pre-existing obsessive compulsive disorder, her drug-taking and what might neutrally be described as her fury over the failure of the relationship; likewise, any effects that may be affecting her as result of the two fires. … [T]he drug-induced psychosis for which she was treated at that institution was contributed to by the termination of the relationship with the defendant … [T]his was also of a temporary and short duration, and … there are no persisting consequences from the drug-induced psychosis"@68-73. P's susceptibility to psychiatric episodes was factored in. P awarded, among other heads, $30,000 at common law in general damages and $10,000 in **aggravated damages**.

See *Mason* at Dog attack

In *Mantzios v Mount Pritchard District & Community Club* Ltd 30/4/10 [2010] NSWDC 70 Bozic SC DCJ awarded P, a 28 y.o. (23 when assaulted), $80,000 in general damages, $10,000 in aggravated damages, and **$25,000 in exemplary damages**, among other heads, for his **broken nose** and **anxiety disorder** resulting from being assaulted. P's memory, moods, and social life affected. P back to work.

In *Drazina v De Martin & Gasparini P/L* 4/3/10 [2010] NSWDC 26 Murrell SC DCJ considered A to be **28% of a most extreme case**. A was a 53 y.o. concreter who suffered injuries in a 2005 work incident including a "Closed head injury and postconcussion syndrome … [which] causes

significant ongoing impairment … **Cognitive disorder and chronic adjustment disorder with depressed and anxious mood**. … [S]ubstantial improvement is unlikely. The condition is impacting on the plaintiff's perception of his physical disabilities … Pre-existing degenerative changes in the cervical spine were rendered symptomatic … causing tenderness in the cervical spine and some symptoms in the right arm. But for the accident, the symptoms would have emerged gradually over the years. The condition is permanent. … [O]nce litigation has concluded, the plaintiff will probably focus less on his physical problems and he will be less disabled by a subjective experience of pain … Right shoulder pain and some limitation of movement. The condition is permanent, but once litigation has concluded the plaintiff will probably focus less on this problem and he will be less disabled by a subjective experience of pain and restricted movement"@39.

See *Kuehne* at NSW CLA s44 and Dog attack

In *Sneddon v The Speaker of the Legislative Assembly* 2/6/11 [2011] NSWSC 508 Price J found that P "**suffered Major Depression, Panic Disorder with Agoraphobia and Generalised Anxiety Disorder**. … [T]he third defendant's bullying and harassment [between 1999 and 2008 while she worked in his electoral office] was a necessary condition of the occurrence of her psychiatric injury: s 5D(1)(a) CLA. … [I]t is appropriate for the scope of the Member for Swansea's liability to extend to the psychiatric injury: s 5D(1)(b) CLA. … [T]he first defendant's [Speaker's] negligence (see [202] above) exacerbated the psychiatric injury and materially contributed to the harm that the plaintiff ultimately suffered" @259-260. "[T]he plaintiff's claim for the first defendant's negligence is confined to past and future economic loss, loss of superannuation, a component for *Fox v Wood* and interest on past loss of income. As against the second and third defendants, damages are to be assessed in accordance with the provisions of Part 2 CLA" @264. "Amongst the matters that bear upon the assessment of non-economic loss are; the plaintiff's hospitalisation for about a month in 2007 and that she **has not fully recovered after some five years of illness**. She is 54 years old. However, her **recovery has been substantial and full recovery is, on the balance of probabilities, not too far away**. …I assess the severity of her non-economic loss to be **16 per cent of a most extreme case** and award damages in the sum of $7,500.00 under this head" @270. Other heads of damages also awarded. **Appeal allowed** in some respects in *Sneddon v State of NSW* 1/11/12 [2012] NSWCA 351, but P's assessment at 16% of a most extreme case affirmed.

In *Allen v State of NSW* 22/8/12 [2012] NSWDC 119 Levy SC DCJ made a **notional assessment** in a case where P was allegedly assaulted by three police officers in 2008 when he was 36. P was self-employed in a gyprocking partnership business. P has "significant mental health symptoms comprising **depression spectrum and anxiety symptoms which overpowered the plaintiff's underlying resilience**, despite his history of drinking, and which has caused the plaintiff to fail to make a proper psychological adaptation to the stressor (being the alleged assaults) … [P has a] sense of bewilderment as to his perception of the assaults. It was argued that this was either the last event in the causal chain which operated to create in him a state of inability to cope with life, or as a result of a gradual chipping away of his reserves (the perceived assaults being the significant determining events) leading to the same result. Either way, the plaintiff's existence has changed from being a person who could cope with his life, in terms of work, and some form of social life, albeit involving drinking alcohol to excess on weekends, to being a person his mother has aptly described as being **an adult child who needs looking after with regard to his day-to-day needs, compared to a more independent existence beforehand** … [P has an] inability to cope with work and the essential self-care demands of day-to-day life" @272-276. P **$80,000 general damages** assessed among other heads.

In *Young v State of New South Wales and Ors; Young v Young (No 2)* 11/4/13 [2013] NSWSC 330 P suffered **PTSD and depression**. She was transformed from a "gregarious, competent, independent businesswoman and hotel manager to a marginalised, depleted, dependent person who lacks confidence, self-esteem and the ability to earn any substantial income" @145. Adamson J was "satisfied that the plaintiff feels, understandably, that she has been deprived of her home, dignity and reputation by Mr Young's conduct towards her. To be required to disrobe and change in front of several police officers and to be banished, empty-handed, from the premises that had been not only her home and her workplace but also the

home and workplace of several members of her family and extended family for years was both devastating and humiliating. **The highly invasive and humiliating way in which her home was searched pursuant to the warrant was a direct result of the falsehoods Mr Young had fabricated**" @149. P's damages awarded as follows: **Malicious procurement of warrant** Compensatory damages - pain and suffering, including interest $50,000 Aggravated damages $20,000 Exemplary damages $25,000 **Malicious prosecution** Compensatory damages - pain and suffering, including interest $25,000 - discrepancy between costs recovered from the police informant and costs incurred to be calculated Aggravated damages $20,000 Exemplary damages $25,000.

In *Rasmussen v South Western Sydney Local Health District* 29/5/13 [2013] NSWSC 656 P, who worked successfully as a restaurant manager, suffered an **anxiety disorder and pathological grief reaction because of post-traumatic stress as a result of the death of her first born baby days after his birth**. D admitted negligence. P has gone on to have two more children and has been able to work part time and complete a degree. Nevertheless, she has not been the same outgoing, confident and very competent person she once was. "The joy that might usually accompany childbirth has been tainted by grief at the loss of her first-born. Her enthusiasm for work is tempered by her concern about whether she is performing to standard, her fear of losing her job and her anxiety about her children who are cared for by others while she is working" @53-54. P "remains vulnerable to stressors, particularly those associated with childbirth and children. She will remain prone to anxiety and emotional lability whenever she encounters boys who would, had Kaden survived, have been his contemporaries. P assessed at **40% of a most extreme case**. Adamson J awarded P $214,000 for NEL among other heads.

PTSD

In *State of NSW v Burton* 27/11/08 [2008] NSWCA 319 the Court of Appeal assessed damages for loss of chance of a 'better outcome' (the meaning of which discussed) in the case of a **policeman who was subjected to a traumatic incident**, but **did not receive appropriate counselling or psychiatric treatment as soon as he should have**. He developed a post traumatic stress disorder and left the police force to later become a baggage handler. The court noted how the chance of a better outcome was highly speculative, but nevertheless attempted to calculate such. Loss of chance assessed at 20%.

In *'H' v State of New South Wales* 28/8/09 [2009] NSWDC 193 Levy SC DCJ assessed damages in the case of a P who had a PTSD due to being **assaulted at school when he was 16 y.o. by young Asian men**. P had a **serious phobia toward Asians** and chose to live in Dubai to limit his exposure to them. Levy SC DCJ stated that the "[P's] injury, his remaining entrenched PTSD with his ever-present **vulnerability to decompensation and depression**, the cosmetic defect of his scarring, albeit relatively minor and kept covered, and his ever-present **hyper-vigilance** all combine to **seriously affect his ability to lead a normal life**"@420. "It is difficult to envisage how the [P] could continue to cope with work long-term when he continues to maintain hyper-vigilance, hyper-arousal and finds himself in scenarios where, as he described it, he was '*caught*' and '*stuck*' when he encountered Asian people and where his reaction triggered **flashbacks** of the assault, brought on **shaking and frequent nightmares that took days to get over**, and for which there was no curative treatment. The prospect of vulnerability to recurrent episodes of disabling psychological illness does not auger well for an ongoing unimpaired future earning capacity"@473. P assessed at **45% of a most extreme case** and awarded NEL of $202,500 among other heads of damage.

As a result of being assaulted by security at a nightclub P suffered and suffers a **depressed fracture of the zygomatic arch, ongoing headaches and a PTSD**. P's psychiatrist, whose evidence was accepted, stated that P was "suffering from [PTSD], in that he had symptoms of heightened arousal, intrusive symptoms and avoidance symptoms. They had disrupted every facet of his life in a negative way, although the symptoms had begun to decrease in intensity and frequency. At that point he thought the prognosis was good in the long term, but in his last report … he said that the plaintiff was still suffering from [PTSD], that although those symptoms were of less frequency, intensity and duration, they were clearly chronic and had led to a permanent change in Mr Smith's psyche and his experience of life" @70. P awarded **$80,000 in general damages** and $15,000 for damages as of right and for **invasion of privacy**.

"Having regard to the evidence that the first defendant did not train the security guards to do their jobs properly, having regard to the way in which this incident occurred, … having regard to the way in which the injuries were inflicted on the plaintiff and more importantly than all of those things, having particular regard to the nightclub's failure to do anything after the event, to inquire into the health of the plaintiff, to do something to discipline Mr Blaikie and be content to let things run their course without properly investigating the matter, and to take no steps in my opinion of an adequate nature to ensure that these sort of things would not occur at the first defendant's premises again … the first defendant needs to be punished for those matters by an award of **exemplary damages** in order to deter it from letting these sort of things occur again" @76. $15,000 awarded. *Smith v Cheeky Monkeys Restaurant* 18/8/09 [2009] NSWDC 257 Rolfe DCJ

In *Matthews v Dent & Anor* 7/5/10 [2010] NSWDC 68 Levy SC DCJ found that P, a 57 y.o., "suffered **soft tissue whiplash injuries to her neck and her back** [in motor accident when she was 52]. The effect of these injuries has been to aggravate underlying degenerative changes to render her neck and her back symptomatic. This has affected a number of levels in her cervical and lumbar spines where she has been shown to have **disc bulges and disc protrusions**. She experiences pain, discomfort and restriction of movement, she has reduced sitting, standing and walking tolerance. She has difficulty lifting carrying and bending and she is restricted in her physical capacities, including for domestic and employment activities. … [P's] physical problems fall into the category of long-term impairment following soft tissue injuries … [T]he prognosis for the plaintiff is for ongoing physical symptoms in her neck, her back and in her left shoulder in the foreseeable future"@218-219. P has a **PTSD, dysthymic disorder, and chronic depression**. P awarded $140,000 for NEL among other heads.

In *Doherty v State of NSW* 20/5/10 [2010] NSWSC 450 Price J assessed damages in the case of a **crime scene investigator** who ceased work in 2005, when he was 42 y.o. due to **PTSD and a major depressive disorder**. P had returned to work not having fully recovered from depression. D did not handle his return appropriately and should not have exposed him to crime scenes. P also showed contributory negligence to the extent of 35%. P's condition may improve, but P not likely to return to police work, or any other work for more than eight hours a week. P assessed at **37% of a most extreme case** and awarded $175,000 in general damages among other heads. **Appeal and cross appeal** in *State of NSW v Doherty* 5/8/11 [2011] NSWCA 225 dismissed except for COA finding it appropriate to increase the discount for vicissitudes to 30 percent.

In *Shaw v McGee* 7/10/11 [2011] NSWDC 155 a caravan park owner was found to be in breach of his duty of care as occupier of the park and hence liable for sexual assaults, indecent conduct and sexual harassment by his caretaker on P. P had a **history of being assaulted or abused sexually**. Her partner also so mistreated her in the closed period for which this assessment related. P's **PTSD was exacerbated and she suffered a major depressive disorder**. **Closed period** claim for about two years. P's case found to be **20% of a most extreme case**. P awarded $18,200 for NEL among other heads. Elkaim SC DCJ took "into account the severity of psychiatric injury being imposed on an already distressed person and that a good deal of the pain and suffering was caused on an ongoing basis. The defendant's failure to rein in Mr McGee was not a once only event. It continued over a number of months during which the effect on the plaintiff would no doubt have intensified. In addition … although in remission, the plaintiff's symptoms … may re-emerge either in their own right or in the creation of yet further vulnerability to future assaults on her mental state" @155.

See *Simon & Anor v Hunter & New England Local Health District. McKenna v Hunter & New England Local Health District* 2/3/12 [2012] NSWDC 19 where Elkaim SC DCJ **assessed the two sisters and the mother of the deceased (Mr Rose) each at 26% of a most extreme case** which would have entitled them each to $41,500 for NEL among other heads had their claim succeeded. **Mr Rose was killed by a psychiatric patient** he was driving to Victoria. The patient should not have been released.

In *Thornton v Wollongdilly Mobile Engineering* 7/6/12 [2012] NSWSC 621 the P when he was 17 **witnessed a co-worker being burned to death** in 2007. P developed PTSD and has suffered panic attacks. For two years he was very messed up. Adamson J stated that P

"suffered a serious and traumatic event, which affected his life significantly, at least in the couple of years following it. It will continue to affect his life because of its undoubted trauma and the plaintiff's relative youth at the time of the accident. Nonetheless there has been a significant recovery, although residual symptoms persist" @80. P assessed at **25% of a most extreme case** and awarded $34,000 in general damages among other heads.

See *Gangi v Boral Resources (NSW) Pty Limited (No 2)* 17/5/13 [2013] NSWSC 569 where **P suffered a PTSD and soft tissue injuries in 2007 when a concrete batching plant collapsed**. "The collapse was catastrophic. It resulted in the bins which were carrying hundreds of tonnes of sand and aggregate high above Mr Gangi's truck collapsing onto the ground and the back of the truck" @41. P is tense, withdrawn, suffers mood swings and participates less in family, recreational and domestic activities. Schmidt J assessed P at **20% of a most extreme case**. Appeal dismissed and cross appeal re costs partly allowed 28/8/14 in [2014] NSWCA 287.

See *Hall v State of New South Wales (Department of Corrective Services). Hall v State of New South Wales (Department of Education and Communities)* 21/5/13 [2013] NSWSC 66 where **P was teaching in a correctional centre when a fight broke out between high security inmates**. But for an **unreasonable delay in responding of about 30 seconds by security officers**, P would not have suffered a PTSD. Elkaim SC DCJ stated that "the plaintiff's life has been significantly affected, … she has been unable to work and she spends most of her time in a depressed mood without the motivation to carry out even basic tasks. On the other hand she is not entirely without a sense of humour, she is able to travel, to go out and to interact with her children. She is having intensive treatment but she has not been hospitalised nor is there a suggestion of that occurring in the future. In my view **25% of a most extreme case** is appropriate" @113. P awarded $35,000 for NEL, among other heads.

In *Perry & Bell v Australian Rail Track Corporation Ltd & Ors* 7/6/13 [2013] NSWSC 714 P1, in 2006 when he was 47 and working as a train driver, suffered PTSD when the **train he was co-driving collided with a truck**. He has suffered "**depression, night sweats, flashbacks, insomnia and an upset metabolism**" @266. He already had depression due to previous train accidents. P1 is permanently unfit to work as a train driver, but has worked in other fields. This has not been without difficulty. P1's injuries "are very significant. He has suffered from them for over eight years, and is likely to be permanently affected by them. They have been disruptive of almost all aspects of his daily life" @279. P1 assessed at **50% of a most extreme case** which amounts to $267,500 for NEL under CLA. Other heads awarded.

In *Perry & Bell v Australian Rail Track Corporation Ltd & Ors* 7/6/13 [2013] NSWSC 714 P2, in 2006 when he was 47 and working as a train driver, suffered a major psychiatric injury and a **significant orthopaedic injury to his back** when the **train he was driving collided with a truck**. P2 suffers from **depression** and a **PTSD** which interferes with his sleep and causes him to see ghosts, talk to them and sleepwalk. He is unlikely to work again. Previously, as a train driver he had witnessed several suicides, and this incident is the straw that broke the camel's back in terms of his mental state. P has been suicidal at times. Campbell J assessed P2 at **53% of a most extreme case**, which amounted to $283,500 for NEL, among other heads.

See *Turano v Bartlett* 16/4/14 [2014] NSWDC 32 where P, when he was 43 (now 50), was involved in a terrifying head-on collision with a runaway box trailer. P suffered a "blow and abrasion to the forehead from the steering wheel; Musculo-ligamentous injuries to the cervical spine, the base of the neck, shoulders and lumbar spine; Fractured left sided 7th, 8th and 9th ribs with associated bruising to the chest wall; Injury to the left shin and ankle; Injury to the toes" @283. P's "**ongoing physical complaints principally relate to pain in his neck, his upper back, and to his shoulders**, the left shoulder being more problematic for him than the right. To a lesser extent, he also has pain in his lower back. The fact that these problems have been characterised as being of a soft tissue nature, does not diminish the pain experienced by the plaintiff in those areas" @286. This has rendered him unfit for manual work, but **the physical effects are overshadowed by chronic post-traumatic stress disorder and major depression**." @289. P's PTSD is unlikely to recede or resolve. P

experiences anxiety, flash backs, nightmares, difficulty sleeping, suicidal thoughts. He isolates himself, cries for no apparent reason and his wife left him due to his post-accident change in personality. He has difficulty communicating, concentrating and lacks motivation. Levy SC DCJ awarded P $225,000 for NEL among other heads.

Quadriplegia

See general heading Quadriplegia (recent awards)

Ribs

P, a bricklayer, was assaulted in September 2004 when he was 55 y.o. and suffered **soft tissue injuries to his ribs and a PTSD with major depressive disorder (moderate)**. His still suffers discomfort and his psychological problems should improve with treatment. After about 18 months P returned to full time work as a bricklayer, although he works at a slower pace. Common law award included General damages $40,000; PEL $17,427; FEL $15,000; Out of pocket expenses $1,569.95; Past voluntary care $4,158; Aggravated damages $10,000; Exemplary damages $10,000 *Van Der Poel v Hall & Ors* 26/3/09 [2009] NSWDC 50 Sidis DCJ. Appeal allowed and new trial ordered in *Hall v van der Poel* 24/12/09 [2009] NSWCA 436. Quantum not revised.

Scarring

In *Logan as tutor for Logan v Logan* 21/5/10 [2010] NSWDC 128 P, a **four year old** (11 at trial), suffered a **facial laceration in a MVA which "extended from her right lower lip, down her chin and cheek and into her upper neck**" @3. P is "left with substantial facial scarring and she has developed a psychiatric disorder with a physical manifestation through **encopresis** at times of stress" @7. Her **psychological issues are significant** and include anxiety and PTSD. Also "the laceration damaged nerves in … the plaintiff's face, so that there is an element of **palsy** in the right side of her lower lip. The result is that the plaintiff's smile is uneven, she is prone to drooling and to collection of food in this area" @12. P also slurs her speech when she is tired, despite having therapy. P's scar is prominent. It may improve with further treatment, but there's no guarantee it will. Sidis DCJ awarded, among other heads, $200,000 for NEL.

See *Tocker v Moran* 14/12/12 [2013] NSWSC 248 where **P, in 2009, was at a party and dancing around a bonfire. He tripped and fell into the fire and suffered burns**. He broke his fall with his hands. P was 19. P "complained of a great deal of embarrassment in relation to the pigmentary change involving the donor site of his left thigh, and also the **pigmentary change of the lower aspect of his left forearm and the dorsum of his left hand**. That change was subject to comment by members of the public in his subsequent employment in bar work. He has **occasional numbness** in the area. … There was also **contracture of the first web space of the left hand and a contracture of the volar aspect of the fourth web space of the left hand**. … [P] had residual disability, particularly in relation to impairment by way of scarring and split skin grafts. He had permanent impairment as a result of the scarring and as a result of the contracture, particularly of the first web space … Having regard to the severity of the plaintiff's injuries, the **significant scarring** suffered by him, the **extreme pain and suffering undergone by the plaintiff during his hospitalisation and subsequent treatment** for his burns and the significant impact his injury has had on his life's activities, … [Mahony SC DCJ found] … **30% of a most extreme case** … appropriate" @57-59. This would have attracted NEL damages of $123,000 if liability had been established.

See *Thompson v Cross* 13/3/14 [2014] NSWDC 8. When P was 20 months old, her grandmother negligently left her near a kettle with boiling water, and after tugging on the cord P suffered "**keloid scarring around the right nipple**. There was **an area of burns measuring about 10cm by 6cm below the *'shorts line on the anterior aspect of the thigh'***. There was another area of **scarring on the right arm *"'both above and below the elbow, with again two small areas of keloid scarring'***. There was also some ***'minor depigmentation'* on the left foot**. He envisaged further surgery some time in the future" @44. In assessing NEL Elkaim SC DCJ stated: "I have taken into account the significant pain that the plaintiff must have endured after the accident but at the same time the relatively small amounts of pain that have accompanied the scarring. I think the scarring to the right breast is significant and has had a large effect on the plaintiff's life and, notably, the early upbringing of her children. I think the areas of depigmentation have also had an effect especially as sources of **embarrassment** to

the plaintiff. The effects of the injury are permanent. The **deformed right nipple is obviously influencing the plaintiff's perception of her capacity to form a new relationship**. The **inability to breastfeed** may well be relevant in the future if the plaintiff has more children" @54-55. P assessed at **28% of a most extreme case** and awarded $77,000 for NEL, among other heads, including $10,000 for future surgery.

Scalp

In *O'Toole v Temelkovska* 20/6/12 [2012] NSWDC 88 Levy SC DCJ assessed P at 25% of a most extreme case and awarded her $34,000 in general damages among other heads. "On 16 October 2009, when the plaintiff was aged 12 years, she attended the defendant's hairdressing salon for the purpose of having coloured streaks applied to her hair. She had chemicals and aluminium foils applied to her wet hair and she was then seated under a heat lamp" @4. P suffered a **full thickness burn to her scalp at the crown of her head**. It was a traumatic experience for her and she has endured much treatment, embarassment and loss of confidence. She will continue to experience daily inconvenience and discomfort in grooming and psychological discomfort. Her scar will be permanently alopecic.

Shoulder

In *Ali v Holdmark Developers* 27/4/09 [2009] NSWDC 75 Murrell SC DCJ assessed the P at **20% of the most extreme case**. P fell to the ground at a shopping centre causing her **soft tissue injury to her hip, knee and foot**. She experienced **pain from these for some months**. P also injured her left shoulder in the fall and "experiences **ongoing pain and restricted movement in the left shoulder**, although she exaggerated her symptoms. As she continues to experience pain after 3 years, it is likely that she will experience a low-level permanent disability in the left shoulder. There is a possibility of surgery to correct the tear. She is left-handed, and the pain means that her activities are significantly restricted. She takes pain-killing medication"@16.

In *Zreika v State of NSW* 6/5/09 [2009] NSWCA 99 Ipp JA did not consider that the A's shoulder injury and other injuries reached the 15% threshold of a most extreme case.

P **bookkeeper was 63 y.o.** (65 at trial) when she suffered a fall and injured her **neck and shoulders**. "[T]he difficulties this causes for her with perseverance with her work and difficulty managing physical household tasks represents a very significant detriment to … [her] enjoyment of the amenity of her life. She continues to suffer from the inconvenience of having to do stretching exercises ... She is restricted in her daily household, domestic and gardening activities and faces the prospect of a surgical procedure ... [She] will have that procedure in the very near future as … she has difficulty coping with her work due to pain. She will also face the prospect of a long convalescence from that procedure, of the order of 6 months"@70. P assessed at **31.5% of a most extreme case** and was awarded $126,000 for non-economic loss. P would have worked until she was at least 70 years old and was also awarded, among other heads, $189,220 for FLOEC. *Walker v Portmans* 22/5/09 [2009] NSWDC 46 Levy SC DCJ

In *Hodges v Coles Group Ltd* 4/6/09 [2009] NSWDC 189 Williams DCJ assessed a 40 y.o. truckdriver who suffered serious injury to his right shoulder which he dislocated in an unloading accident at **33% of a most extreme case**. P is unable to continue as a truck driver, but is able to do lighter work such as fitting out aluminium fishing boats. He has had further dislocations of the same shoulder. $148,500 awarded in general damages among other heads.

In *Taylor v Woolworths* 27/10/09 [2009] NSWDC 311 Sidis DCJ assessed the P, who was 58, at **28% of a most extreme case**. P suffered, in a fall, a **fracture in the greater tuberosity of her irght humerus**. It was a serious fracture requiring surgery and P has some restriction in movement above the shoulder and retains three screws in her right shoulder. She is unable to do the heavier aspects of housework.

In *Alzaway v CPT Custodian Pty Ltd* 30/10/09 [2009] NSWDC 304 Hungerford ADCJ assessed the P, who in a fall **aggravated for about three months her pre-existing back and shoulder problems**, at **8-10% of a most extreme case**. No award for NEL as threshold not met.

In *Basha v Vocational Capacity Centre Pty Ltd* 15/12/09 [2009] NSWCA 409 the COA increased the trial judge's assessment from 20% to **30% of a most extreme case (attracting an award of $103,500)**. The A's shoulder problems were significantly exacerbated by a rigourous vocational assessment which she was asked to undergo. The A was about 60 y.o. and her problems in both shoulders were settling down. After the assessment, however, she was left with **pain and restriction which will last the rest of her life**. A required a further shoulder operation. She will need ongoing help with the heavier aspects of her house and garden work.

In *Sijuk v Ilvariy P/L* 29/4/10 [2010] NSWSC 354 the 54 y.o. P fell from a scaffold in 2004 and "suffered physical injuries that culminated in significant physical and economic incapacity. The plaintiff has only pursued physically demanding occupations up to the time of the accident. The **left shoulder disability has clearly developed into a chronic condition and has prevented and will prevent him from returning to his pre-injury occupation and any other job requiring the use of the upper limbs to discharge work of a physical nature**. … [H]e has been and remains significantly disabled by his neck/left shoulder condition. … To his physical condition has been added the disabling effect of a **chronic depression** … [The] plaintiff has suffered with **significant pain and disability**, especially with his left neck/shoulder region ... The disabilities have been extensive enough to have impacted significantly on his personal life, in particular, in preventing him from performing the outdoor activities formerly undertaken by him around the house and limited his ability to be self-sufficient with regard to domestic chores" @264-268. Hall J found P to be **31% of a most extreme case** and awarded P $123,000 in general damages among other heads.

Johnstone DCJ in *Caldwell v Coles Supermarkets P/L* 11/6/10 [2010] NSWDC 136, where **P slipped on oil or grease on D's premises when 40 y.o.,** found that P had "an ongoing permanent disability of a moderate nature that nevertheless impacts negatively on his capacity for endeavours of a particularly physical nature involving the use of his left shoulder and arm both in his private life and at work, manifested in restricted movement, pain and reduced strength. This disability has permanently reduced his capacity to earn" @39. The "**fractured left humeral neck of the plaintiff's left shoulder** appeared to unite in a satisfactory position, with only minimal angulation" @29. Johnstone DCJ concluded that a "permanent shoulder injury of this kind that results in significant pain on a daily basis, aggravated by particular activities, with the prospect of a lifetime of discomfort and restricted movement, is … a serious disability. The plaintiff does obtain relief from medication .... Nevertheless this man is restricted in various social and sporting pursuits - he can no longer swim overarm, an activity he enjoyed before the accident, nor can he play golf any more. He cannot engage in lifting or swinging his children. Emotionally he is adversely affected, and his wife has noted a marked change in his personality. She has also observed that he has developed a drooped posture. There has been a significant adverse impact on his family life" @67. P **30% of a most extreme case** and awarded $109,000 for NEL among other heads.

In *Marshbaum v Loose Fit Pty Ltd & Anor* 11/10/10 [2010] NSWSC 1130 Hoeben J considered a case where a 60 y.o **P was injured descending stairs** in 2006. "Following her fall, the plaintiff was in considerable pain. Not only did she have pain in the left shoulder and arm, her face was bruised and her left leg was painful. … X-rays taken … showed that the **humeral head fracture was comminuted with inferior dislocation**. The fracture line extended through the articular surface of the humeral head. A superior displacement of the greater tuberosity fragment was also noted on CT scans" @103. **While … the plaintiff had very considerable difficulties with her left arm and shoulder in the 15 months following her fall until the final operation in February 2008, it seems to me that she has made a reasonable recovery**. The **regional pain syndrome** affecting her left arm has substantially resolved and except for the interference with her sleep, the pain in her left arm and shoulder has also resolved. What she has been left with is the inconvenience and irritation of having to depend upon others to provide assistance for her where heavy or awkward use of the left arm and shoulder is involved. She will have to put up with that inconvenience and irritation for the rest of her life" @139. P assessed at **32% of a most extreme case** and awarded $142,000 for NEL, among other heads. **Appeal re liability against P dismissed, but appeal against owners allowed** in *Loose Fit Pty Ltd & Anor v Marshbaum* 30/11/11 [2011] NSWCA 372. Found to be

just and equitable that Loose Fit recover from the Owners a contribution of 50 per cent of the damages payable to the Plaintiff.

In *James v Whiteman* 21/11/11 [2011] NSWDC 178 P suffered a **fracture of the proximal portion of the right humerus at the right shoulder joint; a fracture of the nose; possible soft tissue injury to the cervical spine; and a possible closed head injury**, with transient loss of consciousness when he was struck at high speed by a cyclist in 2009. "The plaintiff was a hardworking man whose life was clearly dominated by his work and by his family. The former has effectively been taken away from him. He may well, after much studying, obtain some literary skills. They are unlikely to assist him in finding stable employment. The plaintiff has endured a good deal of treatment, including surgery, and more treatment will be needed probably for the rest of the plaintiff's life. His right arm is not useless but it is severely limited in its capability. The plaintiff is in constant pain and relies on medication to help him sleep and to dull the ache during the day" @68-69. Elkaim SC DCJ assessed P at **30% of a most extreme case** and awarded him $119,500 in general damages among other heads. P is 49 and would have continued working as a boner or some similar occupation until he was 65.

In *Howarth v Spotless Group Limited and Ors* 23/3/12 [2012] NSWDC 25 P, a 43 y.o. cleaner (now 48), slipped on a greasy floor at work and injured his **left elbow and shoulder**. P's "left shoulder had settled but the symptoms it produced were not entirely resolved. The plaintiff complained of ongoing pain, particularly if his left arm was elevated. He said that at times the shoulder became inflamed and he needed to take pain killing medication" @119. P's "main concern was his left elbow. … [I]n spite of the multiple surgical interventions, he continued to suffer symptoms … [T]he elbow locked from time to time causing him increased pain, there was nerve involvement that caused tingling and numbness in his fingers and the range of movement of his arm was reduced. The elbow was painful and the pain was worse after repetitive movement or use of equipment that vibrated, such as power tools or a lawn mower" @120. P "suffered from moderate to severe pain, restrictions on the range of movement of his left elbow and sleep disturbance. He relied on pain killing medication and cortisone injections and physiotherapy at six weekly intervals. … [E]lbow replacement surgery might be required in future" @126. P's diagnosis included "**Acromioclavicular joint dislocation at the left shoulder … Permanent and significant aggravation of pre-existing osteoarthritis at the left elbow resulting in multiple operative procedures including one by myself … [and] Dysaethesia and neuropraxia affecting the sensory branch of the radial nerve below the elbow** as a result of his surgical intervention" @128. Sidis DCJ assessed P at **33% of a most extreme case** and awarded NEL or $171,500 among other heads. **Appeal allowed in part** 8/11/13 in *Berkeley Challenge Pty Ltd v Howarth* [2013] NSWCA 370 but NEL award confirmed.

In *Maric v The Nominal Defendant* 16/5/12 [2012] NSWDC 69 P in 2007, when he was 37, suffered in a motorcycle accident a "**complete acromioclavicular joint dislocation of the right shoulder … [and a] flake evulsion fracture over the dorsum of the left wrist Triquetrum**" @63. These injuries will likely affect P permanently and restrict him in his work, particularly as a carpet layer. P assessed to have a 20% whole person impairment. P had pre-existing depression, but this was exacerbated. Elkaim SC DCJ assessed (liability not established) P's general damages to be $150,000, among other heads. Appeal dismissed 26/6/13 in [2013] NSWCA 190. The primary judge had not erred in not concluding that the accident happened on a 'road'. However, the trial judge did err by finding Mr Morrissey negligent, and that therefore A was contributorily negligent.

In *Langendoen v Coolangatta Estate Pty Ltd* 9/11/12 [2012] NSWDC 210 Elkaim SC DCJ assessed P at **28% [of a most extreme case]** principally because of the dramatic effect the injury has had on the appearance of the plaintiff's shoulders [her **right shoulder is significantly lower than her left**]. This is a deformity with which the plaintiff will have to live for the remainder of her life together with the effects of the **non-union of her fracture and the associated instability and pain** of a most extreme case" @54. P fell from a wall in 2008 when she was 49. P is limited in doing heavier domestic duties, lifting and in raising her right arm above chest height. P's NEL assessed at $75,000 and other heads of damage awarded.

In *Stock v Johnston* 15/8/12 [2012] NSWDC 212 a pedestrian (P), a high school administration officer, was hit in 2008 when she was 34. P suffered a "**fractured neck of humerus and rupture of the transverse ligament with a lateral and anterior subluxation of the long head the biceps tendon**" @79. P was also diagnosed with "**chronic vertigo** with almost **complete loss of sense of smell** and decreased range of movement of the right shoulder and neck pain and he assessed 16% whole person impairment" @79. P suffers from "ongoing **soft tissue damage to the plaintiff's cervical spine**, which causes, inter alia, cervical pain and also an occipital headache. There clearly is permanent damage to the plaintiff's right shoulder. She is right hand dominant and clearly, it causes her ongoing problems" @88. P has a combined permanent impairment of 11%. General damages not limited by CLA. P awarded **$150,000 for NEL** among other heads.

In *Fullin v WR & EM Kennedy Nominees Pty Limited t/as Franbridge Distributors* 24/5/13 [2013] NSWDC 70 P fell in a shop in 2011 when he was about 73 and retired. Scans revealed "**Acromioclavicular joint degeneration and acromial spurring. Supraspinatus tendon tear. Partial tear of the superolateral insertional fibres of subscapularis. Long head of biceps tendon tear**. Features suggest a distant Hill Sachs fracture" @28. P underwent a arthroscopic rotator cuff repair and physiotherapy. "Dr Harvey's [accepted] diagnosis was that the tendon tears could have been caused by the fall. He found that the plaintiff *'has been left with some loss of movement in the right shoulder which is likely to persist. He still has residual pain in the shoulder but one would expect this to gradually become less with time'*. He thought that the fall had been *'largely responsible for the restriction in shoulder movement and the pain that he is experiencing'*. Dr Harvey thought that the plaintiff's condition was static and that *'it is unlikely that he is going to regain much further movement in the right shoulder'*. He did, however, envisage a decrease in pain over time" @38. The fall was responsible for 75% of P's physical problems. P's ability to carry out some of his pre-accident activities has been interfered with and he will suffer loss of enjoyment of his retirement years. P assessed at **25% of a most extreme case** and was awarded $35,000 in general damages among other heads.

See *Selby v Bankstown City Council* 7/6/13 [2013] NSWDC 84 where Levy SC DCJ did not find the Council liable where P, aged 72 in 2009, **tripped over a raised paving block (3mm) on a footpath**. "As a result of the fall, the plaintiff fell onto her right shoulder, and then onto both knees. In those events she also hurt her nose, one of her cheeks … and her hands when she tried to break her fall. After the fall, she found herself on her hands and knees on the ground. She experienced immediate pain and swelling of the right shoulder with associated restriction of movement of that shoulder" @8. P's "knee, face and head injuries had cleared up not long after the accident, however, she has been left with persisting problems with her right shoulder. The **plaintiff now cannot raise her right arm high enough to do her hair. She experiences a clicking sensation in the shoulder. She has pain and restriction in the movement of the shoulder**. After carrying out extremes of shoulder movement, she experiences pain that can last for weeks. She cannot do her knitting any more, she has problems writing letters, and she is no longer able to hold heavier items such as a dinner set. She feels she has been left with about 30 per cent of the previous strength she had in her right arm. The plaintiff finds it difficult to use public transport because of her apprehension of the risk of being bumped and this has reduced her social outings, including attending the matches of her favourite football team. She cannot do her former housework. She has difficulty carrying her shopping. All of these matters have taken an emotional toll upon her. As a result of her injuries the plaintiff has suffered recurrent nightmares. She has also suffered difficulty sleeping because she finds she must assume a posture to avoid sleeping on her right side. She suffers from tearfulness and irritability due to her disabilities" @33-36. P notionally assessed at **28% of a most extreme case** which amounted to $75,000 for NEL. [D]ue allowance and proportion must … given to the plaintiff's advanced age: *Reece v Reece* [1994] NSWCA 259, at [5]- [10]" @105. Other heads assessed.

In *Carr v O'Donnell Griffin; Carr v Wagga Mini Mix and Pre-Cast Concrete Pty Limited* 27/6/13 [2013] NSWSC 840 P fell from bull dozer at work in 2007 when he was 43. "[A]s a result of the accident, the plaintiff experiences **constant pain in both shoulders, his lower back and left knee**. He cannot perform any activities where he has to reach above shoulder height, and it is also difficult to do any work where his arms have to remain outstretched from his body. He is unable to kneel or squat, and his pain increases if he bends, stoops or lifts anything. The pain

in his neck and shoulders is causing him to suffer headaches. The plaintiff has not been able to sleep well since the accident" @102. P "underwent surgery, namely a **left knee arthroscopy and left rotator cuff repair and acromioplasty**" @129. He no longer pursues his active lifestyle based around outdoor activities and hard work. His shoulder continues to pop out. P suffers an **adjustment disorder and chronic pain syndrome**. P **52% of a most extreme case** and awarded $278,200 for NEL, among other heads.

In *Liu v Jiang* 20/8/13 [2013] NSWDC 184 P was involved in a low impact car accident in 2008 when she was 44 and working as a retail assistant. P injured her **neck and left shoulder**, suffering a **near full-thickness tear of the supraspinatus tendon of her left shoulder**. P is right-handed. Her resultant adjustment disorder with depression and anxiety secondary to chronic pain will clear up within six months of the end of this litigation. P **will have pain for the rest of her life** "from her **C5-6 disc protrusion** and from the condition of her left shoulder. However, that pain might abate with time or become more tolerable" @82. It will limit her in her employment. Neilson DCJ assessed P's NEL under the MACA at $120,000, among other heads.

In *Veevers v Coleman* 25/10/13 [2013] NSWDC 210 P slipped on a steep driveway at work in 2010. Risk not found to be forseeable and liability was not established. Nevertheless, Elkaim SC DCJ assessed P at **25% of a most extreme case** where he "suffered a **significant injury to his shoulder which caused him considerable pain for some time, led to surgery and has left him with a degree of restricted movement** which affects both his social and working life" @75.

See *Fetu v Northern Iron and Brass Foundry Pty Ltd* 20/12/13 [2013] QDC 330 where the P in 2008, when he was 49, injured his shoulder at work whilst lifting. As a result P has **rotator cuff disease with a superimposed frozen shoulder and a moderate adjustment disorder**. Medical evidence confirmed that "any reported ongoing pain and/or physical disability at that time was more likely than not to be attributable to the underlying pre existing degenerative pathology or to other non organic factors and not as a result of any physical work related injury suffered" @155. From December 2010 "[a]ny ongoing physical disability could no longer be attributable to any work related injury suffered" @156. P's adjustment disorder no longer prevents him from working either. Twelve counselling sessions recommended. Ryrie J awarded P general damages of $35,000, among other heads.

In *Meimaropoulos v Cheum* 27/3/14 [2014] NSWDC 26 P when she was 68 in 2008, as a result of a fall when subject to a **dog attack**, suffered a **rotator cuff tear and some acromioclavicular joint arthritis**. The fall aggravated her degenerative rotator cuff. P underwent an arthroscope of her shoulder. "She has restriction in movement, particularly elevation at and above shoulder height" @89. P also suffered **damage to her trigeminal nerve**. Her consequential disabilities appear to be insignificant. Gibson DCJ assessed P at **22% of a most extreme case** and awarded her $25,000 for NEL among other heads.

See *Kay v Sydney Airport Corporation Limited* 6/6/14 [2014] NSWSC 744 where P, who was 36 at time of injury, sued "for negligence in respect of injuries [**right shoulder rotator cuff/capsular injury**] she sustained on 2 April 2006 when she hurt her shoulder while attempting to insert a connector into an aircraft socket to connect the aircraft to a Ground Power Unit … in the course of her employment as an **aircraft maintenance engineer**" @1. P returned to work on light duties until she had a shoulder operation in September 2006. P "had a second operation on 9 January 2008. After the operation she still had **difficulty rotating her shoulder and continued to suffer pain**. She returned to light duties on 5 April 2008. She was able to do several tasks in her former job but she was **not regarded as fit to reach up and open and close hatches above her head, change wheels or brakes, or connect aircraft to GPUs**. She could however chock aircraft and carry out light maintenance work, such as inspecting aircraft and signing off on maintenance work" @163. "On 10 March 2009 Ms Kay's employment was terminated. She was very disappointed as her career as an aircraft maintenance engineer had been very significant to her and she had dedicated the previous 21 years to it" @165. P is largely unhindered in her domestic activities. Her claims of depression were rejected. Adamson J assessed P at **30% of a most extreme case** an awarded NEL damages of $127,000 among other heads.

See *Dailhou v Kelly; State of NSW v Kelly (No 2)* 2/9/14 [2014] NSWSC 1207 where Adamson J discussed the obligations of a book shop owner to **safeguard customers from falling down stairs in his shop**. Liability not established. P, who was born in 1954, was a deputy principal and businessman. P fell down stairs in 2007 and "sustained an **undisplaced fracture of the humeral head of the shoulder with comminution involving fractures of the greater and lesser humeral head tuberosities**. Apart from a very minor anomaly of a peripheral part of the articular cartilage, the humeral head articular cartilage was intact … [T]he fracture to the right humeral head was not particularly severe and that there was no real evidence for the suspected avascular necrosis of the humeral head" @58-59. P also suffered a minor knee injury which has resolved. Subsequent incidents damaged P's shoulder further, but **70% of issues with shoulder attributable to fall**. Shoulder injury created "a need for domestic care of 1 1/2- 2 hours a week and for gardening of 1/2 an hour a week " @75. "His … shoulder has substantially healed but continues to trouble him (in part because of subsequent injuries) although he has a good range of movement. He underwent an operation to his shoulder in late 2009 … The fact that he was able to travel around the world on a business trip about six months after the fall is a powerful indication that its effects were substantially self-limiting, apart from the pain and difficulties with his shoulder" @73. P's sleeping is affected. P assessed at **25% of a most extreme case**.

See *Humphries* at Back

Spine (Multiple)

[See also Back and Neck]

In *Matthews v Dent & Anor* 7/5/10 [2010] NSWDC 68 Levy SC DCJ found that P, a 57 y.o., "suffered **soft tissue whiplash injuries to her neck and her back** [in motor accident when she was 52]. The effect of these injuries has been to aggravate underlying degenerative changes to render her neck and her back symptomatic. This has affected a number of levels in her cervical and lumbar spines where she has been shown to have **disc bulges and disc protrusions**. She experiences pain, discomfort and restriction of movement, she has reduced sitting, standing and walking tolerance. She has difficulty lifting carrying and bending and she is restricted in her physical capacities, including for domestic and employment activities. … [P's] physical problems fall into the category of long-term impairment following soft tissue injuries … [T]he prognosis for the plaintiff is for ongoing physical symptoms in her neck, her back and in her left shoulder in the foreseeable future"@218-219. P has a **PTSD, dysthymic disorder, and chronic depression**. P awarded $140,000 for NEL among other heads.

In *Seng v P & M Quality Smallgoods Pty Ltd & Anor* 18/11/11 [2011] NSWDC 175 P suffered "**shock, a chest injury and injury over the length of her spine, particularly to her back and neck, and related jolting of her shoulders** when she was crushed or ' *squashed* ' by the metal trolley [at work]" @146 - she "continues to suffer from neck pain with associated referred pain in her shoulder, and lower back pain, with related weakness in her legs, which significantly restricts her ability to carry out physical activity in both the work and domestic settings" @149 - P "has significant restrictions in her work, her domestic and leisure activities. She also suffers from resultant difficulties with sleep and emotional distress" @164 - Levy SC DCJ assessed P at **33% of a most extreme case** and awarded her $171,500 for NEL among other heads. **Appeal allowed** 12/6/13 in [2013] NSWCA 167. Trial judge should have found that P did not reach the 15% threshold for NEL and there should have been no award for economic loss. The medico-legal reports tendered by P were based on an unqualified acceptance of P's evidence.

See *Cobcroft* above at Hip.

In *Pettigrew v Wentworth Shire Council* 12/6/12 [2012] NSWSC 624 P, in a motor accident, suffered "**traumatic fractures of facets at C5/6 with right C6 radiculopathy. There were also wedged compression fractures of T3 and T4**" @134. "[T]he medical evidence … unanimous as to the **serious** nature of the **injuries suffered by the plaintiff to his neck and upper back and surrounding structures**. … All the doctors agree that continuous pain and restriction in his neck and upper back are reasonable. He will experience these disabilities for the rest of his life. Many activities which the population perform without thinking, he will have to

carry out cautiously or will be unable to perform them at all. He will be required to take strong painkillers with their inevitable side effects, for the rest of his life. His ability to engage in leisure activities involving competitive sport or even simple running has been substantially lost. He will always have problems sleeping and getting himself comfortable when in bed" @185. P cannot continue working as a motor mechanic. He is 44 and was 38 at the date of injury. P assessed at **40% of a most extreme case** and Hoeben JA awarded general damages of $208,000 among other heads.

Spleen

In *Addison v The Owner – Strata Plan No. 32680* 6/10/10 [2010] QDC 251 a 19 y.o. fell in a pit at night. P suffered a **ruptured spleen requiring a splenectomy, injury to his chest and ribs, other internal injuries and shock**. P has a very disfiguring scar on his abdomen. He has returned to full time employment and is otherwise fit and healthy with a good mental state. Gibson DCJ assessed P at 24% of a most extreme case and awarded **general damages of $26,000** among other heads.

Thumb

See *Quick* at general 'Dog attack' heading.

Wrist

In *Penrith Rugby League Club Ltd t/as Cardiff Panthers v Elliot* 18/8/09 [2009] NSWCA 247 the "respondent suffered [when she fell] **serious bilateral wrist fractures, with ongoing moderate levels of pain and discomfort and restriction in the range of her movements**"@11. She was assessed at 26% of a most extreme case and awarded NEL of $36,000 among other heads.

In *Clarence Valley Council v Macpherson* 22/12/11 [2011] NSWCA 422 P in 2008 "sustained a **severe twisting injury to his right wrist together with a fracture of the base of the fourth metacarpal** whilst using an auger drill bit powered by a chainsaw to drill holes in camphor laurel trees [at work as a labour hire worker]" @3. Surgery in 2010 brought about an 80-90% improvement and it "has **improved to the point where he is generally pain free unless he lifts a heavy object or jars his wrist or otherwise subjects it to some form of trauma**. True it is that he now cannot perform some of the social, domestic and recreational activities which he performed before the injury and that he suffers a degree of **depression** for which he takes anti-depressant medication as a consequence of his inability to fulfil the role which he performed for and on behalf of his family prior to the accident [and] … the overall prognosis is that he will develop degenerative changes in the wrist joint with associated pain, stiffness and decreased function" @82. COA replaced finding that R was 30% of a most extreme case with 25% which equated to **$33,800 in general damages**. Other heads also assessed.

In *Jackson v Mazzafero* 15/6/12 [2012] NSWCA 170 the COA confirmed decision re NEL, but allowed appeal in other respects. The A fractured her wrist when she fell in 2007 while visiting R's premises. She was a 57 y.o. nurse. She "suffered a **severely comminuted fracture of her left wrist which required internal and external fixation**. The fixators were removed in January 2008. Thereafter the appellant was diagnosed with reflex sympathetic dystrophy (regional pain syndrome) in relation to her left wrist. This condition produced changes in temperature and colour and pain. The condition gradually resolved" @10. Further surgery on wrist a real possibility. A became **anxious and depressed** and went on medication. By trial these psychological problems had resolved. The A returned to lighter duties in May 2008. Finding of **26% of a most extreme case** and $40,000 for NEL confirmed.

In *Williams v Landsdowne Partners Pty Ltd …* 19/7/13 [2013] NSWDC 154 P, who is 58, fell at a nightclub in 2009 and "sustained a **displaced mid shaft fracture of the left radius and ulna** with a grade 1 open wound … [P] underwent open reduction internal fixation that day. Her radius was stabilised with a six hole compression plate and the ulnar was stabilised with a seven hole compression plate. She remained **in a cast for six to seven weeks**" @74-75. P suffered a **serious break of her left wrist**. P's "left wrist injuries have exacerbated, accelerated or aggravated the carpal tunnel syndrome, through compensation for the left arm, to a very limited extent" @156. P "has **three scars** which she is self-conscious about and … she has **permanent weakening in her left hand**, pain, nerve irritability causing numbness and

changes in sensations in her left wrist and hand at a low level" @158. Knox SC DCJ assessed P at **25% of a most extreme case** ($35,000 in general damages) due to "the pain of the broken wrist, hospitalisation, surgery and recovery, together with the ongoing weakness, pain, altered sensations, discomfort, scarring and potential need for future operations to remove plates or to address the nerve damage" @168. Other heads also awarded.

In *Ridgeway v Narooma Sport and Game Fishing Club* 29/10/13 [2013] NSWDC 248 P, a nurse, "struck the right side of her body on … jetty [in February 2012] as she fell to her side and when she fell into the water she braced herself with her left hand and damaged her wrist when she fell through the water onto the sand or mud under the water. She **damaged her ribs**, which were possibly broken, suffered bruising down the right side of her body and a **fractured wrist** … She suffered very severe pain from these injuries and particularly up her left arm and across her left shoulder … She **has suffered pain in the wrist, left thumb, left arm and shoulder since the accident**. She has also suffered continuing pain around the ribs that she broke" @21-23. The **circumstances of P's fall were humiliating and so too her consequential bankruptcy and need to depend on others**. P "continues to suffer pain and feels her wrist is weak. The **arthritis in the thumb of her left hand has been worsened** by this accident and that will continue permanently. She can do all the work of a nurse but is anxious about her wrist and calls on others to assist her with the physical aspects of her job. She continues to get assistance of others and this is likely to continue" @36. P assessed at **28% of a most extreme case** and awarded NEL of $77,000, among other heads.

In *Pavlis v Wetherill Park Market Town* 27/5/13 [2013] NSWDC 331 **P, who was born in 1962, slipped in 2009 as she was approaching an ATM in wet conditions**. P "**fractured the distal radius; in fact, there were three fractures**. She was given a cast and a sling … She had further X-rays that showed a comminuted impacted fracture of the distal radius. It was placed in a cast which remained in place for about eight weeks " @11-12. Olsson SC DCJ "not satisfied the plaintiff is significantly disabled in the use of her right hand. It may be that she continues to have pain, numbness or pins and needles but that is a different matter from saying that it is not capable of being used" @53. P "required a lot of assistance, both personally and in household tasks, in the period between the fall and the time the cast was removed at the end of November 2009. … [S]he continued to have pain and tenderness after that and was referred for physiotherapy … [and] continued to need and continued to accept help from her family in personal household tasks for a period after that" @55. P assessed at 22% of a most extreme case, although liability not established.