LIABILITY OF GOVERNMENT AGENCIES TO INJURED GUEST WORKERS

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By

Doug Galbraith

The Clayton Utz contact for this document is
Doug Galbraith 02 6279 4000

Clayton Utz
Lawyers
Level 8 Canberra House
40 Marcus Clarke Street
CANBERRA ACT 2601

This paper is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from these programs.
Liability of Government Agencies to Injured Guest Workers

1. **Background**

   1.1 In the modern age it is becoming more and more common for workers performing the functions of an organisation to not be employees of that organisation.

   1.2 In particular it has become common for organisations including Government Agencies to enter into contracts with labour hire firms for the provision of workers to perform the functions of that Agency (e.g. IT staff from EDS or IBM, admin/secretarial staff from Drake or Wizard). Those workers are known as "Guest Workers".

   1.3 It is not uncommon for Guest Workers to be injured in the course of carrying out that work for the Agency and in such circumstances it is common for them to bring claims for damages against both the "Labour Hire Employer" and also the Agency (the "Host").

   1.4 In respect of such claims some "myths" have grown in certain quarters;

      - The first is that such Guest Workers cannot sue the Agency because the Agency is protected by the Safety, Rehabilitation and Compensation Act 1988 (the "Comcare Act"). That is incorrect as the Comcare Act only limits public servants from suing an Agency for damages for personal injury.

      - The second is that as the Agency is not the employer of the Guest Worker, it does not owe the worker any duty of care and therefore cannot be held liable to pay damages for any injuries suffered by that worker. That is also incorrect for reasons that I discuss below.

2. **General Principles of Liability to the injured persons (post tort reform)**

   2.1 Following the "insurance crisis" resulting from the collapse of HIH all States and Territories introduced legislation designed to make it harder for injured persons to obtain damages.

   2.2 That legislation however did not drastically affect the principles for determining liability (whether any damages should be paid) but in some jurisdictions they significantly reduced the quantum (amount) of damages payable.

   2.3 In order to succeed in obtaining damages for personal injury (or death) the plaintiff still needs to convince a court that the defendant owed him/her a duty of care, that duty of care was breached, and that breach led to loss by the plaintiff.

   2.4 The test for whether a person (or organisation) owes the injured plaintiff a duty of care has not dramatically altered in almost 100 years and all the State and Territory tort reform legislation contains essentially the same test for whether a duty of care is owed. That test being whether the defendant was in a position to "foresee" a "not insignificant" risk against which "reasonable precautions" should have been taken.

   2.5 In applying these tests for the existence of a duty of care the higher courts have generally adopted as the main factor the degree and nature of control exercised by the defendant over the risk of harm that eventuated.

   2.6 That legislation did enact some minor changes which, in my view, had largely been already implemented by the courts in order to impose more "personal responsibility" on plaintiffs. The main legislative changes were:
• plaintiff is presumed to be aware of obvious risks (most states)
• no duty to warn of obvious risks (most states)
• contributory negligence by the plaintiff of 100% can be found (some states)
• deceased's contributory negligence may reduce dependant's damages (most states)
• plaintiff cannot recover if injured while committing a serious offence (all states)
• no damages for pure mental harm unless a recognised psychiatric illness is shown (most states)

3. Liability of Employers to Employees

3.1 The above Tort reform legislation did not affect claims for damages bought by employees against their employers for injuries suffered during the course of work. It has long been recognised that, without a doubt, employers owe a duty of care to their employees of the highest order. That duty of care is to "take reasonable care to avoid exposing the employee to unnecessary risks of injury".

3.2 Further the duty of an employer to an employee is now accepted by the courts to be "non-delegable". That means that the employer will still owe a duty of care to the employee if it delegates to a third party all, or some aspects of, the employee's safety.

3.3 Where delegation is attempted, the duty of care is not however absolute (i.e strict liability). The duty remaining on the employer is to "ensure that reasonable care is taken by the delegate" (Burnie Port Authority v General Jones Pty Ltd (1994) 79 CLR 520; Davie v New Merton Board Mills Limited (1959) AC 604).

4. Liability of Hosts to Guest Workers

4.1 However the duty owed by a Host to a Guest Worker is not unarguable and whether it is owed will depend on the general principles discussed at part 2 above.

4.2 In applying those tests to the question of whether a duty of care is owed to such Guest Workers the courts are clearly focused on the extent to which the day to day work and workplace of the Guest Worker is under the control and supervision of the Host as against the Labour Hire Employer.

4.3 In general, where the Guest Worker's day to day work and workplace is under the direct control and supervision of the Host then the courts will find that a clear duty of care is owed and that duty of care is analogous to that of an employer (TNT Australia Pty Limited and Manpower Services (Aust) Pty Limited v Christie (2003) NSWCA 47).

4.4 Conversely, where the Guest Worker's day to day work and workplace is not under the direct control and supervision of the Host then the courts will sometimes find that a duty of care is not owed by the Host at all (Samsung Australia and Skilled Engineering v Macura [2005] NSWCA 386).

4.5 The results of the above principles are broadly:

• Government Agencies will be found to owe a high duty of care (analogous to that of an employer) to Guest Workers provided by Labour Hire Employers (e.g. IT contractors, secretarial support staff etc) who are engaged to work in the business of
the Agency, where their day to day work and workplace are under the direct control and supervision of Agency staff;

- Government Agencies will generally not be found to owe Guest Workers a duty of care if they have little or no control over the day to day work or work place of the Guest Worker.

5. Apportionment between Host and Labour Hire Employer

5.1 It is fair to say that in most cases a duty of care will be found to be owed by both the Government Agency and the Labour Hire Employer. However because the Agency will usually be found to have the day to day control and supervision of the plaintiff's system of work and place of work, in deciding who should bear the monetary responsibility for the loss, the courts will usually find that the greater share of liability should be born by the Agency with the usual apportionment being in the range of 60-80% to the Agency. Below is a table of fairly recent cases in various jurisdictions giving apportionments between the Host and the Labour Hire Employer which tends to confirm that range of apportionment as a rule of thumb.

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Apportionment</th>
<th>Facts</th>
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<tbody>
<tr>
<td><em>Boral Resources v Watt</em> [2005] NSWCA 191; BC200504144</td>
<td>60%</td>
<td>40%</td>
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<tr>
<td><em>Hoskstra v Residual Assco Industries</em> [2004] NSWCA 564; BC200404017</td>
<td>85%</td>
<td>15%</td>
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<tr>
<td><em>GLG Australia v Nominal Defendant</em> [2004] NSWCA 166; BC200403320</td>
<td>75%</td>
<td>25%</td>
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<tr>
<td><em>Stanley v Advantage Personnel Ltd</em> [2003] NSWSC 911; BC200305042</td>
<td>75%</td>
<td>25%</td>
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<tr>
<td><em>Clont Industrial Pty Ltd v Baiada Poultry Pty Ltd</em> [2004] NSWCA 89; BC200401882 Note: the apportionment was agreed between the parties</td>
<td>73% (agreed)</td>
<td>26.3% (agreed)</td>
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<tr>
<td><em>TNT Australia Pty Ltd v Christie</em> [2003] NSWCA 47; BC200301130</td>
<td>75%</td>
<td>25%</td>
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<tr>
<td><em>White v Valco Engineering Pty Ltd</em> [1999] NSWSC 1055; BC9907860</td>
<td>80%</td>
<td>20%</td>
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<tr>
<td><em>Grmek v Trivan Pty Ltd</em> (unreported, NSWCA, 19 April 1996)</td>
<td>90%</td>
<td>10%</td>
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</tbody>
</table>
6. **Can a Government Agency by contract with the Labour Hire Employer exclude its liability for damages to the Guest Worker**

6.1 As the contract providing for the services of the Guest Worker to the Agency is between the Agency and the Labour Hire Employer, there is nothing to prevent that contract containing a clause whereby the Labour Hire Employer indemnifies the Agency for any claims for damages bought by the Guest Worker for injury in performance of the work. Indeed one sometimes sees an indemnity clause along the lines of - "(Labour Hire Employer) indemnifies (Host Employer) against any claim, demand or action arising from any injury or illness suffered by (Guest Worker) in the course of the work undertaken by (Guest Worker) pursuant to this contract".

6.2 The authorities are however clearly to the effect that such a clause will be read down by a court as not assisting the party claiming the indemnity in the absence of clear and express words that the clause indemnifies the Agency even for liability arising from its own negligence. In a recent decision of the ACT Supreme Court, Master Harper undertook a thorough investigation of the authorities in the area and concluded "however, one can distil from them a general proposition that an indemnity clause will not generally be interpreted to permit a complete indemnity of a principal contractor where the principal contractor has itself been guilty of negligence grounding a direct liability to the plaintiff, in the absence of express words" (*Johnson v Australian War Memorial and Ors* (2008) ACT SC 122).

6.3 Therefore the only clause wording that would avail the Agency would be the above clause but with the following words added at the end "even where the injury or illness results wholly or partly from the negligence of ("the Host")". Those would be sufficiently clear words to enable enforcement of the indemnity against the Labour Hire Employer.

6.4 However, it would be unlikely in the extreme that any respectable Labour Hire Employer would agree to such a clause. Its General Liability insurance policy (which would respond to such a claim for indemnity by the Host) will invariably contain an exclusion clause excluding cover for any liability arising out of any indemnity unless the liability would have arisen in the absence of such indemnity" (taken from the Comcover Policy but it is standard in General Liability insurance policies). To accept such a clause would therefore require the Labour Hire Employer to pay the damages owing by the Agency to the Guest Worker, but prevent it having insurance for those damages.
1. Background
2. Post Tort Reform Liability

- "Tort Law Reforms: left principles for determining liability largely unchanged
- still need Duty of Care → Breach → Loss
- neighbour test still relevant to Duty (Donohue v Stevenson)
- plaintiff must prove "foreseeability" of a "not insignificant risk" against which a "reasonable person" would have taken precautions (02/03 Tort Law Legislation in all States)

Post Tort Reform Liability (cont)

- Main factor in determining whether a duty exists is the degree and nature of control exercised by the defendant over the risk of harm that eventuated

Post Tort Reform Liability (cont)

- But minor legislative changes
  - plaintiff presumed to be aware of obvious risks (most States)
  - no duty to warn of obvious risks (most States)
  - contributory negligence by the plaintiff of 100% can be found (some States)
  - deceased's contributory negligence may reduce dependent's damages (most States)
Post Tort Reform Liability (cont)

- plaintiff cannot recover if injured while committing a serious offence (all States)
- no damages for pure mental harm unless a recognised psychiatric illness (most States)

3. Liability of Employers to Employees

• Duty not affected by Tort Reform Legislation
• Duty is to “take reasonable care to avoid exposing the employee to unnecessary risks of injury”
• Duty is “non-delegable” but not “absolute” - must “ensure that reasonable care is taken by the delegate”

4. Liability of Hosts to Guest Workers

• Whether duty exists depends on general principles
• Focus on extent to which the work and workplace of the Guest Worker is under the control and supervision of the Host as against the Labour Hire Employer
  - TNT Australia and Manpower Services v Christie: direct control by Host, therefore duty owed
  - Samsung Australia and Skilled Engineering v Macura: no control or supervision by Host therefore no duty
5. Apportionment between Host and Labour Hire Employer

- Duty normally owed by both
- Agency (Host) normally bears greater share of liability due to more direct control
- Usually 60% to 80% to the Agency

6. Can a Government Agency by contract with the Labour Hire Employer exclude its liability for damages to the Guest Worker

- "[Labour Hire Employer] indemnifies (Host) against any claim demand or action arising from any injury or illness suffered by (Guest Worker) in the course of the work undertaken by (Guest Worker) pursuant to this contract"
  - not enforceable (Johnson v Australian War Memorial & Ors 2005 ACT SC 122)

- "[Labour Hire Employer] indemnifies (Host) against any claim demand or action arising from any injury or illness suffered by (Guest Worker) in the course of the work undertaken by (Guest Worker) pursuant to this contract even where the injury or illness results wholly or partly from the negligence of (Host)"
  - enforceable
- But Labour Hire Employer unlikely to agree to such indemnity clause as no insurance cover for this additional liability imposed by the indemnity clause
7. Post Tort Reform Assessment of Damages (not employer liability or motor vehicle personal injury liability)

- Non Economic loss (based on degree of generosity)
- ACT - Full Common Law
- Tas - Threshold $4,000
- NT - Threshold 5% of a most serious case
- WA - Threshold $12,000
- Qld - No threshold - Injury scale 1 - 100

SA - Threshold "ability to lead normal life significantly impaired for at least 7 days", - injury scale 1 - 60

NSW - Threshold 15% of a most serious case

Vic - Threshold 5% degree of impairment (10% for psychiatric harm) using AMA Guide
  - role of court largely taken away

Post Tort Reform Assessment of Damages

- Loss of earnings
  - maximum weekly earning rate 3 x average weekly earning (about $150,000 p.a.) (NSW, ACT, Qld, Vic, WA, NT)
  - no damages for first week: maximum award of $2.2m (SA)
Post Tort Reform Assessment of Damages

- Gratuitous Care and Attention
  - threshold 6 hours/week for at least 6 months (NSW, Qld, Vic, NT)
  - threshold of $5,000 (WA)
  - full Common Law (ACT, Tas)
  - full Common Law but only for services of family member (SA)
# POST TORT REFORM LIABILITY LEGISLATION

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<tr>
<td>Status of Act</td>
<td>Act - taken to have commenced 20/3/02 (most amendments commenced 6/12/02)</td>
<td>Act - most provisions commenced 1/1/02 (most amendments commenced 9/9/03, latest amendment commenced 10/9/06)</td>
<td>Consolidated to 8/2/06</td>
<td>Amendments commenced 23/10/02, 21/5/03 and 2/12/03, latest amendment commenced 25/7/06</td>
<td>Act - commenced 1/1/03 (most amendments commenced 1/12/03, latest amendment commenced 1/1/06)</td>
<td>Act - commenced 1/5/03 latest amendment commenced 1/8/06</td>
<td>Act - commenced 1/1/03 (amendments commenced 4/7/02, latest amendment commenced 15/12/05)</td>
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**PROVISIONS:**

- **Test for duty of care**
  
  s35B(1) - for negligence P must prove foreseeability of a 'not insignificant' risk against which reasonable precautions should have been taken
  
  s31F(1) - same as NSW
  
  s91(1) - same as NSW

- **Breach of duty - standard of care**
  
  s5B(2) - sets out factors which must be balanced to determine what precautions are reasonable
  
  s5C - states that it is insufficient for P to prove only that the risk could have been avoided if something was done differently
  
  s42 same as NSW
  
  ss9(2) & 10 - same as NSW
  
  cl 32(2) - same as NSW, but not equivalent to NSW's s5C
  
  s4B(2) - same as NSW
  
  s4D - same as NSW, but not equivalent to NSW's s5C

- **Causation**
  
  (i) test for causation
  
  s5D - negligence must be 'necessary condition' & imposition of liability must be 'appropriate'
  
  s45 - same as NSW
  
  s11((1)) - same as NSW
  
  cl 34(1) - same as NSW
  
  s51 - similar to NSW
  
  s5C - same as NSW
  
  s13 - same as NSW
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<tr>
<td>(ii) admissibility</td>
<td>s5D(3)(b) - P's testimony is inadmissible in cases which turn on what P would have done if D had not been negligent</td>
<td>s11(3) - same as NSW</td>
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<td>(i) presumption of knowledge</td>
<td>s5G - injured persons presumed to be aware of obvious risks</td>
<td>s14 - same as NSW</td>
<td>cl 37 - same as NSW but only where D uses volenti defence</td>
<td>s54 - same as NSW but only where D uses volenti defence</td>
<td>s5N - same as NSW</td>
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<td>(ii) obvious risks: duty</td>
<td>s5H - no duty to warn of obvious risks</td>
<td>s15 - same as NSW</td>
<td>cl 38 - same as NSW</td>
<td>s50 - same as NSW</td>
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<td>(iii) inherent risks: duty</td>
<td>s5I - no liability for materialisation of inherent risks</td>
<td>s16 - same as NSW</td>
<td>cl 39 - same as NSW</td>
<td>s55 - same as NSW</td>
<td>s5P - similar to NSW</td>
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<td>(i) standard of care</td>
<td>s5R - standard of care for P same as for D</td>
<td>s23 - same as NSW</td>
<td>cl 44 - same as NSW</td>
<td>s5K - same as NSW</td>
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<td>(ii) 100% reduction</td>
<td>s55 - courts can make 100% reduction (i.e. contributory negligence can defeat claim)</td>
<td>s47 - same as NSW</td>
<td>s24 - same as NSW</td>
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<td>(iii) compensation to relatives claim</td>
<td>s5T - court can have regard to deceased's contributory negligence</td>
<td>s27 - no reduction for deceased's contributory negligence</td>
<td>Law Reform Act 1995</td>
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<td>s10(5) - reduction for contributory negligence of deceased person</td>
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<td>s4 - contributory negligence cannot defeat claim</td>
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<td>(i) mental harm arising from accidents</td>
<td>§30 - only bystanders &amp; family members of accident victim can recover</td>
<td>§36 - liability to an accident victim extends to liability for mental harm suffered by victim, family members &amp; bystanders</td>
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<td>§73 - only bystanders and those in close relationship can recover</td>
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<td>§32 - same as NSW</td>
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<td>(ii) duty of care for mental harm</td>
<td>§32 - recognised psychiatric illness to person of normal fortitude must be foreseeable</td>
<td>§34 - same as NSW</td>
<td>§33 - same as NSW</td>
<td>§72 - same as NSW</td>
<td>§55 - same as NSW</td>
<td>§34 - same as NSW</td>
<td>§35 - same as NSW</td>
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<td>(iii) damages for consequent mental harm</td>
<td>§33 - no damages for economic loss unless harm is recognised psychiatric illness</td>
<td>§35 - same as NSW</td>
<td>§35 - same as NSW</td>
<td>§75 - same as NSW</td>
<td>§57 - same as NSW</td>
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<td>• Self-defence and recovery re: criminal acts</td>
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<tr>
<td>(i) no liability for acts of self-defence</td>
<td>§52 &amp; 43 - D not liable for acts of self-defence, whether or not reasonable</td>
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<td>§9 - occupier incurs no liability if entrant was committing criminal offence</td>
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<td>(ii) bar on recovery for criminal acts</td>
<td>§54 - P cannot recover if injured whilst committing indictable offence</td>
<td>§54 - P cannot recover if injured whilst committing indictable offence but judicial discretion to allow recovery in exceptional cases</td>
<td>§45 - P cannot recover if injured whilst committing indictable offence but judicial discretion to allow recovery in exceptional cases</td>
<td>§43 - P cannot recover if injured whilst committing indictable offence but judicial discretion to allow recovery in exceptional cases</td>
<td>§14G - in determining whether P has proven breach of duty, court must consider whether P was engaged in illegal activity. Same for occupiers' liability (§4B(4)(b))</td>
<td>§10(1) - P cannot recover if injured whilst committing indictable offence but judicial discretion to allow recovery in exceptional cases</td>
<td>§6 - P cannot recover if injured whilst committing criminal offence</td>
<td>§10(1) - P cannot recover if injured whilst committing criminal offence</td>
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<tbody>
<tr>
<td></td>
<td>Part 2, Div 6 for personal injury cases, limitation period is 3yrs after date of discoverability, with long stop period of 12yrs</td>
<td>s11 - limitation period is 6yrs after cause of action arises</td>
<td>s10 &amp; 11 - limitation period is 6yrs after cause of action arises, but 3yrs if personal injury damages are claimed</td>
<td>Limitation of Actions Act 1936</td>
<td>ss35 &amp; 36 - limitation period is 6yrs after cause of action arises, but 3yrs if personal injury damages are claimed</td>
<td>Limitation of Actions Act 1958</td>
<td>s51AA (for actions arising after 5/1/02)</td>
<td>Limitation Act</td>
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<td>• Damages for non-economic loss</td>
<td>s16 - maximum amount is $365,000. No damages if degree of injury is less than 15% of a most serious case</td>
<td>s61-2 - maximum for non-economic loss is $250,000 and damages are calculated on a 'jury scale' of 1-100</td>
<td>cl52 - non-economic loss only if P's ability to lead a normal life was significantly impaired for at least 7 days. Uses 1-60 scale to determine non-economic loss</td>
<td>s28G - maximum general damages set at $771,385. cl28LE &amp; LF - no damages unless degree of impairment is 5% (or 10% for psychiatric harm) using AMA Guide</td>
<td>s9 &amp; 10 - if damages for non-economic loss would be less than $12,000, no damages are to be awarded</td>
<td>s24-28 - maximum is $350,000. No damages if degree of injury is less than 5% of a most serious case</td>
<td>s27 - threshold of $4000, no cap</td>
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<tr>
<td>• Using prior decisions as guidance to determine non-economic loss amount</td>
<td>s17A - courts and counsel may refer to earlier decisions to determine appropriate non-economic loss damages</td>
<td>s59 - same as NSW</td>
<td>s61(1) (a) - court is to consider J's injury scale determinations from prior proceedings</td>
<td>cl10A - same as NSW</td>
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<td>• Damages for economic loss</td>
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<tr>
<td>(i) maximum earnings capped</td>
<td>s12(2) - maximum weekly earning rate which can be used is three times the average weekly earnings</td>
<td>s98 - as for NSW</td>
<td>s54 - same as NSW</td>
<td>cl54 - no damages in respect of the 1st week of incapacity. Total max is 'prescribed maximum', which is $2.2million</td>
<td>s28F - same as for NSW</td>
<td>s11 - same as NSW</td>
<td>s20 - same as NSW</td>
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<tr>
<td>(ii) future economic loss - prospects &amp; percentages</td>
<td>s13 - award of damages must be based on 'the claimant's most likely future circumstances'</td>
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<td>s21 - same as NSW</td>
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<td>(iii) future economic loss - discount rate</td>
<td>s14 - current discount rate is 5%</td>
<td>s57 - current discount rate is 3%</td>
<td>cl55 &amp; 3 - current discount rate is 5%</td>
<td>s28L - current discount rate is 5%</td>
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<td>s22 - current discount rate is 5%</td>
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### POST TORT REFORM DAMAGES LEGISLATION

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>NSW</th>
<th>ACT</th>
<th>QLD</th>
<th>SA</th>
<th>VIC</th>
<th>WA</th>
<th>NT</th>
<th>TAS</th>
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<tbody>
<tr>
<td><strong>● Damages for</strong></td>
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<td><strong>gratituous attendant</strong></td>
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<td><strong>care services</strong></td>
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<td>(i) &quot;but for&quot; test</td>
<td>s15(2) - damages awarded only where there is a reasonable need for them</td>
<td>s50(1) - same as NSW</td>
<td></td>
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<td>s28A(1) - same as NSW</td>
<td>s12(2) - same as NSW</td>
<td>s23(1) - same as NSW</td>
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<tr>
<td>(ii) small amounts of care</td>
<td>s15(3) - threshold of 6 hrs per week and for more than 6 months</td>
<td>s59(2) - same as NSW</td>
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<td>s28A(2) - same as NSW</td>
<td>s12(3) &amp; 13 - threshold of $5000 or no damages awarded</td>
<td>s23(1) - same as NSW</td>
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<tr>
<td>(iii) calculation where more than 40 hrs/wk</td>
<td>s15(4) - uses average weekly earnings to calculate</td>
<td></td>
<td>c158 - weekly amount, must not exceed 4 times State average weekly earnings</td>
<td>s28B(1) - same as NSW</td>
<td>s12(5) - same as NSW</td>
<td>s23(3) - same as NSW</td>
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<td>(iv) calculation where less than 40 hrs/wk</td>
<td>s15(5) - hourly rate = 1/40th average weekly earnings</td>
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<td></td>
<td>s28B(2) - same as NSW</td>
<td>s12(7) - same as NSW</td>
<td>s23(4) - same as NSW</td>
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<td><strong>● Interest on damages</strong></td>
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<tr>
<td><strong>s18 - no interest for non-economic loss or for gratuitous care. Otherwise Cth Govt 10 year Treasury Bond rate</strong></td>
<td>s60 - rate is 10 yr Treasury Bonds from Reserve Bank</td>
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<td>c156 - no interest for non-economic damages</td>
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<td>s29 - same as NSW</td>
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<tr>
<td><strong>● Punitive, exemplary or aggravated damages</strong></td>
<td>s21 - no exemplary, punitive or aggravated damages in negligence cases</td>
<td>s52 - no exemplary, punitive or aggravated damages</td>
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<td>s19 - no aggravated or exemplary damages</td>
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Getting Wired
Insurance Information Session
1st March 2007

Jo Drummond
Claims Manager
Comcover Member Services

The Policy Wording
How are these type of claims covered under the Comcover Policy wording?

Section 2.1 General Liability and Professional Indemnity

2.1.12 A liability to pay compensation for bodily injury, death, sickness, disease, disability, shock, fright, mental anguish and mental injury

Example 1

FACTS
- Agency employs temporary staff via a labour hire firm.
- Temporary worker commences with agency as a data input assistant.
- Temporary worker injures her back whilst lifting files onto her desk.
- Temporary worker brings a workers compensation claim against her employer, the labour hire firm.
- The Workers Compensation claim is settled and then the WC insurer seeks contribution from the agency.
Example 1 (cont)

Is the Agency liable to make a contribution?
Yes

Why?
- Both the Agency and the labour hire firm owe a non-delegable duty of care to the worker.
- It transpires that the Agency failed to provide the temporary worker with any manual handling training.
- The WC insurer relies on the case of TNT v Christie (NSW Court of Appeal 2003)

RESULT: The Agency contributed 75% of the claim.

Example 2

FACTS:
- Agency uses a contractor to provide gardening services.
- Gardener steps on drainage plate which cracks underneath him and he injures his leg.
- Gardener brings a claim against the agency.
- The agency tries to join the contractor, the gardener's employer, as a defendant also.

Example 2 (cont)

Is the Agency successful in obtaining a contribution from the Contractor?
No

Why?
- As the occupier of the premises where the accident occurred the Agency owes a general duty of care to all those who come on to their premises to ensure they are safe.
- The Agency is unsuccessful in arguing the contractor should have been aware of the crack as it was not easily visible.

RESULT: The Agency had to pay the entire claim.
Lessons to be Learned

- Make sure all staff are given the correct OH&S training.
- Ensure all hazards and danger on your premises are made safe as soon as they are noticed.
- Try and protect yourself via the terms of your contracts.
- Don’t assume anything.

QUESTIONS?