

COSTS CAPPING in PERSONAL INJURIES LITIGATION: the bluntest legislative instrument

By Michelle Castle

The wave of tort law reform that swept across Australia in 2002 made many changes to personal injuries law. Specifically intended to recalibrate the law of negligence, the changes targeted elements such as the duty of care, breach of duty and damages. However, three states – NSW, Queensland and the ACT – also used the bluntest of legislative instruments to aid reform: the costs cap.

NSW was the first state to introduce a costs cap in relation to personal injuries claims. Introduced in May 2002, and now found in the *Legal Profession Act 2004*, it imposes a cap on costs in any 'claim for personal injury damages' where the verdict is less than \$100,000.¹ The amount of costs permitted is the greater of \$10,000 and 20% of the verdict.² Thus, where the verdict is less than \$50,000, \$10,000 in costs is recoverable. Between \$50,000 and \$100,000, an amount between \$10,000 and \$20,000 is recoverable. This amount includes the costs of all legal services; that is, solicitors' fees, agent's fees and counsel's fees. In addition, 15% of the amount sought to be recovered, or \$7,500, is allowed where there has been a rehearing in the District Court following an arbitration or an appeal to the Court of Appeal.³ The threshold of \$100,000 is the highest in any state and is widely recognised as a significant factor in the dramatic decrease in personal injuries actions commenced in NSW. The threshold is so high and the cap so rigid that in many instances the injured person ends up with inadequate compensation after paying the fees necessary to bring the case (including legal fees, court fees, experts' fees and the like), or the case, though meritorious, is not brought at all. The unfairness of this situation is compounded by the fact that when defendants win cases, their costs are not capped at all,⁴ thus creating a risky and very uneven playing field for injured people.⁵

The ACT government, through the *Civil Law Wrongs Act 2002*, also introduced a costs cap but, characteristically for that government, it was a moderate and more flexible cap than the one in NSW. Firstly, it applies only where the verdict is less than \$50,000;⁶ secondly, it allows, in addition to the restricted costs, an amount for counsel's fees on a brief to appear;⁷ and thirdly, it confers a discretion on the court or taxing officer to allow more than the capped costs, due either to the complexity of the claim⁸ or the behaviour of one or more of the parties.⁹ Nevertheless, in the absence of complexity or 'bad behaviour', the costs cap still creates severe injustice in that it leaves injured people inadequately compensated after the payment of the costs necessary to support their action. An amount of up to \$10,000 is highly inadequate in circumstances where it is necessary to bring proceedings to vindicate the plaintiff's right to compensation.

In Queensland, the *Personal Injuries Proceedings Act 2002* introduced a cap on recoverable costs in proceedings where the verdict is under \$50,000. The provisions are particularly harsh: where the verdict is less than \$30,000,

no costs are recoverable, subject to provisions that operate along 'Calderbank' lines in relation to pre-action mandatory final offers¹⁰ (and, where proceedings are brought, no costs are recoverable prior to the commencement of those proceedings¹¹). The cap operates regardless of the complexity of the matter, the amount and cost of evidence required to support the action, and the behaviour of the other parties to the litigation.

The following table summarises the provisions:

State	Act	Sections	Verdict threshold	Amount of costs
NSW	<i>Legal Profession Act 2004</i>	337-343	\$100,000	Greater of \$10,000 and 20%
ACT	<i>Civil Law Wrongs Act 2002</i>	180-185	\$50,000	Greater of \$10,000 and 20%
QLD	<i>Personal Injuries Proceedings Act 2002</i>	40, 56	\$50,000	Nil under \$30,000; \$2,500 for \$30,000 - \$50,000

CONCLUSION

The Australian Lawyers Alliance does not support the use of costs caps. In its national policy document, *Caps on Legal Costs*,¹² it makes the point that 'The amount of damages recovered is not related to the complexity of a claim. The fact that the compensation awarded in a case does not exceed \$100,000, does not mean that the case didn't raise serious legal complexities, involve many different people and companies in a complicated factual scenario, or involve questions on important matters of public interest that need to be investigated... The result [of costs caps] is an effective barrier to accessing the justice system... No equivalent barrier exists for economic losses sustained in business.'

In the wave of tort law reform that occurred in 2002, only NSW, the ACT and Queensland passed harsh laws limiting the costs recoverable by successful plaintiffs in personal injuries actions. The other states did not see the need for such caps: the extensive laws and scales that regulate costs in those jurisdictions still exist. Costs caps are blunt legislative instruments. In many cases, they effectively eliminate the right to bring an action for personal injury damages, but without the political fallout that would flow from such a blatantly unfair legislative provision. ■

Notes: 1 Section 338(1). 2 Sections 338(1)(a), (5)(b). 3 Section 338A. 4 *Boylan Nominees Pty Ltd v Williams Refrigeration Australia Pty Ltd* [2006] NSWCA 100. 5 The Australian Lawyers Alliance has published some case studies in relation to the inadequacy of the costs recoverable. These are available on the website http://www.lawyersalliance.com.au/documents/public_affairs/case_studies_on_costs_capping.pdf 6 Section 181(1). 7 Section 180. 8 Section 184(1)(a). 9 Section 184(1)(b). 10 Where a mandatory final offer is accepted, a different costs regime operates. 11 Section 56(2)(b). 12 www.apla.com/documents/public_affairs/national-policy-paper/Caps_on_Legal_Costs.pdf.

Michelle Castle is a solicitor and principal of DG Thompson, Legal Costs Lawyers and Consultants. PHONE (02) 9977 2900
EMAIL michelle.castle@dgt.com.au