List of Recommendations

Implementation of the Panel's Recommendations

A national response

Recommendation 1

The Panel's recommendations should be incorporated (in suitably drafted form) in a single statute (that might be styled the *Civil Liability (Personal Injuries and Death) Act* ('the Proposed Act') to be enacted in each jurisdiction.

Paragraph 2.1

Overarching recommendation

Recommendation 2

The Proposed Act should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action.

Paragraphs 2.2 – 2.3

Professional Negligence

Treatment by a medical practitioner — standard of care

Recommendation 3

In the Proposed Act, the test for determining the standard of care in cases in which a medical practitioner is alleged to have been negligent in providing treatment to a patient should be:

> A medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational.

Paragraphs 3.5 – 3.19

Standard of care — professionals generally

Recommendation 4

The Proposed Act should embody the following principles:

In cases involving an allegation of negligence on the part of a person holding himself or herself out as possessing a particular skill, the standard of reasonable care should be determined by reference to:

(a) What could reasonably be expected of a person professing that skill.

(b) The relevant circumstances at the date of the alleged negligence and not a later date.

Paragraphs 3.31 – 3.33

Duties to inform

Recommendation 5

In the Proposed Act the professional's duties to inform should be legislatively stated in certain respects, but only in relation to medical practitioners.

Paragraphs 3.37 – 3.39

Recommendation 6

The medical practitioner's duties to inform should be expressed as duties to take reasonable care.

Paragraphs 3.43 – 3.46

Recommendation 7

The legislative statement referred to in Recommendation 5 should embody the following principles:

(a) There are two types of duties to inform, a proactive duty and a reactive duty.

(b) The proactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the reasonable person in the patient's position would, in the circumstances, want to be given before making a decision whether or not to undergo treatment.

(c) The information referred to in paragraph (b) should be determined by reference to the time at which the relevant decision was made by the patient and not a later time.

(d) A medical practitioner does not breach the proactive duty to inform by reason only of a failure to give the patient information about a risk or other matter that would, in the circumstances, have been obvious to a reasonable person in the position of the patient, unless giving the information is required by statute.

(e) Obvious risks include risks that are patent or matters of common knowledge; and a risk may be obvious even though it is of low probability.

(f) The reactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the medical practitioner knows or ought to know the patient wants to be given before making the decision whether or not to undergo the treatment.

Paragraphs 3.47 – 3.69

Procedural recommendations

Recommendation 8

Consideration should be given to implementing trials of a system of court-appointed experts.

Paragraphs 3.70 – 3.79

Recommendation 9

Consideration should be given to the introduction of a rule requiring the giving of notice of claims before proceedings are commenced.

Paragraphs 3.81 – 3.83

Not-for-Profit Organisations (NPOs)

No exemption for NPOs

Recommendation 10

Not-for-profit organisations as such should not be exempt from, or have their liability limited for, negligently-caused personal injury or death.

Paragraphs 4.1 – 4.7

Recreational services generally

Recommendation 11

The Proposed Act should embody the following principles:

The provider of a recreational service is not liable for personal injury or death suffered by a voluntary participant in a recreational activity as a result of the materialisation of an obvious risk.

(a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the participant.

(b) Obvious risks include risks that are patent or matters of common knowledge.

(c) A risk may be obvious even though it is of low probability.

Paragraphs 4.11 – 4.18

Recommendation 12

For the purposes of Recommendation 11:

(a) 'Recreational service' means a service of

(i) providing facilities for participation in a recreational activity; or

(ii) training a person to participate in a recreational activity; or

(iii) supervising, adjudicating, guiding or otherwise assisting a person's participation in a recreational activity.

(b) 'Recreational activity' means an activity undertaken for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk.

Paragraph 4.19

Recommendation 13

The principles contained in Recommendation 11 should not apply in any case covered by a statutory scheme of compulsory liability insurance.

Paragraph 4.24

Warning and giving notice of obvious risks

Recommendation 14

The proposed Act should embody the following principles:

A person does not breach a proactive duty to inform by reason only of a failure to give notice or to warn of an obvious risk of personal injury or death, unless required to do so by statute.

(a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the person injured or killed.

(b) Obvious risks include risks that are patent or matter of common knowledge.

(c) A risk may be obvious even though it is of low probability.

Paragraphs 4.26 – 4.34

Recommendation 15

The principles contained in Recommendation 14 should not apply to 'work risks', that is, risks associated with work done by one person for another.

Paragraph 4.35

Emergency services

Recommendation 16

There should be no provision regarding the liability of not-for-profit organisations as such for personal injury and death caused by negligence in the provision of emergency services.

Paragraph 4.37

Trade Practices

Part IVA

Recommendation 17

The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any

claim for negligently-caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

Paragraphs 5.14 – 5.22

Recommendation 18

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

Paragraphs 5.14 – 5.22

Part V Div I

Recommendation 19

The TPA should be amended to prevent individuals bringing actions for damages for personal injury and death under Part V Div I.

Paragraphs 5.23 – 5.33

Recommendation 20

The TPA should be amended to remove the power of the ACCC to bring representative actions for damages for personal injury and death resulting from contraventions of Part V Div 1.

Paragraphs 5.34 – 5.35

Part V Div IA, Part V Div 2A and Part VA

Recommendation 21

The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA.

Paragraphs 5.36 – 5.41

Recommendation 22

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA.

Paragraphs 5.36 – 5.41

Limitation of Actions

General provision

Recommendation 23

The Proposed Act should provide that all claims for damages for personal injury or death resulting from negligence are governed by the limitation provisions recommended in this Chapter.

Paragraphs 6.6 – 6.9

The limitation period and the long-stop period

Recommendation 24

The Proposed Act should embody the following principles:

(a) The limitation period commences on the date of discoverability.

(b) The date of discoverability is the date when the plaintiff knew or ought to have known that personal injury or death:

  (i) had occurred; and

  (ii) was attributable to negligent conduct of the defendant; and

  (iii) in the case of personal injury, was sufficiently significant to warrant bringing proceedings.

(c) The limitation period is 3 years from the date of discoverability.

(d) Subject to (e), claims become statute-barred on the expiry of the earlier of:

  (i) the limitation period; and

(ii) a long-stop period of 12 years after the events on which the claim is based ('the long-stop period').

(e) The court has a discretion at any time to extend the long-stop period to the expiry of a period of 3 years from the date of discoverability.

(f) In exercising its discretion, the court must have regard to the justice of the case, and in particular:

(i) whether the passage of time has prejudiced a fair trial of the claim.

(ii) the nature and extent of the plaintiff's loss.

(iii) the nature of the defendant's conduct.

Paragraphs 6.18 – 6.40

Suspending the limitation period — minors and incapacitated persons

Recommendation 25

The Proposed Act should embody the following principles:

(a) The running of the limitation period is suspended during any period of time during which the plaintiff is a person under a disability.

(b) 'Person under a disability' means:

(i) a minor who is not in the custody of a parent or guardian;

(ii) an incapacitated person (such as a person who is unable, by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of his or her affairs) in respect of whom no administrator has been appointed.

(iii) a minor whose custodial parent or guardian is a person under a disability.

(c) In the case of minors and incapacitated persons who are not persons under a disability, the relevant knowledge for the purpose of determining the date of discoverability is that of the parent, guardian or appointed administrator, as the case may be.

(d) Where the parent or guardian of a minor is the potential defendant or is in a close relationship with the potential defendant, the limitation period

(called 'the close-relationship limitation period') runs for 3 years from the date the plaintiff turns 25 years of age.

(e) A close relationship is a relationship such that:

(i) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or

(ii) the minor might be unwilling to disclose to the parent or guardian the conduct or events on which the claim would be based.

(f) In cases dealt with in (d), the court has a discretion at any time to extend the close-relationship limitation period to the expiry of a period of 3 years from the date of discoverability.

Paragraphs 6.41 – 6.56

Survival of actions

Recommendation 26

The Proposed Act should embody the following principles:

(a) Subject to sub-para (b), the limitation principles contained in Recommendations 24 and 25 should apply to an action brought by the personal representative of a deceased person acting as such.

(b) In such a case, the limitation period should begin at the earliest of the following times:

(i) when the deceased first knew or should have known of the date of discoverability, if that knowledge was acquired more than 3 years before death;

(ii) when the personal representative was appointed, if he or she had the necessary knowledge at that time;

(iii) when the personal representative first acquired or ought to have acquired that knowledge, if he or she acquired that knowledge after being appointed.

Contribution between tortfeasors

Recommendation 27

The Proposed Act should provide for limitation periods in regard to contribution between tortfeasors.

Foreseeability, Standard of Care, Causation and Remoteness of Damage

Standard of care

Recommendation 28

The Proposed Act should embody the following principles:

(a) A person is not negligent by reason only of failing to take precautions against a foreseeable risk of harm (that is, a risk of harm of which the person knew or ought to have known).

(b) It cannot be negligent to fail to take precautions against a risk of harm unless that risk can be described as 'not insignificant'.

(c) A person is not negligent by reason of failing to take precautions against a risk that can be described as 'not insignificant' unless, under the circumstances, the reasonable person in that person's position would have taken precautions against the risk.

(d) In determining whether the reasonable person would have taken precautions against a risk of harm, it is relevant to consider (amongst other things):

  (i) the probability that the harm would occur if care was not taken;

  (ii) the likely seriousness of that harm;

  (iii) the burden of taking precautions to avoid the harm; and

  (iv) the social utility of the risk-creating activity.

Paragraphs 7.15 – 7.19

Causation

Recommendation 29

The Proposed Act should embody the following principles:

Onus of proof

(a) The plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

The two elements of causation

(b) The question of whether negligence caused harm in the form of personal injury or death ('the harm') has two elements:

(i) 'factual causation', which concerns the factual issue of whether the negligence played a part in bringing about the harm; and

(ii) 'scope of liability' which concerns the normative issue of the appropriate scope of the negligent person's liability for the harm, once it has been established that the negligence was a factual cause of the harm. 'Scope of liability' covers issues, other than factual causation, referred to in terms such as 'legal cause', 'real and effective cause', 'commonsense causation', 'foreseeability' and 'remoteness of damage'.

Factual causation

(c) The basic test of 'factual causation' (the 'but for' test) is whether the negligence was a necessary condition of the harm.

(d) In appropriate cases, proof that the negligence materially contributed to the harm or the risk of the harm may be treated as sufficient to establish factual causation even though the but for test is not satisfied.

(e) Although it is relevant to proof of factual causation, the issue of whether the case is an appropriate one for the purposes of (d) is normative.

(f) For the purposes of deciding whether the case is an appropriate one (as required in (d)), amongst the factors that it is relevant to consider are:

(i) whether (and why) responsibility for the harm should be imposed on the negligent party, and

(ii) whether (and why) the harm should be left to lie where it fell.

(g)

(i) For the purposes of sub-paragraph (ii) of this paragraph, the plaintiff's own testimony, about what he or she would have done if the defendant had not been negligent, is inadmissible.

(ii) Subject to sub-paragraph (i) of this paragraph, when, for the purposes of deciding whether allegedly negligent conduct was a factual cause of the harm, it is relevant to ask what the plaintiff would have done if the defendant had not been negligent, this question should be answered subjectively in the light of all relevant circumstances.

Scope of liability

(h) For the purposes of determining the normative issue of the appropriate scope of liability for the harm, amongst the factors that it is relevant to consider are:

(i) whether (and why) responsibility for the harm should be imposed on the negligent party; and

(ii) whether (and why) the harm should be left to lie where it fell.

Paragraphs 7.25 – 7.51

Contributory Negligence, Assumption of Risk and Duties of Protection

Contributory negligence

Recommendation 30

The Proposed Act should embody the following principles:

(a) The test of whether a person (the plaintiff) has been contributorily negligent is whether a reasonable person in the plaintiff's position would have taken precautions against the risk of harm to himself or herself.

(b) For the purposes of determining whether a person has been contributorily negligent, the standard of the reasonable person is the same as that applicable to the determination of negligence.

(c) In determining whether a person has been contributorily negligent, the following factors (amongst others) are relevant:

(i) The probability that the harm would occur if care was not taken.

(ii) The likely seriousness of the harm.

(iii) The burden of taking precautions to avoid the harm.

(iv) The social utility of the risk-creating activity in which the person was engaged.

(d) Whether a plaintiff has been contributorily negligent according to the criteria listed in (a) and (c) must be determined on the basis of what the plaintiff knew or ought to have known at the date of the alleged contributory negligence.

Paragraphs 8.6 – 8.13

Apportionment

Recommendation 31

The Proposed Act should embody the following principle:

Under the Apportionment Legislation (that is, legislation providing for the apportionment of damages for contributory negligence) a court is entitled to reduce a plaintiff's damages by 100 per cent where the court considers that it is just and equitable to do so.

Paragraphs 8.20 – 8.27

Assumption of risk

Recommendation 32

The Proposed Act should embody the following principles:

For the purposes of the defence of assumption of risk:

(a) Where the risk in question was obvious, the person against whom the defence is pleaded (the plaintiff) is presumed to have been actually aware of the risk unless the plaintiff proves on the balance of probabilities that he or she was not actually aware of the risk.

(b) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the plaintiff's position. Obvious risks

include risks that are patent or matters of common knowledge. A risk may be obvious even though it is of low probability.

(c) The test of whether a person was aware of a risk is whether he or she was aware of the type or kind of risk, not its precise nature, extent or manner of occurrence.

Paragraphs 8.28 – 8.32

Mental Harm

Recognised psychiatric illness

Recommendation 33

A panel of experts (including experts in forensic psychiatry and psychology) should be appointed to develop guidelines, for use in legal contexts, for assessing whether a person has suffered a recognised psychiatric illness.

Paragraphs 9.5 – 9.7

Duty of care — mental harm

Recommendation 34

The Proposed Act should embody the following principles:

(a) There can be no liability for pure mental harm (that is, mental harm that is not a consequence of physical harm suffered by the mentally-harmed person) unless the mental harm consists of a recognised psychiatric illness.

(b) A person (the defendant) does not owe another (the plaintiff) a duty to take care not to cause the plaintiff pure mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken.

(c) For the purposes of (b), the circumstances of the case include matters such as:

(i) whether or not the mental harm was suffered as the result of a sudden shock;

(ii) whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath;

(iii) whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses;

(iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant; and

(v) the nature of the relationship between the plaintiff and any person killed, injured or put in peril.

Paragraphs 9.8 – 9.28

Recommendation 35

The Proposed Act should embody the following principle:

The rules about when a duty to take reasonable care to avoid pure mental harm arises are the same regardless of whether the claim for pure mental harm is brought in tort, contract, under a statute (subject to express provision to the contrary) or any other cause of action.

Paragraphs 9.29 – 9.30

Contributory negligence

Recommendation 36

The Proposed Act should embody the following principle:

In an action for damages for negligently-caused pure mental harm arising out of an incident in which a person was injured, killed or put in peril as a result of negligence of the defendant, any damages awarded shall be reduced by the same proportion as any damages recoverable from the defendant by the injured person (or his or her estate) would be reduced.

Paragraphs 9.31 – 9.33

Consequential mental harm

Recommendation 37

The Proposed Act should embody the following principles:

(a) Damages for economic loss resulting from negligently-caused consequential mental harm are recoverable only if:

(i) the mental harm consists of a recognised psychiatric illness; and

(ii) the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken

(b) In determining the question of foreseeability in (a)(ii), the test is whether it was foreseeable, in the light of all the relevant circumstances, including the physical injuries in fact suffered by the plaintiff, that if care was not taken a person of normal fortitude, in the position of the plaintiff, might suffer consequential mental harm.

Paragraphs 9.34 – 9.39

Expert evidence

Recommendation 38

The expert panel referred to in Recommendation 33 should be instructed to develop options for a system of training and accreditation of forensic psychiatric experts.

Paragraphs 9.40 – 9.41

Public Authorities

Policy defence

Recommendation 39

The Proposed Act should embody the following principle:

In any claim for damages for personal injury or death arising out of negligent performance or non-performance of a public function, a policy decision (that is, a decision based substantially on financial, economic, political or social factors or constraints) cannot be used to support a finding that the defendant

was negligent unless it was so unreasonable that no reasonable public functionary in the defendant's position could have made it.

Paragraphs 10.1 – 10.33

Recommendation 40

In the Proposed Act, the term 'public functionary' should be defined to cover both corporate bodies and natural persons.

Paragraph 10.29

Compatibility

Recommendation 41

The Proposed Act should embody the following principle:

A public functionary can be liable for damages for personal injury or death caused by the negligent exercise or non-exercise of a statutory public function only if the provisions and policy of the relevant statute are compatible with the existence of such liability.

Paragraphs 10.34 – 10.39

Breach of statutory duty

Recommendation 42

The Proposed Act should embody the following principle:

In the absence of express provision to the contrary in the relevant statute, any action for damages for negligently-caused personal injury or death made in the form of a claim for breach of statutory duty is subject to the provisions of this Act.

Paragraphs 10.40 – 10.45

Non-Delegable Duties and Vicarious Liability

Recommendation 43

The Proposed Act should embody the following principle:

Liability for breach of a non-delegable duty shall be treated as equivalent in all respects to vicarious liability for the negligence of the person to whom the doing of the relevant work was entrusted by the person held liable for breach of the non-delegable duty.

Paragraphs 11.9 – 11.19

Proportionate Liability

Recommendation 44

In relation to claims for negligently-caused personal injury and death, the doctrine of solidary liability should be retained and not replaced with a system of proportionate liability.

Paragraphs 12.17 – 12.19

Damages

Legal costs

Recommendation 45

The Proposed Act should embody the following principles:

(a) No order that the defendant pay the plaintiff's legal costs may be made in any case where the award of damages is less than $30,000.

(b) In any case where the award of damages is between $30,000 and $50,000, the plaintiff may recover from the defendant no more than $2,500 on account of legal costs.

Paragraphs 13.15 – 13.18

Tariffs for general damages

Recommendation 46

The Proposed Act should embody the following principles:

(a) In assessing general damages, a court may refer to decisions in earlier cases for the purpose of establishing the appropriate award in the case before it.

(b) Counsel may bring to the court's attention awards of general damages in such earlier cases.

(c) The Commonwealth Attorney-General, in consultation with the States and Territories, should appoint or nominate a body to compile, and maintain on a regular basis, a publication along the same lines as the English Judicial Studies Board's Guidelines for the Assessment of General Damages in Personal Injury Cases.

Paragraphs 13.19 – 13.26

Threshold for general damages

Recommendation 47

The Proposed Act should impose a threshold for general damages based on 15 per cent of a most extreme case.

Paragraphs 13.27 – 13.47

Cap on general damages

Recommendation 48

(a) The Proposed Act should provide for a cap on general damages of $250,000.

(a) If such a provision is not enacted, each State and Territory should enact legislation providing for a single cap on general damages that will apply to all claims for personal injury and death.

Paragraphs 13.48 – 13.59

Cap on damages for loss of earning capacity

Recommendation 49

The Proposed Act should provide for a cap on damages for loss of earning capacity of twice average full-time adult ordinary time earnings (FTOTE).

Paragraphs 13.58 – 13.67

Health care costs

Recommendation 50

The Proposed Act should embody the following principle:

For the purposes of assessing damages for health care costs, the issue of reasonableness should be determined by reference to a benchmark constituted by the use of public hospital facilities, and Medicare scheduled fees (where applicable).

Paragraphs 13.68 – 13.71

Gratuitous services

Recommendation 51

The Proposed Act should embody the following principles:

(a) Damages for gratuitous services shall not be recoverable unless such services have been provided or are likely to be provided for more than six hours per week and for more than six consecutive months.

(b) The maximum hourly rate for calculating damages for gratuitous services shall be one fortieth of average weekly FTOTE.

(c) The maximum weekly rate for calculating damages for gratuitous services shall be average weekly FTOTE.

(d) Damages for gratuitous services may be awarded only in respect of services required by the plaintiff as a result of the injuries caused by the negligence of the defendant.

Paragraphs 13.72 – 13.87

Loss of capacity to care for others

Recommendation 52

The Proposed Act should embody the following principles:

(a) Damages for loss of capacity to provide gratuitous services for others shall not be recoverable unless, prior to the loss of capacity, such services were being provided for more than six hours per week and had been provided for more than six consecutive months.

(b) Such damages are recoverable only in relation to services that were being provided to a person who (if the provider had been killed rather than injured) would have been entitled to recover damages for loss of the deceased's services.

(c) The maximum hourly rate for calculating damages for loss of capacity to provide gratuitous services for others shall be one fortieth of average weekly FTOTE.

(d) The maximum weekly rate for calculating damages for loss of capacity to provide gratuitous services shall be average weekly FTOTE.

Paragraphs 13.88 – 13.91

Future economic loss

Recommendation 53

The Proposed Act should embody the following principles:

(a) The discount rate used in calculating damages awards for future economic loss in cases of personal injury and death is 3 per cent.

(b) An appropriate regulatory body should have the power to change the discount rate, by regulation, on six months notice.

Paragraphs 13.96 – 13.109

Interest

Recommendation 54

The Proposed Act should provide that pre-judgment interest may not be awarded on damages for non-economic loss.

Paragraphs 13.110 – 13.114

Death claims — damages for loss of support

Recommendation 55

The Proposed Act should embody the following principles:

(a) In calculating damages for loss of financial support any amount by which the deceased's earnings exceeded twice average FTOTE shall be ignored.

(b) A dependant may not recover damages for the loss of gratuitous services the deceased would have provided unless such services would have been provided for more than six hours per week and for more than six consecutive months.

(c) The maximum hourly rate for calculating damages for loss of gratuitous services the deceased would have provided is one fortieth of average weekly FTOTE.

(d) The maximum weekly rate for calculating damages for loss of gratuitous services the deceased would have provided is average weekly FTOTE.

(e) A dependant shall be entitled to damages for loss only of those gratuitous services that the deceased would have provided to the dependant but for his or her death.

Paragraphs 13.115 – 13.119

Death claims — contributory negligence

Recommendation 56

The Proposed Act should provide that in a claim by dependants for damages in respect of the death of another as a result of negligence on the part of the defendant, any damages payable to the dependants shall be reduced on account of contributory negligence on the part of the deceased by the same proportion as damages payable in an action by the estate of the deceased person would be reduced.

Paragraph 13.120

Structured settlements

Recommendation 57

Rules of court in every jurisdiction should contain a provision to the following effect:

Before judgment is entered in any action for damages for negligently-caused personal injury or death where:

(a) In a case of personal injury, the award includes damages in respect of future economic loss (including loss of superannuation benefits, loss of gratuitous services and future health-care expenses) that in aggregate exceed $2 million; or

(b) In a case of death, the award includes damages for loss of future support and other future economic loss that in aggregate exceed $2 million,

the parties must to attend mediation proceedings with a view to securing a structured settlement.

Paragraphs 13.121 – 13.127

Superannuation contributions

Recommendation 58

The Proposed Act should embody the following principles:

(a) Damages for loss of employer superannuation contributions should be calculated as a percentage of the damages awarded for loss of earning capacity (subject to the cap on such damages).

(b) The percentage should be the minimum level of compulsory employers' contributions required under the relevant Commonwealth legislation (the Superannuation Guarantee (Administration) Act 1992 (Cwth)).

Paragraphs 13.128 – 13.133

Collateral benefits

Recommendation 59

The Proposed Act should embody the following principles:

(a) In assessing damages in an action under this Act, whether for personal injury or death, all collateral benefits received or to be received by the plaintiff as a result of the injury or death (except charitable benefits and statutory social-security and health-care benefits) should be deducted from those damages on the basis of the like-against-like principle.

(b) Collateral benefits should be set off against the relevant head of damages before any relevant damages cap is applied.

Paragraphs 13.134 – 13.158

Exemplary and aggravated damages

Recommendation 60

The Proposed Act should contain a provision abolishing exemplary and aggravated damages.

Paragraphs 13.159 – 13.167

Indexation

Recommendation 61

The Proposed Act should provide that the fixed monetary amounts referred to Recommendations 45, 48 and 57 should be indexed to the CPI.

Paragraph 13.168