Costs Payable in Personal Injury Claims under the Various Legislative Regimes by Paul Garrett

I was asked to deliver a paper in relation to costs which are payable under the various regimes where claimants or plaintiffs are successful in those claims.

While sitting in isolation the issue of costs in respect of each of these regimes may be simple to deal with, they become more complicated when they involve concurrent tortfeasors across different legislation particularly those involving work related injuries.

First I will deal with the various pieces of legislation -

Motor Accident Insurance Act 1994

Section 55F deals with costs involving damages of not more than the upper offer limit(formerly $50,000). This section was amended by *Civil Liability and Other Legislation Amendment Act 2010* commencing 1 July 2010. The legislation previously referred to a claim where the award was $30,000 or less or $50,000 or less. The amendments now introduce the concept of, "the upper offer limit","the lower offer limit" and "the declared cost limit" (Section 100A). This section also requires the Minister to index these limits on 1 July every year by making recommendations to the Governor in Counsel based on CPI increases.

The declared cost limit means the amount prescribed under the Regulation and at the present time for an injury on and from 2 December 2002 to and including 30 June 2010 - $2,500. For an injury arising on and from 1 July 2010 - $2950 (Regulation 27A(I)(a)(b).

The lower offer limit is the amount prescribed and presently for an injury on and from 2 December 2002 to 30 June 2010 - $30,000. For an injury on and from 1

July 2010 - $35,340 (Regulation 27A(2)(a)(b).

The upper offer limit is the amount prescribed by the Regulation and for an injury from 2 December 2002 to 30 June 2010 - $50,000. For an injury on and from 1 July 2010 - $58,900 (Regulation 27A(3)(a)(b).

If the Court awards the amount equal to or less than the lower offer limit

If the Court awards an amount equal to the lower offer limit or less, the Court must make no order for costs, if the amount awarded is less than the claimant's mandatory offer, but more than the insurers mandatory offer (Section 55(2)(a).

If the amount awarded is equal to or more than the claimant's mandatory final offer, costs are to be awarded to the claimant on an indemnity basis from the date on which the proceedings started but no costs is to be allowed for costs up to that date (55F(2)(b)).

If the amount awarded is equal to, or less than, the insurer's mandatory final offer, costs are to be awarded to the insurer on a standard basis from the commencement of proceedings but no award is to be made up to that date (66F(2)(c)).

If the Court awards more than the lower offer limit but not more than the upper offer limit

If the Court awards more than the lower offer limit but not more than the upper offer limit in damages the Court must, if the amount awarded is less than the claimant's mandatory final offer, but more than the insurer's final offer award costs on a standard basis to a maximum of the declared cost limit (55F(3)(a)).

If the amount awarded is equal to, or more than, the claimant's mandatory final offer, costs are to be awarded to the claimant up to the date on which proceedings started on a standard basis limited to the declared cost limit and, costs on and after

the date on which proceedings have started on an indemnity basis (55F(3)(b)).

If the amount awarded is equal to, or less than, the insurer's mandatory final offer, costs are to be awarded up to the date on which proceedings started to the claimant, on a standard basis but limited to the declared cost limit on and after the date on which proceedings started to be awarded to the insurer on a standard basis (55F(3)(c)).

The section also goes on to deal with the Court's power to make an award for costs to compensate a party resulting from the failure of another party to comply with procedural obligations under the Act and to restrict the party's entitlements to costs where the evidence are necessarily repetitive. The example given under the legislation is that a claimant who calls two or more experts from the same area of expertise to give evidence of substantially the same effect, the Court will only allow the costs relating to one of the expert witnesses. The section also gives a discretion to the Court where the award of damages is effected by factors not reasonably foreseeable at the time of the making of the offer, such as the claimant's condition unexpectedly deteriorating, in which event the Court can ignore the mandatory offers and award costs on the basis of later offers of settlement (Section 55F(7)).

If a mandatory final offer is accepted for more than the lower offer limit but not more than the upper offer limit the claimant is entitled to the following costs: Regulation 29(1):

> "(a) 100% of item 1 costs;
>
> (b) 50% of item 5 costs;
>
> (c) the claimant's costs of legal representation, if any, at the

compulsory conference at the rate of $175 for the first hour and $150 for every hour after the first and, for a period of less than 1 hour, the relevant proportion of the appropriate hourly rate;

(d) the claimant's costs of an application to the court up to a maximum of $400;

(e) reasonable disbursements of which documentary evidence is available.

(2) However, if the amount calculated under subsection (1) is more than the declared costs limit, the claimant's entitlement is limited to the declared costs limit.

(3) In this section -

item 1 costs means costs allowable under the *Uniform Civil Procedure Rules 1999*, schedule 3, part 2, item 1.

item 5 costs means costs allowable under the *Uniform Civil Procedure Rules 1999*, schedule 3, part 2, item 5." (Regulation 29).

Personal Injuries Proceedings Act 2002

Section 56 deals with costs in cases involving damages of awards of not more than an amount equal to the upper offer limit (formerly $50,000).

This section was also amended by the *Civil Liability and Other Legislation Amendment Act 2010* which commenced on 1 July 2010.

The amendments are similar to the amendments to the *Motor Accident Insurance Act* and deals with awards where the amount awarded is equal to or less than the upper offer limit.

The upper offer limit is prescribed by the Regulation and currently is for an injury arising on and from 2 December 2002 to 30 June 2010 - $50,000 and for an injury arising on and from 1 July 2010 - $58,900 (Regulation 13(3)(a)(b)).

The lower offer limit for an injury arising on and from 2 December 2002 to and including 30 June 2010 - $30,000 and for an injury arising on and from 1 July 2010 - $35,340 (Regulation 13(2)(a)(b)).

The declared cost limit is the amount prescribed in the Regulations and for an injury arising from 2 December 2002 up to and including 30 June 2010 - $2,500 and from an injury arising from 1 July 2010 - $2,950 (Regulation 13(1)(a)(b).

The Legislation also requires the Minister to recommend to the Governor in Council on 1 July every year the amounts that should be allowed for the declared cost limit, lower offer limit and the upper offer limit based on the CPI increases (Section 75).

If the Court awards an amount equal to the lower offer limit or less

If the Court awards an amount equal to the lower offer limit or less the Court must, if the amount awarded is less than the claimant's mandatory final offer, but more than the respondent's mandatory final offer, order no costs (Section 56(2)(a)).

If the amount is equal to, or more than, the claimant's mandatory offer, costs are to be awarded to the claimant on an indemnity basis from the date on which proceedings started, but no costs are to be awarded up to that date (Section 56(2)(b)).

If the amount awarded is equal to, or less than, the respondent's or respondents' mandatory final offer, costs, are to be awarded to the respondent on a standard basis from the date on which proceedings started, but no award is to be made for costs up to that time (Section 56(2)(c)).

If the Court awards more than the lower offer limit but not more than the upper offer limit

If the Court awards more than the lower offer limit but not more than the offer upper limit in damages, the Court must if the award is less than the claimant's mandatory offer, but more than the respondent's mandatory offer, order costs to the claimant on a standard basis up to a maximum of the declared cost limit (56(3)(a)).

If the amount awarded is equal to, or more than, the claimant's mandatory offer, costs are to be awarded to the claimant on a standard basis up to when proceedings started to a maximum of the declared cost limit and after the proceedings have started on an indemnity basis (Section 56(3)(b)).

If the amount awarded is equal to, or less than, the respondent or the respondent's mandatory final offer, costs are to be awarded to the claimant on a standard basis up to the date on which proceedings are commenced to a limit of the declared cost limit and after that date to be awarded to the respondent on a standard basis (Section 56(3)(c)).

The section also provides that the Court must not award costs to a party relating to the introduction of unnecessarily repetitive evidence (Section 56(4)). This section also gives discretion to the Court where the award of damages is affected by factors that are not reasonably foreseeable at the time of the making of the mandatory offer by having regard to a later offer (Section 56(6)).

For the purpose of Section 40 if a mandatory offer is for more than the lower offer limit but not more than the upper offer limit and the offer is accepted the following costs are recoverable under Regulation 11:

(1) For section 40 of the Act, if a mandatory final offer for more than the lower offer limit but not more than the upper offer limit is accepted, the claimant is entitled to payment of costs on the following bases -

(a) 100% of item 1 costs;

(b) 50% of item 5 costs on the basis that preparations for trial and a directions conference have been undertaken (note the difference between this regulation and Regulation 29 of the Motor Accident Insurance Regulation);

(c) the claimant's cost of legal representation at the compulsory conference (if applicable) at the rate of $175 for the first hour and $150 for each hour after the first, and, for a period of less than 1 hour, the relevant proportion of the appropriate hourly rate;

(d) the claimant's costs of an application to the court up to a maximum of $400 for each application;

(e) reasonable disbursements if documentary evidence supporting the disbursements is available.

(2) However, if the amount calculated under subsection (1) is more than the declared costs limit, the claimant's entitlement is limited to the declared costs limit.

(3) In this section -

item 1 costs means costs allowable under the *Uniform Civil Procedure Rules 1999*, schedule 3, part 2, item 1.

item 5 costs means costs allowable under the *Uniform Civil Procedure Rules 1999*, schedule 3, part 2, item 5." (Regulation 11of the Personal Injury Proceedings Regulation 2002)

Workers Compensation and Rehabilitation Act 2003

The *Workers' Compensation and Rehabilitation Act 2003* was amended by the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2010* commencing on 1 July 2010.

The position in relation to costs consequences purely involving an employer and WorkCover are governed by the *Workers' Compensation and Rehabilitation Act* and Regulations. Where the claim involves the employer and a concurrent joint fees the position becomes slightly more complicated and I will deal with this later.

Part 12 of Chapter 5 of the Legislation deals with costs. These costs provisions though must be read with the Workers' Compensation and Rehabilitation Regulations 2003.

Division 1 of Part 12 - Costs applying to workers with WRI of 20% or more, worker with latent onset injury that is a terminal condition or dependent

Division 1 deals with a worker with a work related impairment (WRI) of 20% or more, a worker with a latent onset injury that is a terminal condition, or a dependent (Section 310).

If the claim is dismissed, the Court makes no award of damages or makes an

award of damages that is equal to or less than the **insurers written final offer** it must apply the principles set out in Section 312 to 314 (Section 311).

Costs if written final offer by the claimant

If the claimant makes a written offer that is not accepted by the insurer and the Court later awards an amount equal to or more than the claimant's written final offer and the Court is satisfied the claimant was willing to carry out the proposed offer it must, order the insurer pay the claimant's costs calculated on an indemnity basis (Section 312).

Costs if written final offer by insurer

If the insurer makes a written final offer that is not accepted by the claimant and the claim is dismissed, the Court makes no award of damages or makes award of damages that is equal to or less than the insurer's final offer of settlement, the Court must order the insurer to pay the claimant's costs, calculated on a standard basis, up to and including the date of service of the written offer and order the claimant to pay the insurer's costs, calculated on a standard basis, after service of the written offer (Section 313).

I can't understand why the claimant would be entitled to their costs up to the date of the offer where the claim is dismissed and no award for damages is made. The amendments introduced on 1 July 2010 seem to provide for this.

For the purposes of the judgment, interest after the date of the offer is to be disregarded for the purposes of whether the offer is successful (Section 314).

Division 2 of Part 12 - Costs applying to a worker with WRI of less than 20%

Division 2 of Part 12 deals with costs which apply to a worker with a WRI of less

than 20% or no WRI. No order for costs other than provided by this section is to be made by a Court (Section 316(1)).

If a **claimant** or **insurer** makes a final written offer of settlement that is refused the Court must make the following orders as to costs.

If the Court later awards an amount of damages that is equal to or more than the worker's written final offer - order that the insurer pay the worker's costs on a standard basis from the date of the written offer (Section 316(2)(a)).

If the Court later dismisses the worker's claim, makes no award of damages or awards an amount of damages that is equal to or less than the insurer's written offer - order that the worker pay the insurer's costs on a standard basis from the date of the final offer (Section 316(2)(b)).

If an award of damages is less than the claimant's written final offer but more than insurer's written final offer each party bears their own costs (Section 316(3)).

An order for costs of an interlocutory application may be made only if the Court is satisfied the application has been brought because of unreasonable delay by one of the parties (Section 316(4)).

If an entity other than the worker's employer or the insurer is joined as a defendant in the proceedings, the Court may make an order about costs in favour of, or against the entity according to the proportion of liability of the defendants and the justice of the case (Section 316(5)).

The Court may make an order for costs against the worker's employer or the insurer under sub-section 5 only if the order is in favour of the entity and the worker's employer or the insurer join the entity as a defendant (Section 316(6)).

Workers' Compensation and Rehabilitation Regulations governing costs

Part 8 of the Workers' Compensation and Rehabilitation Regulations 2003 deals with the quantum of costs that may be allowed where the Act applies.

Division 1 of Part 8 deals with costs of proceedings before an industrial magistrate or industrial commission.

Division 2 of Part 8 deals with costs in claims for damages.

Regulation 114 provides that Division 2 applies only to a claimant who is a worker whose WRI is 20% or more or a dependent.

The Regulation does not refer to a worker who has a latent onset of a terminal condition. This type of claimant does not appear to be covered by the regulation costs.

Net damages in the Regulations means damages recovered less compensation paid by an insurer (Regulation 115).

Costs before proceedings started

If a claimant recovers at least $150,000 net damages and the claim is settled without the holding of a compulsory conference the amount to be allowed is 120% of the amount in Schedule 6 Column A. If the matter settles after the compulsory conference the amount in Schedule 6 Columns A and B. For investigation of liability by an expert the amount in Schedule 6 Column C (Regulation 116(2) (a) and (b)).

For an application to the Court the amount in Schedule 6 Column D (Regulation 116(2)(c)).

If the claimant recovers net damages of $50,000 or more but less than $150,000, the costs are 85% of the amounts previously referred to (Regulation 116(3)).

If the claimant recovers less than $50,000 net damages the costs are 85% of the amount calculated under Regulation 116(2) multiplied by the proportion that the net damages bears to $50,000 so if the net damages are $30,000 the costs are 85% of the amount calculated under sub-section 2 multiplied by 3/5ths (Regulation 116(4)).

If the Court in the proceedings awards payment of solicitor - client costs, the costs recovered under the schedule of costs are multiplied by 120% (Regulation 116(5)).

Section 312 of the Legislation refers to indemnity costs but the Regulation refers to solicitor - client costs. Under the Uniform Civil Procedure Rules solicitor-client costs means indemnity costs and I would assume that this is what is intended where the Regulations refer to solicitor - client costs.

Set out hereunder is Schedule 6 of the legal costs referred to in Regulation 116.

Column A Pre-proceeding notification and negotiation	**Column B Compulsory conference**	**Column C Investigation by expert**	**Column D Pre-proceedings court applications**
$2,0000	$135 for the first hour or part of an hour $105 for each additional hour or part of an hour	$270	$400

Costs after proceedings started

Regulation 117 of Division 2 prescribes the legal professional costs of a claim after proceedings started. Sub-section 2 provides costs are charged under the relevant Court scale of costs.

Query: Does this mean that where standard costs are ordered under the Act once proceedings have started this Regulation applies and indemnity costs are assessed under normal principles. Conversely does it mean that when an indemnity order for costs is made after the action has started, the scale is to be applied but with an indemnity test?

Regulation 118 deals with outlays incurred by a claimant which are allowable. They are as follows:

> "118 Outlays
>
> (1) In addition to legal professional costs, the following outlays incurred by the claimant are allowed -
>
> (a) 1 hospital report fee for each hospital that provided treatment for the worker's injury;
>
> (b) 1 report fee for each doctor in general practice who provided treatment for the worker's injury;
>
> (c) 1 medical specialist's report fee for each medical discipline reasonably relevant and necessary for the understanding of the worker's injury;
>
> (d) 1 report fee of an expert investigating liability, of not more than $1000, less any proportion of the fee agreed to be paid by

the insurer;

(e) Australian Taxation Office or tax agents' fees for supplying copies of income tax returns;

(f) fees charged by the claimant's previous employers for giving information necessary for the claimant to complete the notice of claim, but not more than $50 for each employer;

(g) fees charged by a mediator in an amount previously agreed to by the insurer;

(h) filing fees or other necessary charges incurred in relation to an application to the court before a proceeding is started;

(i) reasonable fees for sundry items properly incurred, other than photocopying costs.

(2) The fees -

(a) are allowable only for reports disclosed before the start of proceedings; and

(b) for subsection (1)(a) to (c) - are payable according to the recommended Australian Medical Association scale of fees."

Division 2A Costs when offers made for a contribution claim

The amendments on 1 July also introduced a new Division 2A into Chapter 5 relating to costs where there are contribution claims. Section 316A provides that sub-sections 3 to 5 apply if the contributor or other party (including an insurer) made an offer that was not accepted and the Court later awards an amount of

contribution that is equal to or more than the other party's written final offer, the Court must order the contributor to pay the other party's costs on an indemnity basis from the date the written offer was made (Section 316A(3)).

If the Court later dismisses the contribution claim or makes no award for contribution or makes an award of contribution of an amount that is equal to or less than the contributor's written final offer the Court must order, the other party to pay the contributor's costs on a standard basis from the date the written final offer was made (Section 316A(4)).

If an award of contribution is less than the other party's written final offer but more than the contributor's written final offer each party bears their own costs (Section 316A(5)).

This section applies to a written offer whether or not it is made as a separate offer or as part of a joint or consolidated offer. An offer means a written final offer under Section 292 of the Act (Section 316A sub-section (6) and (7)).

A Court may make no order about costs to which Divisions 1, 2 or 2A applies except for the orders provided for in the Division (Section 318A).

Practical Implications

The difficulties with costs becomes more complicated where the claim involves the employer and a concurrent tortfeasor.

Before I go on to deal with the issues which need to be considered a couple of principles in relation to costs and the WorkCover Legislation should be highlighted.

Pursuant to Rule 679 of the *Uniform Civil Procedure Rules* **Costs of the**

Proceedings mean costs of all the issues in the proceeding and includes:

(a) Costs ordered to be costs in the proceedings and

(b) Costs of complying with necessary steps before starting the proceeding and

(c) Costs incurred before or after the start of the proceedings for successful or unsuccessful negotiations for settlement of the dispute.

These rules though must be read subject to substantive legislation such as the *Motor Accident Insurance Act*, *WorkCover Act* and *Personal Injuries Proceedings Act*.

Costs of an issue

Where a party recovers costs of an issue the only costs the party is entitled to recover are the additional costs caused by that issue. Any costs which are common with that issue in the action are not recoverable as they are not additional costs caused by that issue. Any example would be attending a callover or perusing a document which would have been perused for the claim as well as the costs of that issue. An example of costs of an issue is costs of a counter-claim (*Smith -v- Madden*[1946] 73 CLR 129 and *Brook -v- Harman*[1975] 5Q.L.220).

The Plaintiff's Costs of a proceeding where successful against one defendant

Where the plaintiff recovers **costs of the proceedings** against one defendant but is unsuccessful against the other the plaintiff is still entitled to those costs which are proper or necessary against all the defendants. It falls to the defendant in this situation to seek another order from the Court to restrict the plaintiff's entitlement to all those costs (*Parker -v- Borg and Suncorp Metway Insurance* Jersey CJ unreported 4 July 2002).

Care should be taken in the wording of the form of discharge to therefore ensure that the costs provisions reflect what the parties intend as the costs payable. Quite often a form of discharge is worded to say the PIPA respondent X pays the costs of the PIPA claim. The effect of such wording could technically mean that the PIPA respondent is only liable for costs of the issues solely related to the PIPA claim i.e. the common costs aren't picked up. Frequently this is not what the parties intend. The parties quite often intend that the PIPA respondent is to pay all costs of the claim **except for those costs which solely relate to the WorkCover claim**. If this is what is intended by the settlement the discharge should be appropriately worded.

The discharge should be worded in this fashion to enable the claimant to recover the costs which it would otherwise have been entitled to save for the WorkCover claim. By wording the discharge this way the claimant can recover against the PIPA respondent the common costs of reports which were obtained both for WorkCover and for the PIPA claim. Generally speaking this appears to be what the parties intend when they resolve the question of costs and care should be taken to ensure the discharge is worded appropriately.

Further observation I should make is the comments made by the late Justice Dutney in a matter of *Campbell -v- CSR Limited and CSR Plain Creek Pty Ltd* [2002] QSC 266 at paragraph 60.

His Honour was required to consider whether Section 315 of the *WorkCover Act 1996* was available to a concurrent tortfeasor which was not the employer to reduce the Griffiths and Kirkmeyer component. His Honour formed the view that the *WorkCover Queensland Act 1996* was intended to regulate claims against employers who are insured under the statutory scheme and to restrict only claims against employers and WorkCover required to insure under that scheme which is

consistent with the exclusion from the definition of damages in Section 11 of claims where the employer is separately required to insure under another Act. While His Honour comments related to the *WorkCover Queensland Act 1996* the definition is similar under Section 10 of the *Workers' Compensation and Rehabilitation Act 2003.*

If this is the position regarding general application of the legislation, a concurrent tortfeasor with the employer may not be able to enjoy the benefits of the costs regime which exists under the *Workers' Compensation and Rehabilitation Act* and Regulations.

Query therefore where a joint offer is made under Section 292 of the *Workers' Compensation and Rehabilitation Act* to a plaintiff or by a plaintiff invokes the provisions of Divisions 1 and 2 of Chapter 5 and falls within the general restrictions to make orders for costs provided by Section 318A.

The particular provisions i.e. Sections 312, 313 and 316 refers to the principles of costs that apply where the claimant makes a written final offer that is not accepted by the **insurer** or the **insurer** makes a written final offer that is not accepted by the claimant. The restriction of Section 318A arguably may not apply where there are joint offers which do not solely involve the insurer. These are matters though which may require judicial guidance.

Another decision worth noting from a plaintiff's prospective is *Bonser -v- Melnacis* [2000] QCA 13 (2002) 1 Qd.R1. While this decision dealt with the now repealed provisions of the *WorkCover Queensland Act 1996* rather than the current legislation it dealt with the application of section 6 of the *Law Reform Act 1995* sub-section (c) which provides

"Any tortfeasor liable in respect of that damage may recover contribution

> from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise,..."

The Court found that the procedures introduced by the WorkCover Act abolishes any entitlement on the part of an injured worker to commence proceedings against the employer unless those procedures have been undertaken.

As the claimant in that particular case had not complied with those steps, the employer had no liability to the plaintiff which could support a claim by a third party for contribution under Section 6(c) of the Law Reform Act.

As was observed by the Court of Appeal a plaintiff applying or failing to apply for an assessment can dictate where the eventual loss is going to fall.

As I mentioned, while this decision deals with the *WorkCover Queensland Act 1996* which is now abolished it probably still has application today.

A claimant should therefore be conscious of the fact that if a tortfeasor wishes to seek contribution from WorkCover or an employer and require the claimant to undertake the WorkCover steps, agreement should be reached that those costs are costs of the proceedings against that respondent.