

National Injury Insurance Scheme

*How the intersection between
WCRA, PIPA and MAIA affects
serious injury claims*

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The right barrister for the brief



Gratuitous care

Walters v Roche & Anor

[2020] QSC 319

"On the defendant's/non-literal interpretation of section 9, a plaintiff would be able to include in their claim for treatment, care and support damages a claim for gratuitous care, subject to section 59 of the CLA" per Ryan J [165]

"To conclude, in my view, section 9 does not literally exclude from "treatment, care and support" the treatment, care and support delivered in the circumstances listed in section 9. Rather, section 9 creates a subset of treatment, care and support for the purposes of the Scheme and the CLA" per Ryan J [195]

"On the non-literal interpretation of section 9, had the present plaintiff not withdrawn the preservation notice, the lump sum amount awarded to him for treatment, care and support damages could have included an amount for gratuitous care (or, it seems to me, could have been calculated by reference to his losses, represented by his needs – however those needs were to be met; that is, by way of services provided by paid carers or provided gratuitously)" per Ryan J [173]

Who would pay?

A closer analysis of S44 National Injury Insurance Scheme (Queensland) Act

44 Acceptance of treatment, care and support damages

(1) This section applies if—

(a) the participant is awarded treatment, care and support damages under a final judgment of a court or a binding settlement; and

(b) the agency is liable, under section 42, to contribute towards the insurer's liability on the claim for treatment, care and support damages.

(2) The Participant must within the acceptance period, give notice to the agency and the insurer stating whether or not the participant accepts the awarded treatment, care and support damages.

(3) If the participant states in the notice given under subsection (2) that the participant accepts the awarded treatment, care and support damages—

(a) the agency must pay to the participant the amount of the awarded treatment, care and support damages, less any amount that relates to the period of the participant's participation in the scheme; and

(b) the participant stops being a participant in the scheme when the participant receives the payment under paragraph (a); and

(c) despite the final judgment of the court or the terms of the binding settlement—

(i) **the insurer is not liable to pay** to the participant the amount of the awarded treatment, care and support damages; and

(ii) **the agency is not liable to pay** to the participant any amount of the awarded treatment, care and support damages that relates to the period of the participant's participation in the scheme.

(4) Subsection (5) applies if the participant gives a notice under subsection (2) stating that the participant does not accept the awarded treatment, care and support damages.

(5) Despite the final judgment of the court or the terms of the binding settlement, neither the agency nor the insurer is liable to pay the amount of the awarded treatment, care and support damages.



WCRA – Chapter 4 A Serious Personal Injuries

Some things to note

The eligibility criteria is identical

It does not apply to journey or recess claims – s232H

No time limit on applying for Chapter 4A inclusion (but not it applies to workers entitled to compensation under Chapter 3 and therefore attracts the usual 6 month time limitation on statutory claims)

It does not create a contest between insurers in respect of funding – it is all funded by WorkCover, although WorkCover delegates its Chapter 4A responsibilities to the National Injury Insurance Agency in Qld



*Chapter 4A –
Some things to note*

The election to preserve the right to claim damages must be made in the Notice of Claim for Damages –s 232V(1)

If a worker fails to make that election, they will be prevented from receiving treatment care and support damages – s232V(3)

If it is decided or agreed the worker is guilty of contributory negligence to the extent of 50% or more, the worker will be prevented from receiving treatment care and support damages – s232W(1)(b)(iii)

Does Chapter 4A broaden the heads of damages recoverable pursuant to the WCRA?



The definition of:

treatment care and support needs;
excluded treatment, care and support;
and
treatment care and support damages,



is the same under Chapter 4A WCRA as in the NIISQ Act



Walters decided gratuitous care was within the meaning of treatment care and support damages, on the basis excluded treatment care and support is a subset of treatment care and support needs.

*Does Chapter
4A broaden
the heads of
damages
recoverable
pursuant to
the WCRA?*

Treatment care and support damages is broadly defined to mean “*damages*” relating to the workers’ “*treatment care and support needs*” and is not narrowed so as to expressly exclude claims not otherwise permissible pursuant to Chapter 5, Part 9 of the WCRA.

“Damages” is defined to effectively mean damages payable by the employer, the right to which arises independently of the WCRA (accordingly, including gratuitous care damages).

Part 5 of Chapter 4A dealing with the election to receive treatment care and support damages is expressed to be substantive in nature and to prevail against an inconsistent act or rule of law.

Does Chapter 4A broaden the heads of damages recoverable pursuant to the WCRA?

232T Application of part

- (1) *This part applies **if an eligible worker may seek treatment, care and support damages for the worker's injury...***

232V Worker Must Make Election

- *If the worker makes a claim for damages **under chapter 5** for the worker's injury, the worker must state in the notice of claim given under section 275 whether or not the worker elects to seek treatment, care and support damages for the injury....*
- (3) *If the worker **does not elect to seek** treatment, care and support damages for the worker's injury, or the election is taken not to have been made under section 232W, the worker **is not entitled to seek** treatment, care and support damages for the injury.*

*Does Chapter
4A broaden
the heads of
damages
recoverable
pursuant to
the WCRA?*

- WorkCover’s liability for a worker’s treatment care and support, once a worker is accepted as having a serious injury, is expressly stated to be **to “pay for the worker’s treatment care and support...as provided under this chapter”** and is not limited by reference to Chapter 5, Part 9’s restriction on damages – S 232L(1)
- So, given all of the above, could it be argued that may include paying treatment care and support **damages** provided the appropriate election is made, noting the prevailing nature of Chapter 4A mentioned above?
- As a matter of interpretation, Chapter 4A does not create a right to damages and rather, preserves the entitlement to claim for seriously injured workers

*Can a worker
get more
“treatment
care and
support” if
they elect to
remain in the
scheme?*

Single plaintiff with
“serious injury” within
the meaning of Chapter
4A WCRA

Mum provides his
support needs whilst
support plan being
established

Subsequently, NIS, on
delegation from
WorkCover, arrange for
all services to be paid

Mum ceases helping
and returns to her usual
way of life

What does this mean?

*Can a worker
get more
“treatment
care and
support” if
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remain in the
scheme?*

- Two important restrictions upon awards for paid care under the WCRA:
 - *s306E – the worker cannot receive damages for services of substantially the same kind that he/she paid for before the injury*
 - *s306H – the “hybrid” restriction (cannot receive paid care damages if services have also been provided gratuitously)*

The refund trap

S270 WCRA - WHEN DAMAGES ARE TO BE REDUCED

1) *The amount of damages that an employer is legally liable to pay to a claimant for an injury must be reduced by the total amount paid or payable by an insurer by way of compensation for the injury.*

(2) However, subsection (1) applies to compensation paid or payable under chapter 4A only if the damages include treatment, care and support damages.

(3) *Also, the amount of damages must not be reduced by an amount paid under section 193.*

(4) *This section does not limit the reduction of the amount of the damages by any other amount that the insurer or the claimant is legally liable to pay on account of the worker under another law.*

WorkCover / PIPA claims and the serious injury provisions

- The *Civil Liability Act* 2003 will have no application
- Damages against the employer will be regulated by Chapter 5 of the WCRA and can include damages for treatment, care and support provided the worker has made the election
- Damages against the 3rd party will be assessed at common law
- But, can the worker elect to remain a life-time participant and in its claim against the 3rd party, seek components of treatment care and support damages from the PIPA respondent?

WorkCover / PIPA claims and the serious injury provisions

S119 WCRA

- (1) *This section applies if, for an injury, there is—*
- (a) *an entitlement to compensation; and*
 - (b) *an entitlement to recover damages against an employer or another person.*
- (2) *An entitlement to compensation ends when settlement for damages is agreed or judgment for damages is given...*
- (3) ***However, an entitlement to compensation under chapter 4A for an injury ends only if—***
- (a) the damages include treatment, care and support damages; and***
 - (b) the worker accepts the treatment, care and support damages within the acceptance period...***

*WorkCover /
PIPA claims
and the
serious
injury
provisions*

What about where the worker is guilty of contributory negligence?

- If 50% or more, a worker's election to receive treatment care and support damages is of no effect (s232W). That is, they must remain in the scheme for life.
- Which means a decision needs to be made whether to accept anything which comes within the meaning of treatment care and support damages from the PIPA respondent.

*Refunding
WorkCover
for Chapter
4A benefits
out of PIPA
damages*

**207B INSURER'S CHARGE
ON DAMAGES FOR COMPENSATION PAID**

(1) *This section applies to—*

(a) *an injury sustained by a worker in circumstances creating—*

(i) *an entitlement to compensation; and*

(ii) *a legal liability in the worker's employer, or other person, to pay damages for the injury, independently of this Act; and*

(b) *damages that an employer is not indemnified against under this Act.*

(2) *An amount paid as compensation to a person for an injury, to which there is an entitlement to payment of damages at a time or for a period before the person becomes entitled to payment of damages by an employer or another person, is a first charge on any amount of damages recovered by the person to the extent of the amount paid as compensation to the person.*

(3) *Subsection (2) applies to compensation paid under chapter 4A only if the damages include treatment, care and support damages.*

*MAIA /
WCRA
claim*



*MAIA/
WCRA
claim*

S116 EFFECT ON ENTITLEMENT IF COMPENSATED UNDER CORRESPONDING LAWS

- (1) *This section applies if, for an injury, payment (by whatever name called) that corresponds to compensation under this Act is made to, or on account of, a person under an entitlement under another law.*
- (2) *The person's entitlement to compensation under this Act for the injury stops.*
- (3) *However, **if the person's entitlement under the other law relates only to payments corresponding to compensation under chapter 4A , subsection (2) applies only to stop the person's entitlement to compensation under chapter 4 or 4A .***

*MAIA /
WCRA
claim – past
care*



*MAIA /
WCRA
claim –
contributory
negligence*



*MAIA/
WCRA
claim –
contributory
negligence*

**52C DAMAGES IF INSURANCE AGENCY IS LIABLE TO
CONTRIBUTE**

- (1) *This section applies to a claim for personal injury damages against an insurer under the MAIA if—*
- (a) *the personal injury resulted from a motor accident; and*
 - (b) *the person suffering the personal injury is a life-time participant in the insurance scheme in relation to a serious personal injury resulting from the motor accident; and*
 - (c) *a court decides—*
 - (i) *the person is not guilty of contributory negligence in relation to the claim; or*
 - (ii) ***the person is guilty of contributory negligence in relation to the claim and the damages that the person would be entitled to in the absence of contributory negligence are to be reduced, because of the contributory negligence, by less than 50%; and***
 - (d) *the insurance agency is liable, under the National Injury Act, section 42 , to contribute towards the insurer’s liability on the claim for treatment, care and support damages.*
- (2) *The court may award treatment, care and support damages.*
- (3) *However, if the court awards treatment, care and support damages, **the court must not, in assessing the amount of the treatment, care and support damages, take into account any contributory negligence of the person.***

Take home points

Preserve the right to receive treatment care and support damages

The plaintiff (whether under the WCRA or NIIAQ scheme) then must make an election to accept the damages award after receipt of the judgement

This allows plaintiff to seek answers regarding entitlement to particular categories or components of damages within the claim and then make the final decision dependent upon the outcome

Take home points

Advice for new seriously injured clients
on back of *Walters*

To apply or not to apply?

Keep in mind the potential second bite
of the cherry: 232ZD WCRA --
additional payments if treatment care
and support damages insufficient

Questions?



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