

Insurance law update

September 2015



Wrongs Amendment Bill 2015

INTRODUCTION

In 2013, the previous Victorian Liberal Government directed the Victorian Competition and Efficiency Commission (“the Commission”) to review the personal injury provisions of the Wrongs Act (“the Act”). The review was intended to pick up any inequities, inconsistencies or anomalies within the Act in response to criticism about the unfair imposition of ‘unreasonable barriers’ and ‘limitations’ under the Act whereby legitimate claims were being denied or under-compensated. The Commission handed down its report in February 2014 and a bill was introduced in Parliament on 16 September 2015.

Broadly speaking the Bill seeks to amend only certain aspects of the Act. The bill adopts many of the recommendations set out in the Commission’s Report. There are five key aspects of the bill.

1. Changing the method by which it is calculated and the maximum amount of damages for non-economic loss.

Under the bill this will be calculated by using the ‘all groups consumer price index for Melbourne’ from the previous year, which is published by the Australian Bureau of Statistics.

The bill also fixes a maximum amount for damages for non-economic loss and the how that amount is indexed. The formula does not provide for any reduction in the maximum recoverable in the event of deflation.

Damages for non-economic loss will be \$577,050 compared to the current \$371,380 and the method of calculation for damages for each week during the loss of earnings period, is to be set at 3 times the amount of average weekly earnings at the date of award.

2. Expanding the definition of dependents to include unborn children

The bill expands the definition of ‘dependents’ to include any persons who are wholly, mainly or in part, dependent on the claimant, which will also include any unborn children of the claimant at the time of the liability.

3. Damages for loss of capacity to provide gratuitous care to dependents

In addition to expanding the definition of ‘dependents’ the bill also confers upon a Court the power to award damages for loss of capacity to provide gratuitous care to dependants.

The ability to claim damages for loss of capacity to care for dependants was abolished at common law by the High Court in *CSR Ltd v Eddy* (2005) 226 CLR 1. The reason for reinstating this particular head of damage is to recognise the importance of parents and carers and the financial stress put on families in the event of an injury or death of a parent or caregiver.

A Court can only award these damages if it is satisfied that the claimant provided care before the accident and the dependents are unable to care for themselves because of their age or physical or mental incapacity.

The bill also provides that it is a reasonable expectation that but for the injury the claimant would have provided gratuitous care to the dependants for at least 6 hours per week and for at least 6 consecutive months. The bill also provides that damages will only be awarded in accordance with section 28IE and must not include any damages for non-economic loss; and claimants cannot receive damages if they have already recovered damages in respect of the loss of capacity to provide gratuitous care.

4. Change the threshold impairment level for persons suffering from a significant psychiatric or spinal injury

The current threshold for whole-person impairment for non-economic loss is 'greater than 5 per cent'. The bill will lower the threshold for claimants with spinal injuries to '5 per cent or more'. This will redress the difficulty for claimants who may be unable to claim compensation for non-economic loss because they do not meet the current threshold. The bill also lowers the impairment threshold for claimants with psychiatric injuries, from 'greater

than 10 per cent' to '10 per cent or more'. Effectively the bill seeks to give effect to many of the recommendations contained in the Report. These changes will make it easier for claimants with spinal or psychiatric injury to access compensation. The change in respect of spinal injuries is probably the most significant amendment introduced by the legislation. It is likely to lead to a noticeable increase in the number of actions commenced.

5. Power to stay a proceedings where the claimant has not served a certificate of assessment

The bill proposes to confer on the Courts a power to stay a proceeding in Part VBA claims in respect of a claim for damages for non-economic loss in cases where the claimant has not served a certificate of assessment and any other information that is required to accompany the certificate when it is served.

SUMMARY:

In its present form the bill, seeks to legislate for damages that had been abolished at common law, lower the threshold for spinal and psychiatric injuries, thereby creating a larger pool of potential claimants- this will ultimately benefit young or catastrophically injured plaintiffs and provide greater access to compensation.

However, the bill also puts a cap on damages for economic loss so that it "operates more fairly" and brings the Wrongs Act into line with Victorian workers compensation legislation.

The bill will be further debated on 30 September 2015 and we will provide a further update.

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