“ITS OK TO SAY SORRY BUT CAN YOU SUE?”

VICTORIA’S PERSONAL INJURY REFORMS

Article at page 58 Law Institute Journal November 2003
By Michael Lombard and Michael McGarvie
Partners, Holding Redlich

ABSTRACT
Victoria now has a raft of new laws aimed at solving the problems in the insurance sector. They will impact on all members of our community and lawyers need to examine the changes carefully. By Michael Lombard and Michael McGarvie

Major changes to Victoria’s personal injury law have been progressively introduced since October 2002. The Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Public Liability Act), The Limitation of Actions (Amendment) Act 2002 (Limitation Amendment Act) together with the Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003 (Significant Injury Act), formed the legislative response of the Victorian government to the perceived insurance crisis in Victoria. The changes to the limitation periods came into operation on 5 November 2002 but, because of the Significant Injury Act, now have a retrospective effect on previously unissued injury claims.

A host of other changes have also been made which the Premier Steve Bracks concluded would provide the opportunity for significant insurance premium relief and make insurance more affordable and accessible over the longer term. The changes will also require lawyers advising about claims to be very careful. The ramifications of an incomplete understanding of the restrictions on personal injury claims could be serious for both plaintiff and insurance lawyers alike.

The controversy
Most Australians are aware of the perceived “crisis” in insurance that has arisen since 11 September 2001. The media has been awash with individuals, companies and community groups complaining about a dramatic rise in insurance premiums or an inability to find any insurance to cover their activity.

The Victorian government maintained that the state would move cautiously in the absence of reliable data and a strong indication that changes to tort law would benefit the community. State Attorney-General Rob Hulls was quoted as saying that the insurers had run a sophisticated public relations campaign but had produced no evidence of a blow-out in claims and court payouts. The Australian Medical Association (AMA) (Victoria) was strongly urging the Victorian government to take action to impose a “robust threshold” on general damages being awarded. It also
called for a reduction in the limitation periods for both adults and minors. The Liberal opposition, on the other hand believed urgent action was required and in February 2002 released a document entitled “Time for action”, which contained a number of measures to help reduce upward pressure on premiums. Among these changes contained a proposal that where law firms took on cases on a no-win, no-fee basis they had to accept responsibility for ensuring that the other party’s costs were paid if their client lost. The cause both political parties agreed that the events of 11 September 2001 and the subsequent stock downturns took an enormous amount of capital out of the international insurance market. The collapse of the HIH group in Australia and other overseas insurers brought to an end an era of highly aggressive premium price-cutting. AMA Victoria conducted a survey of 2000 doctors. Ten per cent said they would stop work altogether by 2003 and 40 per cent said they would effectively withdraw from undertaking higher risk practice and procedures. A cause that was hotly contested, however, was the role of the legal profession. The insurance industry argued that plaintiff lawyers had fuelled a more litigious society. Commentators made extravagant claims, with or without qualification. An example appeared in the August 2002 issue of Sport Health: “Duty of Care’ is a limitless concept. Just as a butterfly flapping its wings in China can allegedly result in a storm on the other side of the world, any human action can conceivably be associated with an infinite set of consequences”. A vigorous campaign was conducted in rebuttal to these allegations. The legislation that was passed has pleased few parties. The opposition labelled it a case of, “Too little, too late” and the AMA Victoria found the response of the government inadequate. Changes “Sorry” admissible The Public Liability Act adds a new Part IIC to the Wrongs Act 1958 – Apologies. An apology is defined as an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault. The new part provides that an apology does not constitute an admission of liability or an admission of unprofessional conduct or unsatisfactory professional performance. When considering that the definition does not include a clear acknowledgment of fault, a simple, “I’m sorry” will not be injurious to the defendant’s case but, “I’m sorry, it was my fault”, will be very harmful. Any apology can, however, be admissible if it is used to establish a fact in issue. Similarly, a reduction or waiver of the fees payable for the service does not constitute an admission of liability or unprofessional conduct. Good Samaritans In a widely applauded reform, the Public Liability Act alters the Wrongs Act 1958 to include protection from civil liability for an individual who provides assistance, advice or care to another person in relation to an emergency or accident and where the person expects no money or other financial reward. The immunity will extend to people who provide advice by telephone or other means of communication to a
person at the scene of an emergency or accident. Important note should be taken of the “Expectation of reward” qualification. It would seem that a doctor making an error when trying to help a stranger outside the surgery would be immune from civil liability but a doctor helping one of his or her own patients may not.

Volunteers

Volunteers are also protected from personal liability provided they are providing a service within the scope of the work provided by their community organisation. Importantly, the liability transfers from the individual to the organisation only if it is incorporated. It is now essential that solicitors advising associations ensure that they become incorporated to protect the members from possible civil liability.

One possible drawback of this section highlighted by the opposition in Parliament, may be the realisation by the Incorporated Association that it does not really need insurance if it has no assets to protect.

Donated food

In 1996, the estimated amount of food thrown away each year in Melbourne was 280,000 tonnes. A new Part VIB – Food Donor Protection – inserted by S10 of the Public Liability Act provides that a food donor cannot be liable in any civil proceeding for death or injury that results from the consumption of food, if the food was donated:

- in good faith
- for a charitable or benevolent purpose
- without an expectation of payment
- in a safe condition at the time of donation
- with appropriate necessary food handling instructions
- with use-by date information

One issue that may arise when the reform is under scrutiny is whether a regular food donor will need to give the same information each time food is provided to the same recipient.

New significant injury test

On 16 June 2003, the Significant Injury Act was given royal assent. It applies to all claims arising out of injuries that occur after 20 May 2003. From 1 October 2003 it applied to all claims subsequently issued, whatever the date of injury. Injured people cannot seek damages for pain and suffering unless they are left with a significant injury. Although the WorkCover and Transport Accident Schemes have been untouched by the reforming Acts, the AMA Guides have again been used to impose a threshold on injured claimants receiving damages. A “significant injury” for the purposes of the Act is defined as a physical impairment greater than 5 per cent in accordance with the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA4). Alternatively, a person must have a psychological injury of greater than 10 per cent according to the Clinical Guides of the Rating of Psychiatric Impairment prepared by the Medical Panel (Psychiatry) Melbourne, in October 1997. The only exemptions to these injury standards are loss of a breast or loss of a foetus.

Matching the WorkCover and Transport Accident Schemes, psychiatric and psychological injury arising as a consequence of the physical injury is excluded from the assessment. This is generally known as “secondary psychological injury”.
Unfortunately, even a substantial physical or psychological injury can receive a low impairment rating using either guide. Some examples of injuries that would not quality for non-economic loss damages under the new regime will be:

<table>
<thead>
<tr>
<th>Injury</th>
<th>Impairment Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Loss of taste</td>
<td>3 per cent (AMA4)</td>
</tr>
<tr>
<td>Loss of great toe</td>
<td>5 per cent (AMA4)</td>
</tr>
<tr>
<td>Undisplaced fracture of pelvis</td>
<td>0 per cent (AMA4)</td>
</tr>
<tr>
<td>Loss of sense of smell</td>
<td>3 per cent (AMA4)</td>
</tr>
<tr>
<td>Loss of little finger</td>
<td>5 per cent (AMA4)</td>
</tr>
<tr>
<td>Loss of ring finger</td>
<td>5 per cent (AMA4)</td>
</tr>
</tbody>
</table>

**Restriction on damages**

The maximum that can now be received for pain and suffering is $382,950 which mirrors the equivalent maximum under the *Transport Accident Act* 1986. *(This sum is subject to CPI indexing)* As the WorkCover legislation has been moving closer to the Transport Accident legislation in recent years, it may one day be the case that all restrictions on damages are identical.

The restriction on economic loss has not mirrored the other schemes. Section 7 of the *Public Liability Act* restricts loss of earnings claims to three times the amount of average weekly earnings at the date of the award. Currently this restriction would be three times $892.10. *(This sum is subject to CPI indexing)*

Another major restriction on damages is the increase of the discount rate for awarding lump sum compensation.

The discount rate is the compounding reduction that is required to provide a lump sum of money today to a plaintiff who would have earned an amount of money over a period. Although the *Transport Accident Act* 1986 requires a 6 per cent discount rate,23 the High Court had decided that 3 per cent was the appropriate rate.24 The *Public Liability Act* increases this rate to 5 per cent for public liability and other injury claims. An example of a 25 year-old moving from 3 per cent to 5 per cent would reduce the lump sum received for economic loss by one quarter.25 Thankfully, there is a mechanism contained in the legislation to adjust the discount rate by regulation, at later dates. It should be noted though, that governments rarely expand the generosity of statutory schemes.

**Risky business**

One of the areas hit hardest by insurance premium rises has been commercial and recreational adventure activity. The *Public Liability Act* changes the *Goods Act* 1958 to correspond with the amendments to the commonwealth *Trade Practices Act* 1974 *(TPA)* which allows waivers for recreational services. The amendments do not allow the waiver to avoid liability if the provider was grossly negligent.26 This includes failing to take appropriate precautions with reckless disregard for the consequences. The legislation also allows for a prescribed form to be created which will be of considerable interest to lawyers and recreational service operators alike.

**Structured settlements**

An often discussed, modification of personal injury law has been the replacement of the payment of lump sums with regular payments of compensation. The major drawbacks were the implications for the plaintiff both from a taxation and social security aspect. Following the development of a formula for preclusion periods in relation to Centrelink payments, the only stumbling block became the treatment of regular payments of compensation as taxable income and the treatment of lump
sums as not taxable.\(^{27}\)

The federal Parliament has now passed amendments to the *Income Tax Assessment Act* 1997, which will allow income tax exemption where certain conditions are met.\(^{28}\) The commonwealth legislation excludes death and workers compensation claims. It must only be for personal injury. It must include at least one structured settlement annuity and can include a lump sum as well. As part of the settlement, the insurer must purchase the annuity from a life insurance company or a state insurer. For income tax exemption to apply, the settlement must provide at least one annuity providing monthly payments equivalent or greater than the current aged pension, which is approximately $1000 per month at the present time. The annuity must also be CPI indexed and payable for the life of the plaintiff. The annuity must not be assignable or commutable.\(^{29}\)

Further annuities above the pension level can also be included in the settlement but must provide for payments to the successful plaintiff at least annually over a 10-year period. The *Public Liability Act* is intended to dovetail into the commonwealth legislation and can only take effect where the parties agree. It does not create a power that the court, when pronouncing judgement, is able to implement.

As the structured settlement becomes an option, solicitors will need to ensure they give their clients full and detailed advice about the option of a structured settlement and allow them to be in a position to make an informed decision.\(^{30}\)

AMA Victoria believes that the right of the plaintiff to choose whether to enter into a structured settlement will undermine the effectiveness of the changes. It advocates that cases involving larger damages awards be subject to compulsory mediation with a view to securing a structured settlement.\(^{31}\)

**Changed limitation periods**

The Victorian government has dramatically changed the limitation periods for all actions except for work injuries and transport accidents.

The *Limitation Amendment Act* imposed a three-year limitation on all non-work and non-transport accidents occurring from 5 November 2002. It did not change the limitation period for people under a disability at the time of the injury.

A reduction in the time in which people under a disability could sue was introduced by the *Significant Injury Act*. It has introduced the concept of a cause of action being “discoverable”. The new Section 27F deems a cause of action discoverable on the first date that the person knew or ought to have known of all the following:

- the death or injury occurred
- the death or injury was caused by the fault of the defendant
- the injury was sufficiently serious to justify bringing an action

The section also provides that a person “ought to know” of a fact if it would have been ascertained by a person who had taken all reasonable steps to ascertain the fact. Except for minors injured by close relatives or associates, children and those under a disability must sue within six years of the date on which the cause of action is discoverable, or 12 years from the event, whichever is the first to expire.\(^{32}\) Where a child has no parents or guardian or an incapable person has no guardian and is not represented, the running of the limitation period is suspended.
Children injured by relatives

For children injured by a close associate of the parent or guardian or the parent or guardian themselves, the law now provides that the cause of action is discoverable when the cause of action is actually discoverable by the victim or at 25 years of age, whichever is the later. The law also has a long stop limitation period of 12 years from turning 25 years old. These provisions are far more generous than previously existed.

General claims

For other claims the action must be brought within three years of the action being discoverable or 12 years from the actual event, whichever is the first to expire.

A most troubling aspect of the Significant Injury Act is the newly inserted S27N of the Limitation of Actions Act 1958, which retrospectively changes the limitation period for some injured people from six years to three years. It provides that if an injured person’s claim was not issued before 1 October 2003, then the claim can only be issued within three years of the date of discoverability. The Courts will still retain judicial discretion to extend time limits in the interests of justice.

Those injured before 21 May 2003 will not be required to prove significant injury if they have sued before 1 October 2003.

Strict liability

At first blush, the Significant Injury Act appears to apply to all causes of action. It may not, however, apply to claims based on strict liability. The new restrictions appear to be confined to claims arising out of negligence. The Significant Injury Act makes reference to fault being an essential cause of injury in relation to three specific aspects of the legislation:

- the definition of a claimant
- the cause of injury disentitling a person from recovering damages for non-economic loss
- the type of claim requiring the provision of assessment information to a court

Strict liability actions do not rely on evidence of fault and may therefore not be caught by these changes. This would affect TPA claims and dog attack cases.

Proposed amendments to the TPA 1974

To ensure that the TPA could not be used to undermine any state and territory laws in relation to claims for damages for personal injuries or death, amendments have been proposed by the federal government. The amendments would prevent people from taking civil action to recover damages for injury, but only in relation to conduct that contravenes a provision of Division 1 of Part V, such as false and misleading representations. They would not restrict a consumer suing under the consumer protection provisions of Part V of the TPA. Nor would they affect the rights of individuals to sue under the defective product provisions of Part VA of the TPA.

Conclusion

The personal injury landscape has now changed dramatically as a result of state and federal government changes. No matter what the circumstances of the injury, perhaps all claims arising after 20 May 2003 will be required to meet a threshold
before non-economic loss damages can be recovered at common law. These barriers, as well as the newly restricted time limits, make the personal injuries jurisdiction not only complex but fraught with danger for all but the most careful lawyer.

The following table illustrates the way in which people's rights will be affected:

<table>
<thead>
<tr>
<th>Injury date</th>
<th>Need to prove “significant injury”?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 1 October 2000</td>
<td>Must have sued before 1 October 2003</td>
</tr>
<tr>
<td>From 1 October 2000 to 20 May 2003</td>
<td>Three years from the date of injury to sue</td>
</tr>
<tr>
<td>From 2003 21 May</td>
<td>Three years from the date of injury to sue</td>
</tr>
</tbody>
</table>

Note: s23A Limitation of Actions Act 1958 applications for leave to proceed out of time available.

MICHAEL MCGARVIE is a partner in the personal injuries division of Holding Redlich. He has a special interest in product liability and is a member of the Editorial Board of the Australian Product Liability Reporter.

MICHAEL LOMBARD is the partner in charge of the transport accident division of Holding Redlich. He is an accredited specialist in personal injury law and a member of the Education and Transport Accident Committees of the Litigation Lawyers' Section of the Law Institute.

1 Mr Bracks; Hansard, Legislative Assembly, 12 September 2002.
2 Note 1 above.
3 Herald Sun, Melbourne, 10 July 2002.
5 Opposition member for Box Hill, Mr Clark; Hansard, Legislative Assembly, 8 October 2002.
6 Note 5 above.
7 Note 5 above.
8 AMA Victoria Position Statement 8 October 2002.
9 “Negligence Law: The emperor has no clothes” by Dr J Sport Health, vol 20 no 5, August 2002.
10 Note 5 above.
12 S9 of the Public Liability Act.
14 Note 5 above.
15 Note 1 above.
Significant Injury Act, inserts new ss28LB and 28LH in the Wrongs Act.

Note 17 above, ss28LB and 28LI.

Note 17 above, s28LF.

Note 17 above, s28LJ.

Transport Accident Act, s93.

Note 1 above, ss 28LB and 28LI.

Note 17 above, s28LF.

Note 17 above, s28LJ.

Transport Accident Act, s93(13).

Todorovic v Waller, 37 ALR 481.

Note 5 above.

Section 16 of Public Liability Act.

Re: The Commissioner of Taxation v Slaven 52 ALR 81.


Note 28 above.

Note 28 above.

Structured settlements require both legal advice and financial advice from a licensed financial adviser.

Dr E Robyn Mason; note 11 above.

Note 17 above, s27E.


Note 33 above.

Note 33 above.

Note 17 above, s27D.

Note 17 above, s27N.

Note 17 above, s28LC(4).

Note 17 above, s28LB.

Note 17 above, s28LE.

Note 17 above, s28LZM.