

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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Summary

INQUIRY SUBMISSION

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GENERAL PURPOSE STANDING COMMITTEE
NUMBER 1

INQUIRY INTO PERSONAL INJURY
COMPENSATION LEGISLATION

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WAGGA WAGGA

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Executive Summary

This submission seeks to identify and illustrate through the use of actual case examples the issues which are the subject of the inquiry by the General Purpose Standing Committee Number 1.

I have endeavoured to deal with the four primary items contained within the Committee's terms of reference from a practical and working perspective reflecting in particular the position in country New South Wales.

Forming part of this submission are three case studies including:

1. Application of the Motor Accidents Compensation Act
2. An analysis of changes to the Workers Compensation legislation before implementation
3. An analysis of changes after the implementation of changes in 1999 to the Workers Compensation Act.

I have concluded the submission with an endorsement of the recommendations made by The Law Society of New South Wales in respect of changes which should be made.

Authors Profile

I am a partner in one of the largest legal firms in country New South Wales and our firm services a large geographical area including Wagga Wagga, Junee, Coolamon, Ganmain, Temora, Ardlethan, Aria Park and Henty.

The practice in which I work carries out a diversity of legal work and has never relied wholly upon personal injury work however at various time up to three partners have been engaged in that sort of work and there are three partners who are Accredited Specialists in that work. Support staff in this area would number about twelve.

I am an Accredited Specialist in personal injury law and have control of the firms personal injury practice and therefore have extensive contact with all persons within the firm working in this area, injured persons themselves, insurance companies, the medical profession and barristers who work in the area. For this reason I believe that I have the benefit of receiving feedback from a variety of different groups who are effected by the legislation under review.

In addition to the above I am an active member of a number of community groups including voluntary associations, agricultural societies, voluntary school associations and the like and am well aware of the difficulties which face those groups concerning insurance issues.

As I have worked in the area of personal injury compensation for an excess of twenty-five years in rural New South Wales I have observed the coming and going of a number of different of schemes to deal with the issue of personal injury compensation. My involvement in these schemes has been as a plaintiff's solicitor although one of my partners has acted exclusively for defendant insurance companies over a similar period of time.

The purpose therefore of this submission is to bring to the attention of the Committee those matters of which I am aware on a first hand basis.

I do not propose to repeat the various actuarial analysis conducted by the various interest groups as the Committee has already received extensive submissions in this regard.

Need for Change

There has been much debate about the reasons for and the need for changes to the personal injury compensation system.

I am aware of the occasional verdict which may have seemed to be excessive and the occasional claim which may have been alleged to be fraudulent.

Those situations did not in my opinion require the extensive changes which have been made since 1999.

I agree that there was need for reform however clearly the reform has gone too far in so far as it effects injured persons.

A more appropriate approach would have been to tighten up the existing system and or compromise that system with a system similar to that as is contained in the Civil Liability Act. The introduction of three separate specific sets of amendments making changes on a wholesale basis have in my opinion, prevented many genuinely injured persons from obtaining proper compensation for injuries sustained by them.

One matter which, does not appear to have been widely addressed in this debate is the wastage of substantial funds by insurers in defending claims that ought to have been settled. It is one thing to blame the lawyers for protracted litigation however in my experience the cause of this is often the inadequacy of the system to deal with an unreasonable attitude taken by insurers in many situations.

In this regard it is relevant to note that insurers are and have always been in a much stronger position to deny, dispute and/or litigate claims of any kind against them. Most injured persons for whom I act have little or no financial

backing to independently support their claim and this has and continues to put them at significant disadvantages as compared to the insurer.

Further it has been said that there was “insurance in crisis” driven by escalating verdicts and an increased number of claims. To my knowledge, if the Riverina area is representative, there was no substantial increase in the number of claims being litigated between say 1995 and 2005. In fact the court lists reflect that there had been a decrease in the filing of claims in the District Court registry over that period.

Most personal injury claims in this area have over the years been dealt with in the District Court of Wagga Wagga. In the late 1980’s the average number of matters awaiting hearing at the District Court at Wagga Wagga would have been between 250 and 300 cases.

About 1999 this number would have been between 100 and 150 cases. There is a sitting of the District Court at Wagga Wagga commencing 23 May 2005 and the number of cases listed for hearing at that sitting is 28.

An analysis of these figures does not support proposition that in this area at least the volume of claims was increasing.

Approach by the Judiciary to 'Insurance Crisis'

It is also apparent to me that in response to community attitudes to personal injury litigation, the judiciary was well on its own way to containing the size of verdicts and to make it more difficult for plaintiffs to succeed in personal injury actions. In this respect the injured person has been subjected to a 'double whammy'.

The Effect of the Changes

Motor Accident Matters

The Committee has already received submission concerning the significant decline in motor accidents claims being lodged and the profit being generated to insurers as a consequence of a reduction of claims and the reduction of payments made.

The general community does not understand the effect of the legislative changes until they are the victim of a motor vehicle accident and I have many clients who are outraged when I inform them of any entitlements they may have if they are innocently injured in a motor vehicle accident.

I have clients who have suffered very significant injuries who are not entitled to compensation for non-economic loss under the new scheme.

To explain to the client that the relevant threshold is as defined by the American Medical Association Guidelines often returns comments of disbelief. Why should they be assessed under a medical assessment guideline that most of them have never heard of? I am often asked the question ' Why am I being assessed under an American system?' I don't know that this question has ever adequately been answered other than it was a guideline available at the time.

It was not a guideline that members of the public were familiar with and it was not a guideline which members of the medical profession in Australia were familiar with until they attended the appropriate courses and were appropriately certified. It is still not a system which most medical practitioners that I speak to are comfortable in assessing people under.

The medical assessment system is hidden away behind the misunderstanding that most people have of it. The best assessment of it is that it is said to be objective however that is the very complain that most of my clients have about it. They do not want to be treated as 'the average person' but rather they wish to be treated on an individual basis and they wish for some appropriately qualified person to make an assessment of how an injury has impacted on them and on their lives.

You have already been provided with a number of examples of seriously injured people who have not met the permanent impairment threshold and of persons who require various forms of assistance which do not meet the domestic assistance threshold.

I wish to draw your attention to a case study which details the circumstances of Mr W who was very badly effected by the death of his son in a vehicle accident and who did not meet the 10% whole body impairment threshold.

Before discussing that case study I would like to emphasise to the Committee the apparent irrationality of a system which precludes any combination or consideration of a cumulative effect of psychiatric injury and physical injury in the assessment of whole body impairment. How can these two issues be clinically removed from each other when there is in many cases an overlapping effect?

Case Study One

In case study one Mr W was born on 5 August 1955. Since 1972 he was employed in various capacities by the State Rail Authority of New South Wales. He is married and had two children, a daughter born 20 January 1980 and a son 7 September 1981.

On 27 January 2001 Mr W's son was travelling from Wagga Wagga to Albury to watch a football match with four other friends. They were going to watch a school mate of theirs make his debut in first grade for the Melbourne Storm.

Whilst travelling along the Olympic Way it was necessary for the motor vehicle to negotiate a notorious level crossing which was unguarded by boom gates and through which the XPT passenger train from Sydney to Melbourne travelled at a speed of 160km per hour. On this fateful day the train collided with the car in which Mr W's son was a passenger and all five occupants of the car were killed. A five-day coronial inquiry was held and significant criticism was made of the rail crossing by the Coroner.

At the time of the accident Mr W worked in an administrative role for the State Rail Authority at Wagga Wagga. His office was on the platform of the Wagga Wagga Railing Station.

Apart from the devastation that followed from the death of his son he saw the train that was involved in his sons death pass though this station twice day. He continued on at work for approximately eighteen months however the psychological impact of this incident and the effect that it had on his life caused him to leave his employment on 29 April 2003 and he has not been able to work since that time.

To use Mr W's own words "I am leading a life which is not mine". He has developed various medical conditions as a consequence of his psychiatric injury and has removed himself totally from any sort of significant social contact with others. He has left his home in Wagga Wagga and has bought a

home on acreage out of town. His day to day life continues to be deeply effected by the loss of his son in the manner in which it occurred. Needless to say the details which followed from the inquest were horrific.

Therefore as a result of the combination of factors involving the death of his son in a motor vehicle accident, Mr W's life has been totally destroyed and his psychological condition is such that on the medical evidence available he would not be able to return to any meaningful work.

Notwithstanding the significant consequences of this accident on Mr W his whole person impairment was assessed at less than 10 percent. In his own words 'If I am less than 10 percent I would hate to meet someone who was over 10 percent'.

Workers Compensation

The issue of Workers Compensation has always been difficult. The pressure to keep premiums affordable for employers is paramount. I am an employer of some 50 staff and am well aware of the pressures that these sorts of imposts on employers create. However I am also in a position where I can observe the horrendous consequences which can arise when employees are injured at work particularly in circumstances where that injury is as a consequence of the negligence of the employer.

In this regard, it is the removal of the common law right to sue an employer which is of paramount concern to me when advising workers, as the limitations contained within the provisions of the Workers Compensation Act generally (even before the amendments) have always made it very difficult for a worker to re-establish any ongoing meaningful work situation without the benefit of the financial resources to do so.

Again there are many case studies which are available which illustrate the deficiencies of the current system and there are many stories from employers which make abundantly clear that their workers compensation premiums have not reduced. I am one of those employers and my workers compensation premiums have certainly not reduced.

As with the motor accidents scheme it is very difficult when clients consult me to tell them that their rights are very limited and that their lives will significantly be altered as the consequence of an injury which was probably not their fault.

I have prepared two case summaries that I to illustrate the significant practical points which I wish to make on this topic.

The first case study relates to Mr N who had a work related injury prior to the amendments and whose damages were assessed prior to the amendments.

Case Study Two

Mr N was born on 13 August 1969. He was employed in his parents business and on 19 July 1997 was using a post hole auger which had on it some unguarded bolts. At the time he was wearing a quilted hip length jacket and the corner of his jacket became caught in the uni joint mooring bolt on the drive shaft which was revolving at 540 revolutions per minute. The bolt became embedded in Mr N's jacket and as a consequence he suffered severe injuries which included a traumatic full amputation of the left upper limb and a traumatic partial amputation of the right upper limb, resulting in complete radial nerve division and significant flexor and extensile muscle loss.

He also suffered injuries to his shoulders, neck and back.

Mr N was transported to hospital in Melbourne and was hospitalised for a period of sixteen weeks during which time he underwent extensive surgical procedures in an effort to save his arms.

In the end the left arm was unable to be saved. The right arm was reattached however has little or no function. A variety of other complications developed however are not relevant to this submission.

At the time of the injury Mr N was 28 years of age. He was married and had three children aged from thirteen months to five years. His wife and children were totally dependent on him financially.

In addition to the above Mr N enjoyed working with his hands was a gifted carpenter and had made many items of furniture and the like over the years.

Following his release from hospital and the months and years that followed it became apparent that he would never be able to do much for himself at all. This included dressing himself, feeding himself, toileting himself, blowing his nose, scratching an itch or the like. Notwithstanding these severe disabilities he possessed a burning desire to make a success of his life and to get on with

things as best he could. He had a continuing need from prosthetic appliances including upgrades and replacements.

His damages were assessed at \$3.25 million. He has used this sum very wisely and is now getting on with his life.

Had Mr N's case been assessed under the 1999 or subsequent amendments he would face two serious issues;

1. If his damages were assessed under the 1999 legislation Senior Counsel has calculated that his entitlement of damages would be between \$800,000 and \$900,000. This assessment includes his lump sum entitlements, treatment to date of trial, domestic assistance and future economic loss. He would not be able to support himself and his family and continue with the required medical treatment and pay for ongoing care (on a 24-hour per day basis when his wife is not available).
2. Secondly he would need to decide if he was 'better off' remaining on workers compensation and not bringing a common law claim at all. This primarily relates to the need he has for ongoing prosthetic care, nursing attendant care and domestic assistance. He would give up his right to claim these expenses in the future if he proceeded with a common law claim.

Obviously he would be much worse off under the new system even though we have been assured by those promoting the changes that the seriously injured would receive the bulk of the compensation and that the amendments were to be aimed at reducing the 'minor claims'.

Case Study Three

Mr L was born on 11 November 1966. He was employed as a labourer at abattoirs from 1992.

In 1995 he became ill and was diagnosed with Q fever which he contracted at work. He had three months off work and his weight reduced from 90 kg to 60 kg. He returned to work on light duties but was unable to continue with his employment and changed his employment on two occasions until he became self employed in a takeaway store in 1999 which he operated with his wife.

In 2002 Mr L's Q fever symptoms of tiredness and breathlessness continued to the point where he was unable to work. He attended his doctor and was admitted to Wagga Wagga Base Hospital and was then flown by air ambulance to St Vincent's Hospital where he was informed that his aortic valve had been destroyed by the Q fever. The aortic valve was replaced and after a lengthy convalescence he returned to part time work in the takeaway shop.

Because of his inability to work additional employees have had to be employed in the business and as this has become uneconomic Mr L and his wife are now being forced to sell the shop.

Mr L's treating cardiologist Associate Professor Kuo has assessed his whole person impairment at 49%.

As at the date of this hearing he is required to pay additional wages in respect of replacement labour of an excess of \$500.00 per week and he requires considerable assistance with the heavier domestic tasks around his home.

Further Mr L continues to spend large sums of money on medication and this medication is currently in excess of \$50.00 per week.

The prognosis of Mr L is that his heart condition will deteriorate notwithstanding that he is 39 years of age. It is suggested that he may require a total heart transplant in approximately five years time and the costs of that transplant would be approximately \$45,000.00. His prospects post surgery are unknown.

The difficulties that Mr L faces are that he wishes to sue his employer at common law. He has been advised that he should not do so as the substantial ongoing treatment costs, domestic assistance and heart transplant would not be paid by the workers compensation insurer and that he would have to provide for that treatment from any amount that he was awarded for future economic loss.

The inability to bring a common law claim provides our client and his family no other option other than to sell their only current means of income.

Again we have a seriously injured worker who is placed in a 'no win situation' under the current system.

Matters of Particular Interest to the Committee

Impact on Employment in Rural and Regional Areas

There are a number of considerations in determining the impact in employment in rural and regional communities by the changes to personal injury compensation legislation. Those areas include the following;

1. Has there been any impact in the form of increased employment opportunity because of reduced insurance rates?

The answer in my opinion is certainly no as there has been no significant reduction in insurance premiums whatsoever.

2. Has employment been effected in legal firms and associated businesses such as medical assessment services, court staff and the like?

The answer is certainly yes. There has been a significant impact on a number of legal firms including my own firm because of the changes in this legislation. At Commins Hendriks the personal injury department has been reduced from a total of ten persons to a total of five persons. Because of the diverse nature of our practice some of these persons have moved into other areas although two of the five persons have left our employment and have not been replaced.

There is a significant flow on effect within our community by reason of the reduction of personal injury work and that flow on effect included Medical Practitioners, Rehabilitation Providers, Process Servers, Court Staff, Accommodation Providers and the like.

Community Events, Activities and Community Groups

I do not believe that despite a lot of publicity surrounding these matters that there has been any significant effect on these activities and events. Most organisations have been able to obtain appropriate insurance however it has been obviously at a substantially increased cost. In many ways this has represented a “windfall” to the insurance industry.

I recently received an e-mail from an organisation which publishes a newsletter about community matters. That organisation is known as ‘Service At Our Community’.

In a publication made on 6 April 2005 this organisation reports on a survey they have conducted on the impact of public liability reforms on community groups. They report; “the results of our survey show that 92% of community groups have either experienced a rise in their insurance premiums or no change raising the question of when are insurers going to reduce premiums”. This seems to be the same sort of message I am hearing from the various community groups I am directly involved in.

23% said that premiums had risen by more than 20%. 8% reported a fall in public liability insurance. Further the survey found that 94% of the 275 groups in the survey had not had a claim against them in the past five years.

Other findings included;

- 8% of groups did not have any insurance
- 1 in 10 groups said they had been forced to cancel some form of activities or events as a result of not being able to afford insurance (as opposed to obtaining insurance)
- a further 12% of respondents have amalgamated or joined with other groups to deal with problems that have arisen

- 93% of the groups who responded to the survey had been in operation for more than five years with 84% in existence for more than ten years
- 30% of groups survived on less than \$5,000.00 per year with a further 29 percent having an income of between \$5,000.00 and \$25,000.00 per year

Insurance Premium Levels and the Availability of Cost Effective Insurance

To some extent this issue is beyond my area of expertise and knowledge however it seems to be accepted that premium levels have not decreased and the need for insurance of all kinds is at an all time high because of the attention which has been directed to this issue.

I would suspect that there are more public liability policies being written overall now than was the case before 'insurance crisis'. Further the premiums are at a record high. Notwithstanding this the benefits flowing from most insurance polices are at an all time low.

The Level and Availability of Compulsory Third Party Motor
Accident Premiums Required to Fund Claims.
Cost of Changes had Not Been Implemented in 1999

The Committee has extensive other material before it in relation to the actuarial aspects of claims costs and claims projections.

I wish however to make the following observations;

1. I do not believe that CTP claims were increasing in volume or value as at the date of the changes and in fact local evidence would suggest that they were probably decreasing at that time.
2. There was no significant 'tail' in those matters because of the inefficiencies which had been developed within the system operating at the time.
3. Most significantly premiums do not appear to have significantly decreased despite the changes and insurer profits are at an all time high.
4. In assessing this issue one needs to consider the benefits which the insured or effected person receives for payment of premium and that benefit is because of the restricted nature of the current system, at an all time low. Therefore although premiums have largely remained at a similar level the amount paid to injured motorists have greatly decreased.

Impact on the WorkCover Scheme if Changes Had Not Been Implemented in 2001

To my knowledge there has been no significant reduction to premiums and in fact premiums have increased across the board.

Benefits to injured workers have greatly reduced and to a certain extent the long term cost of the system is undetermined because workers are maintained on a 'drip system' for an extended period of time (and many for the duration of the claim). This leaves the system in a situation where the true cost of claims can not be accurately determined for the future.

Recommendations

There is absolutely no doubt that due to the increasing number of effected persons there has developed in the community a view that the pendulum has swung to far and there needs to be a 'windback' in respect of the current amendments.

It would be desirable to create a 'level playing field' in relation to accident victims and in this regard I support the recommendations made by the Law Society of New South Wales concerning the manner in which this could be adequately achieved and I urge those recommendations upon the Committee not on my own behalf but on behalf of those injured persons I represent on a daily basis.