Submission No 25

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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Subject: Submission to Personal injury compensation legislation lodged by Paul Macken

Summary

Submissions to Parliamentary Inquiry – Personal Injury Compensation Legislation

Thank you for the opportunity of making a submission to this inquiry. I would like to indicate firstly that as I only became aware of this inquiry very recently and because of time constraints I am making this submission in point form and would appreciate the opportunity of giving evidence before the inquiry to supplement my submission if possible.

Personal Details

I have been admitted as a solicitor in New South Wales since December 1986 and have been continuously in practice acting largely in the area of Personal Injury/Litigation since that date. I am an accredited specialist in Personal Injury Law having received that accreditation when it was first available in 1993.

I provide advice on an honorary basis to the New South Wales Workers Compensation Self Insurers Association Incorporated although I would like to point out that I am not making this submission on behalf of that organisation.

Civil Liability Act and Motor Accident Compensation Act

I have no doubt that you will receive sufficient submissions dealing with the injustices and difficulties that arise by reason of the limitations imposed in respect of public liability and motor accidents claims so that I do not wish to address these issues.

The one submission I would wish to make is that the inconsistency in the threshold requirements for access to damages has a result of creating different classes of victims of personal injury on an arbitrary basis.

In addition it is difficult to see any justification for having the most significant restrictions on access to Common Law damages applying to injured workers and also having the manner in which the damages are calculated for injured workers most severely restricted. A person who sustains and injury in circumstance giving rise to a public liability claim generally has no prior relationship or connection with the person against whom the claim exist and the same can also be said for a person who sustains injury in a motor vehicle accident.

On the other hand a worker who sustains injury in circumstances which would otherwise give rise to the possibility of a Common Law Claim for damages (i.e where there is negligence on the part of the employer) clearly sustains injury while providing a service to the employer. I would submit that both morally and rationally the access to Common Law Damages should be most freely available to injured workers as opposed to those sustaining injuries to which the Motor Accident or civil liability Legislation applies.

There would appear to be obvious merit in establishing a scheme where access to Common Law damages an the manner in which those damages are calculated is consistent whether an injury was sustained at work in a motor vehicle accident or in circumstances covered by the Civil Liability Legislation whilst at the same time retaining a no fault scheme for the payment of statutory benefits to injury workers.

Changes to the Workers Compensation Scheme

I would submit firstly that the availability of Common Law or work injury damages in the Workers Compensation Scheme is largely an illusion. No doubt the records of the Workcover Authority will disclose that very few injured workers obtain access to Common Law damages under the present scheme and the reasons for this are as follows:-

(a) The threshold requirement of a person establishing that they suffer from at least 15% permanent whole person impairment (calculated by reference to the Workcover Guidelines and to the AMA 5th

Edition Guides) excludes the vast majority of injured workers even where the injuries sustained are relatively serious.
(b) Even if the worker is able to get over the threshold requirement to demonstrate a 15% whole person impairment that worker is unlikely to seek the payment of work injury damages because the damages recoverable are limited to economic loss only and the recovery of damages bring to an end that workers entitlement to any other compensation benefits under the scheme. The main losses suffered by a seriously injured worker are more likely to relate to costs of medical and treatment expenses and the cost of the provision of care and assistance so that a seriously injury worker is unlikely to trade a continuing entitlement to those benefits for an amount of damages calculated by reference to economic loss only.

The introduction of changes to the Workers Compensation Scheme in 2001 was accompanied by statements by the Government to the effect that no worker would be worse off under the new Scheme however this has proved no to be this case and to the contrary a large number of injured workers are substantially worse off. I make this submission notwithstanding that I act largely on behalf of employers. Not only are injured workers now essentially excluded from recovering any Common law damages in virtually every case but in addition the benefit levels paid to workers for statutory lump sum compensation have been substantially reduced by the change from the calculation of those benefits by reference to a table of disabilities to the calculation of those benefits by reference to an assessed of whole person impairment. The vast majority of injured workers are now receiving the payment of statutory lump sum compensation which is substantially lower than what they would have received under the previous scheme.

This is simply demonstrated by a review of the 8 decision of Medical Appeal Panels Reported on the Workers Compensation Commission website for 2005. Of those 8 Appeals 7 were by workers and only one by an employer. Of the 7 workers 6 were entirely unsuccessful (in many cases resulting in the payment of no lump sum compensation at all) and the one Appeal which was successful resulted in a normal increase in the lump sum compensation payments made (less than $2,000.00).

At the same time that genuinely injured workers are receiving significantly reduced benefits under the scheme. The changes made to the Dispute Resolution Process are having the effect of allowing fraudulent claims or claims where injured workers are exaggerating the extent of their disability or incapacity to receive compensation benefits or increased compensation benefits where this would not have occurred under the previous scheme. The reason for this is that the Workers Compensation Commission has been set up in a way which requires all parties to disclose all information up front. There is no difficulty with this for an injured worker however an employer may have relevant information or evidence (such as evidence in the form of surveillance) which should not have to be disclosed up front.

Obviously where evidence relating to surveillance of the workers activities is disclosed up front it provides the worker with an opportunity to change the statement they make or the evidence they give in respect of a claim. If that evidence does not need to be disclosed up front then workers who exaggerate the factor extent of their entitlements to benefits under the Workers Compensation Scheme will be able to be prevented from accessing benefits to which they are not entitled.

I am able to provide the inquiry with examples where evidence demonstrating behaviour by an injury worker which would generally be regarded as fraudulent has been excluded from the Workers Compensation Commission with the result that allegedly injured workers have received benefits to which they otherwise should not be entitled.

Conclusion

The various areas of Personal Injury Law in New South Wales are in urgent need of reform firstly to secure a degree of uniformity and secondly to provide a fairer dispute resolution process.

As indicated I would like the opportunity of supplementing these submissions by giving evidence before the inquiry if possible.

Yours Faithfully

Paul Macken
Solicitor