

When There's Nothing Wrong in Having Another Crack

***Mitchell v Latrobe Regional Hospital* [2016] VSCA 342**

23 DECEMBER 2016

On Wednesday, 21 December 2016, the Court of Appeal handed down judgment in ***Mitchell v Latrobe Regional Hospital* [2016] VSCA 342** which addressed the impact of certain amendments to the Wrongs Act made in November 2015.

The decision may have significant implications in Victoria, particularly for claimants who sustained minor spinal injuries prior to the amendments. The Victorian Court of Appeal has held that a claimant is not precluded from seeking a review of his entitlement to bring a claim for non-economic loss damages if his injuries are now assessed using the reduced injury thresholds introduced by the retrospective amendments in November 2015. This is even in circumstances where a Medical Panel had made a binding determination prior to the amendments, that the thresholds in place at the time were not met.

The effect of the decision is that some cases that were long ago closed, particularly ones involving minor spinal injuries, may have to be re-opened.

BACKGROUND

Since the tort law reform of 2003, the *Wrongs Act* 1958 (Vic) (**Wrongs Act**) has imposed limits on access to compensation for economic and non-economic loss arising from personal injury and death in Victoria.

Significantly, an injured claimant cannot recover non-economic loss damages (also known as pain and suffering damages, or general damages) unless the claimant has been assessed under Edition IV of the American Medical Association Guidelines as meeting certain injury thresholds. After a claimant serves an assessment and certain prescribed information on a potential defendant (the **Respondent**), the Respondent can within certain time limits refer the claimant to an independent Medical Panel for a binding determination on whether the injuries meet the thresholds.

Prior to 19 November 2015, the relevant thresholds were:

- for physical injuries, an injury that was considered permanent and assessed at more than 5 per cent Whole Person Impairment (**WPI**); or
- for psychiatric injuries, an impairment that was assessed at permanent and more than 10 per cent.

As from 19 November 2015, the Wrongs Act was amended by the *Wrongs Amendment Act* 2015 (Vic) (the **Amendments**), which relaxed the thresholds for spinal injuries and psychiatric impairment.

Whilst the physical impairment threshold remained at more than 5% WPI, the new thresholds were:

- for spinal injuries, 5 per cent or more WPI; and
- for psychiatric injuries, 10 per cent or more.

For spinal injuries, this meant a significant class of injuries involving permanent, but minor, spinal injury now qualify for general damages.

The Amendments expressly stated that the changes were retrospective, providing the matter had not been subject to a final resolution by way of settlement or judgment. Further, the Amendments gave a court the

power to make such orders as it considered appropriate in order to give full effect to the retrospectivity of the decision.

However, a question that arose on several occasions in the lower courts was whether a claimant could be assessed again under the reduced injury thresholds where a Medical Panel had made a binding determination prior to the amendments.

Mitchell v Latrobe Regional Hospital now resolves that issue.

The Court of Appeal has held that a claimant is not precluded from seeking a review of their assessment under the new injury thresholds even if a Medical Panel determination was made prior to the Amendments of the Wrongs Act.

CASE SUMMARY

The claimant, Gary Mitchell (the **claimant**) was a patient at Latrobe Regional Hospital (the **Hospital**) in April 2013. He issued proceedings in the County Court in June 2015, claiming non-economic loss damages for psychiatric injuries he sustained whilst at the Hospital.

Relevantly:

- in June 2015, the claimant served a certificate of assessment issued by Dr Gregory White, that certified that the claimant's degree of impairment resulting from psychiatric injury would be more than 10 per cent once the injury had stabilised;
- on 14 July 2015, the Hospital referred the claimant to the Medical Panel for assessment pursuant to s 28LWE of the Wrongs Act;
- on 19 October 2015, the Medical Panel issued a certificate of determination to the effect that the claimant's psychiatric injury does not satisfy the threshold level;
- on 19 November 2015, the amendments to the Wrongs Act commenced, including an amended threshold for psychiatric injury, that was altered from 'more than 10 per cent' to '10 per cent or more' (see above);
- on 22 December 2015, the claimant served a certificate of assessment issued by Dr Gregor Schutz, that certified that the claimant's degree of impairment resulting from psychiatric injury was more than 10 per cent.

The Hospital argued that following the Medical Panel's certificate of determination in October 2015, the claimant was barred from claiming non-economic loss damages.

An application was made to the County Court, and her Honour Judge Tsalamandris reserved the following question for the opinion of the Court of Appeal:

"... is the plaintiff's claim for damages for non-economic loss precluded as a consequence of the Certificate of Determination of the Medical Panel dated 19 October 2015?"

During the appeal hearing, counsel for the claimant argued that the new threshold (of 10 per cent or more for psychiatric injuries) applies to any proceeding, whether issued before or after the amendment.

In response, the Hospital submitted that once it was certified that the claimant had not attained the threshold, it was immaterial that there was a subsequent amendment to the threshold.

In a joint judgment, the Court of Appeal held that the Hospital *"had a piece of paper which it could have deployed under the old threshold at a later point of time to bar [the claimant's] claim for non-economic loss. The amendment to the Act rendered that piece of paper inoperative under the new regime"*.

So, in answer to the question “*is the plaintiff’s claim for damages for non-economic loss precluded as a consequence of the Certificate of Determination of the Medical Panel dated 19 October 2015?*” – the Court of Appeal held “no”.

IMPLICATIONS

The Court of Appeal’s decision allows claimants who had already been assessed by a Medical Panel as not reaching the thresholds in place prior to 19 November 2015 to ‘have another crack’ at satisfying the reduced impairment thresholds for spinal or psychiatric injury.

The decision will be particularly significant in claims which involved spinal injuries prior to November 2015 because the reduction of the thresholds from ‘more than 5 WPI’ to ‘5 per cent WPI or more’ has significantly widened the class of claimants who may be able to pursue general damages.

Many claims were not being pursued once a Medical Panel determined that the claimant’s injuries did not satisfy the earlier injury threshold. However, now that Medical Panel determination can be disregarded if a claimant obtains a new assessment stating their injuries exceed the reduced injury threshold, files that were long ago closed may need to be reopened. We can expect plaintiff lawyers will revisit those old files to see whether their clients may now be able to meet those new thresholds and claim non-economic loss damages.

The financial implications for insurers may be significant, in the following context:

- a) as The Wrongs Act says it is the Respondent that must meet the cost of Medical Panel referrals, insurers will be faced with incurring further legal and medical expenses in revisiting whether these claimants can now pursue their claims;
- b) non-economic loss damages in claims that fall within the new injury threshold may be significant. Victorian courts are experienced in assessing non-economic loss damages for claimants who have spinal injuries that would exceed the new threshold. The experience comes from assessing spinal injuries that fall under the workers compensation or transport accident scheme (these are not caught by the Wrongs Act thresholds). Some assessments for spinal injuries of this degree have attracted non-economic loss assessments well in excess \$200,000;
- c) as the changes are fully retrospective, and the courts have shown real complacency in relation to enforcing limitations periods in this jurisdiction, the extent to which old claims will need to be revisited is a vexed question.

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