

# PERSONAL INJURY UPDATE

## Re-righting the “*Wrongs*” retrospectively?

30 OCTOBER 2015

### What happened?

- + The Victorian Government has introduced legislation to remove some restrictions on entitlements to compensation for personal injuries that may substantially increase the entitlements of certain claimants.
- + The *Wrongs Act Amendment Bill* 2015 (**the Amendments**) has already passed through the Legislative Assembly. The Amendments received opposition support in the Legislative Assembly, and are therefore likely to pass through the Legislative Council.
- + In light of the likely amendments to the *Wrongs Act* 1958, this update should be carefully reviewed by all casualty underwriters and claims officers who have an exposure to Victorian matters as the legislative changes may have a considerable impact on both existing exposures and when underwriting new risks.

### What does it mean?

- + The Amendments make the following changes by:
  1. Reducing the thresholds that impose limits on access to compensation for pain and suffering damages for those who have suffered spinal injuries or psychiatric impairment.
  2. Increasing the cap on non-economic loss damages to \$577,050.
  3. Changing the method by which the maximum amount of damages for economic loss is calculated.
  4. Providing for damages for loss of capacity to care for dependants in limited circumstances.
  5. Conferring on courts a power to stay a proceeding where a claimant has not served a Certificate of Assessment or the Prescribed Information.
- + Of the changes, insurers should take particular note of the amendments to the threshold for spinal injuries and for psychiatric impairment.
- + As the Amendments will operate retrospectively (including where proceedings are already on foot), claimants may now choose to pursue claims for injuries that pre-date the Amendments.

## DISCUSSION

### Change in the threshold for certain injuries

The *Wrongs Act* 1958 (**Wrongs Act**) imposes several limits on access to compensation for economic and non-economic loss arising from personal injury and death in Victoria.

Part VBA of the *Wrongs Act* provides that a claimant may not recover non-economic loss damages (or pain & suffering damages) unless the claimant has been assessed under Edition IV of the American

Medical Association Guidelines (**AMA**), as having a whole person impairment (**WPI**) of more than 5 per cent, or alternatively, having a permanent primary psychiatric impairment of more than 10 per cent.

The 'old' Act placed substantial restrictions on claimants who sustained spinal injuries. That is because under the AMA Guides, spinal injuries are principally assessed in increments of 5 per cent.

In the case of a spinal injury, the Amendments now reduce the impairment threshold to 5 per cent or more, which means that more claimants may be able to claim non-economic loss for spinal injuries.

The difference in assessments from 5 to 10 per cent impairment is illustrated in the table below.

Current 'old' Act	Description of Impairment	Amended 'new' Act	Description of Impairment
More than 5% (so 10%)	Evidence of radiculopathy is present	5% or more	Minor impairment  Clinical signs of injury are present without radiculopathy or loss of motion

In other words, under the 'old' threshold, a claimant who suffered spinal injury needed to have clinical evidence of mechanical compression and nerve root compromise. This meant many spinal injuries did not qualify for non-economic loss damages awards, including some spinal fractures, disc prolapses and other spinal compromise not involving the nerve root.

Under the "new" threshold, a claimant will no longer need to show signs of radiculopathy in order to satisfy the requisite threshold of "5 per cent or more". It will be enough for the claimant to demonstrate a minor spinal impairment in order to prove a "significant injury" and claim non-economic loss damages.

Of the claims Wotton + Kearney has been instructed in over the last 5 years, for which claims for non-economic loss were made, only around 14 per cent were primarily for spinal injuries. Of those, almost 60 per cent that were reviewed by an independent Medical Panel were held not to exceed more than 5 per cent WPI. Our view is that there will be a substantial increase in the proportion of the claims that involve spinal injuries as a result of the Amendments. We also consider that there will be a sharp decrease in the number of claims in which the Medical Panel will determine the threshold is not exceeded.

The reduction in threshold for psychiatric impairment is also likely to increase the volume of claims for psychiatric injury. However, we consider the increase will not be as significant as what will flow from the change in relation to spinal injuries. That is because the psychiatric impairment must be "primary impairment". That means that the impairment must be as a direct consequence of the cause of action, and not the secondary consequence of a physical injury.

When the proposed changes were being considered by the Victorian Competition and Efficiency Commission (**VCEC**), it was thought that relaxing the thresholds by a small amount could open the door to a number of deserving claimants without unduly impacting on insurance premiums.

The VCEC made its recommendations to the Government in its final report "*Adjusting the Balance: Inquiry into the Wrongs Act 1958*" (the **Final Report**), which was made public on 1 September 2014.

In the Final Report, the VCEC said that the amendments to the thresholds may impact on insurance premiums "somewhere between 2 and 5 per cent".

We suspect that the impact will actually be much greater, especially in the initial stages of the amended Act, as the amendments will apply retrospectively.

The threshold level for all other physical injuries remains at impairment of more than 5 per cent.

## Retrospective Application

The Amendments (Section 28LZS) state that the threshold level *will* apply to an injury which is the subject of a claim for non-economic loss damages irrespective of whether the injury giving rise to the claim occurred before the Amendments came into operation.

Further, the threshold level *will* even apply to claims where proceedings have already been commenced, providing they have not been “finally settled or determined” before the commencement of the Amendments.

This means that insurers may now be exposed to new liability for causes of action that have already accrued.

Whilst the VCEC has acknowledged that the changes may impact insurance premiums, it is of course too late for insurers to be collecting increased premiums for these causes of actions that have already accrued!

The Amendments state that the Court shall have such powers as it requires to ensure that the Amendments can be given effect retrospectively. Whilst the Amendments are not specific to this effect, this may mean that claimants who have already been assessed by a Medical Panel may seek to be assessed again.

This means that claims that have been previously determined, where claimants were not entitled to non-economic loss damages for spinal injury or psychiatric impairment, may need to be revisited.

## Gratuitous Care for Others

The Amendments will also now allow a claimant to pursue damages relating to the claimant’s inability to perform tasks for the benefit of a third party dependant, such as a child or spouse. This was commonly known as “**Sullivan v Gordon**” damages. In a High Court decision of **CSR v Eddy** [2005] HCA 64, the High Court of Australia had said that the law did not recognise such an entitlement, and that the only basis on which an injured claimant could recover damages resulting from the loss of the ability to provide assistance to a third party was through an award of non-economic loss damages on the basis it would compensate for “loss of amenity” and “enjoyment of life”.

In some Australian States, the legislatures acted quickly to overcome the effect of the High Court’s decision. However, in Victoria it has taken until these Amendments for this to happen.

These Amendments will also have retrospective effect. This means we may see increased claims for damages in matters in which proceedings are already on foot. This may mean that existing reserves, and prior Offers of Compromise, may need to be reviewed.

## Increase in the Cap on Damages

The Amendments will increase the cap on non-economic loss damages to \$577,050. This is to bring the cap into line with other common law caps in statutory schemes, such as work or vehicle related injuries.

The increase is of around \$50,000. As the cap is just that, a limit on non-economic loss damages, not a scale for assessment of damages, this should only impact the most serious of injuries.

The cap will continue to be indexed annually.

## Procedural Amendments

In a decision in which Wotton + Kearney was involved, **Pickering v Killians Walk Owners Corporation No 12870** (Ruling) [2013], the Court said that its “hands were tied” in being able to stay proceedings where a claimant wanted to proceed with her case but had failed to serve a Certificate of Assessment. It said the only recourse available was “costs thrown away” if a Certificate of Assessment was later served.

Following the matter of **Pickering**, Wotton + Kearney submitted to the VCEC that personal injury claims should not proceed to the trial stage until such time as the plaintiff can establish their claim for non-

economic loss damages, by serving a Certificate of Assessment. The VCEC acted on Wotton + Kearney's submissions and made recommendations in respect of the timely service of Certificates of Assessment.

The Amendments empower a Court to stay a proceeding until a claimant serves a Certificate of Assessment. This is a positive outcome for insurers who are looking to obtain claims certainty at the earliest possible stages.

### **The potential impact on damages awards**

Whilst the entitlement to non-economic loss damages will need to be considered in each individual case, and the range of non-economic loss damages varies, it is common to see damages awards for spinal impairment (assessing at 5 per cent WPI) exceeding \$200,000 in the workplace setting. We can therefore expect similar sums being sought and possibly awarded in general liability matters.

The discussion above should send a strong message to insurers and their lawyers. Existing notifications and claims will need to be assessed to determine whether the Amendments impact negatively on claim reserves, the strength of prior Offers of Compromise, and the likelihood of new claims. However, whilst there may be some ability to review prior notifications, the reality is that there may be many more claims that are yet to be notified. We anticipate that plaintiff law firms will also be reviewing their own files to consider whether to pursue claims which had previously been disregarded on the basis of economic viability.

### **FURTHER UPDATES**

We will provide an update on the progress of the Amendments as the Bill passes through the Legislative Council.

Wotton + Kearney closely monitors all awards of damages in Victoria and can assist with obtaining a better understanding of the potential impact of the proposed Amendments. Please feel free to contact us if you would like to further discuss the impact of these Amendments on your business.

For further information please contact:

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