

Personal injuries update

By Ian Morris

The Personal Injuries (Liabilities and Damages) Act 2003 was introduced in Parliament last year and was assented to by the Administrator on 18 March 2003. The Act was commenced on 1 May 2003.

The introduction of the Act says that it intends to modify (read 'limit') the law relating to the entitlement to damages in personal injury cases. It does so by introducing a regime of statutory limitations on the entitlement of damages, statutory direction as to contributory negligence and statutory limits on the award of damages.

The Act applies to all civil claims for personal injuries. That means that it will apply to claims for intentional torts, negligent torts and potentially sections of claims for nuisance and defamation.

The Act does not apply to claims under the Motor Accidents (Compensation) Act, the Work Health Act and the Crimes (Victim's Assistance) Act, save for those provisions to do with structured settlements.

The Act does not interfere with the operation of the Compensation (Fatal Injuries) Act, save for the application of the limits in the Act insofar as assessment of damage is concerned.

Strangely, the Act does not apply to claims for 'dust-related conditions'. There is not much litigation in the Northern Territory in relation to 'dust-related conditions' save for the well-known bovine variety of the condition.

Alterations to personal liability: sections 7 to 13

Four classes of people receive immunity from civil liability and they are:

- * Volunteers, who perform community work for a community organisation and commit an act in good faith and without recklessness, which causes personal injury. The other side of the coin is that the community organisation for which the volunteer performs the service assumes the liability of the volunteer;
- * Good Samaritans who, in good faith

and without recklessness, soberly provide emergency assistance that causes personal injury;

- * The occupier or owner of premises is now not liable for personal injury if the person who suffers it has entered the premises with the intention of committing an offence punishable by imprisonment; and
- * People who generally injure people who are committing an offence punishable by imprisonment, if the injured person's conduct contributed materially to the risk of that injury.

The final indemnity offered by this part of the Act is that people who express regret that injury has occurred do not admit liability for the injury and the expression of regret cannot be admitted in evidence.

Although this section does not give an example of such an expression of regret the Queensland Act does and runs along the lines of (in a medical negligence case) "I am sorry that there was an adverse outcome from your operation".

Contributory negligence: sections 14 to 17

There are two aspects to this part of the Act. The first is that there is a presumption of contributory negligence if the person injured was intoxicated. That presumption might be rebutted if the injured person is able to establish that the intoxication did not materially contribute to the incident or that the intoxication was involuntary.

The second aspect is that a person who is injured is presumed to be guilty of contributory negligence if the injury was caused by a person who was intoxicated and the injured person had relied on the skill of that person. This presumption can also be rebutted if the other person's intoxication did not materially contribute to the accident or the injured person could not reasonably be expected to have

avoided the risk that caused the injury.

A person is intoxicated if at the time of the incident that person has a blood alcohol reading of .08g. In the event that the presumption is not rebutted the court must decrease damages by at least 25 percent.

Damages: sections 18 to 30

The definition section prescribes the *American Medical Association Guide to the Evaluation of Permanent Impairment* as the guide to be used in the assessment of permanent impairment.

"Impairment" does not include a psychological or psychiatric injury prescribed by the Regulations. There are no regulations that deal with this aspect at the moment and so psychological or psychiatric injuries are included in the assessment under the Guides.

Economic loss, whether past or future, is limited to three times average weekly earnings (AWE). The AWE figure represents weekly ordinary time earnings for full-time adult persons, which is currently \$852.00.

There is legislative direction that the award in respect to future economic loss can only be based on the injured person's most likely future circumstance (the common-law situation) and there is also now legislative direction for a discount for "contingencies". Both the assumptions and the contingencies must be identified in a judgment by the court.

The discount rate for future economic loss has been set at five per cent, and that will result in smaller amounts for future economic loss awards.

Gratuitous services can only be awarded if they meet the threshold of six hours or more per week for at least six months.

No more than the amount of AWE for a

quarter may be awarded in respect of gratuitous services.

Gratuitous services must be reduced by any benefit obtained by the person providing the service. It is assumed that this is directed to payments received from the Department of Social Security.

Pain and suffering are to be determined by reference to the Guides. The Court must make its assessment on the basis of evidence produced in accordance with the assessment performed by a medical practitioner of the degree of permanent impairment in accordance with the Guide.

The Act provides for procedures relating to the assessment of permanent impairment to be prescribed by regulation. No such regulations are as yet available.

There is a cap on awards for pain and suffering of \$350,000, which will change with the AWE.

There is a threshold for the award of pain and suffering set at five per cent permanent impairment of the whole person. An assessment of 85 per cent or more will permit an assessment of 100 per cent; the assessment of between 15 and 84 per cent will receive the percentage assessed; and for between five and 14 per cent there is a sliding scale of associated percentages.

The important aspect of this section is that injuries which result in disabilities that are not permanent will not be compensated by award of pain and suffering, loss of amenities and enjoyment of life. There are a host of such injuries (such as food poisoning, fractures and ripped muscles and tendons, failed cosmetic surgery and burns) that will now not result in an award of damages because the economic loss and medical expenses component of those injuries can sometimes be very small.

Interest can no longer be awarded by the court for non-economic loss or gratuitous services. Interest can be awarded on the basis of the Commonwealth Government ten-year benchmark bond rate to the loss from

the day of the loss until the day on which the court assesses the damages.

Structured settlements

The court is now empowered with the consent of the parties and not of its own volition to make an order for a structured settlement.

There has to be some enabling legislation brought in by the Commonwealth to allow this to go ahead and as yet that legislation has not been promulgated.

Actual case studies from the American Medical Association

Case Study One (Public Liability):

A 12 year old boy suffered a major brain injury, multiple hemorrhages in the brain, in a coma, fractured base of skull, fractured nose and face, scarring and disfigurement of the eye.

Prior to the accident, the boy had above average academic achievement and was a school leader. He now requires a teaching aid at school, his academic performance has significantly decreased, memory concentration impaired and personality changes – aggressive, easily distracted and balance problems.

AMA Assessment seven per cent.

Case Study Two (Medical Negligence):

A patient presents to hospital with a positive pregnancy test and abdominal pain.

Assumption made by the hospital that the patient has an ectopic pregnancy. No ultrasound is performed as a technician not available. The client is not referred to another hospital.

Patient has a laparoscopy performed. In fact patient is 12 weeks pregnant (pregnancy could have been palpated in uterus by clinical examination but this was not done). During laparoscopy patient's uterus is perforated. Loss of amniotic fluid. Over next two to three weeks continual loss of amniotic fluid and at 14½ week's gestation fetus dies.

Patient attends hospital for induction of labour. Induction agent administered and patient told it will take several hours to act. Patient goes to toilet and passes fetus in toilet. Helped back to bed by nurse with fetus hanging out of vagina by umbilical cord. Taken to

surgery for D&C.

Patient has psychiatric reaction and is diagnosed with post traumatic stress disorder which resolves after 12 months. Patient subsequently has another pregnancy which because of past perforation is classified as a high risk pregnancy.

No permanent impairment, no entitlement to compensation under AMA guidelines.

Case Study Three (Medical Negligence)

Three year old patient with a facial haemangioma on upper lip. Prior to removal of the large haemangioma the hospital decides to reduce blood flow to the lesion by injecting it with ethanol. The first (and last) time the technique is ever tried at this hospital. The ethanol extravasates from the lesion throughout the facial tissue. Causes severe necrosis of the skin over cheeks, lips and chin. Upper lip drops off. Multiple skin grafts required. The patient is left with extremely severe facial scarring over 60 per cent of face and will require further surgery as a teenager but otherwise requires no day to day care. Scarring has caused a grossly disfigured mouth but other than an inability to lick ice-cream the patient (who is now eight) has no functional impairment.

As the injury requires no day-to-day care and does not impinge on function to any great degree would probably have a zero per cent impairment under AMA guidelines.

Motor Accidents (Compensation) Act

Late last year an amendment to the MACA Act came into effect.

The stated intention for the introduction to the Motor Accidents (Compensation) Amendment Act 2002 is to confirm the manner in which section 13 of the MACA Act had been administered by the Territory Insurance Office was correct prior to what is referred to as: "doubt arising as a result of the decision in *Collman V TIO*".

In fact, there was no doubt which arose as a result of that decision as the basis on which the Territory Insurance Office was to have administered section 13 had been laid down by the Supreme Court since, at the very latest, 1991.