jottings on the bar

Tort law regression?

By Tony Young*

The Territory government has recently implemented a number of tort law "reforms" in response to the so-called national insurance crisis. Further "reforms", including a codification of the law of negligence are under consideration by the government.

This article does not discuss the changes or the proposed changes in any systematic way but rather gives some impressions on the likely consequences of the changes made so far.

THE ABOLITION OF COMMON LAW DAMAGES FOR PERSONAL INJURY

Damages for pain and suffering, loss of amenities of life, loss of expectation of life or disfigurement have been abolished by the *Personal Injuries (Liabilities and Damages) Act*[1]. The traditional common law heads of damages for non-pecuniary loss have been replaced by a statutory scheme based on the American Medical Association Guides to the Evaluation of Permanent Impairment (the Guides). Damages for pecuniary loss such as loss of earning capacity have also been limited by the introduction of a statutory discount rate[2] of five percent rather than the common law three percent for calculation of damages and by capping loss of earning capacity at three times average weekly earnings.

Only permanent impairment is compensable. Injuries that do not cause permanent impairment are not compensable. So, for example, a broken limb or an injury from which the injured person recovers, regardless of whether he or she has suffered severe or prolonged pain, is not compensable. If pain becomes permanent that will be compensable only if it creates a permanent impairment according to the Guides. The pain and discomfort caused by a surgeon leaving behind a pair of scissors in a patient's abdomen after surgery, as happened recently in New South Wales, and the resulting second operation to retrieve them would not be compensable in the absence of permanent impairment. And some permanent but minor injuries are not compensable.

In order to calculate non-pecuniary loss, each injury is ascribed, according to the Guides, a percentage of impairment of the whole person. The calculation requires medical assessment but the Guides can be broadly understood by a lay person.

The *Personal Injuries (Liabilities and Damages) Act* then provides for a calculation of damages based on that percentage. The total amount payable for 100 percent impairment is $350,000.

The minimum compensable impairment of the whole person is five percent. After the five percent threshold is reached there is a sliding scale up to 15 percent. So, for example, a five percent to nine percent impairment results in damages of two percent of $350,000, 10 percent impairment results in three percent of the amount, 13 percent impairment results in eight percent of the amount and so on until 15 percent impairment or more results in the equivalent percentage of the maximum amount. Here a few examples.

* Extensive scarring on the arm without current symptoms and no interference with the activities of daily living equates to an impairment of zero percent.
* A burn scar on the neck covering one percent of the body area, with the scar irritated, itching and burning and causing limitation of neck movement equates to ten percent impairment - three percent of the maximum amount or $1050.
* Difficulty in sexual function equates to between one percent and nine percent impairment or between no damages and $1050. Complete loss of sexual function equates to 20 percent impairment or $70,000.
* Disc herniation through lifting, partial recovery after operation, restricted lumbar movement and chronic low back pain equates to 13 percent impairment - eight percent of the amount or $28,000.
* Disc herniation, discectomy, loss of cervical motion, decreased sensation in the hand, weakness in the arm, severe neck pain aggravated by movement equates to 38 percent impairment or $133,000.

Mr Tony Young, Barrister

THE COSTS REGIME

No costs in some cases

Under the other major statute implementing the "reforms", the *Personal Injury (Civil Claims) Act*

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Mr Young wishes to thank Robin Laver and Peter Barr QC for their comments on this article.

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(not all of which is yet operative) a complex and potentially harsh costs regime is set up. The claimant will not be allowed costs on any pre-litigation settlement that is less than a prescribed minimum amount. The prescribed amount has not yet been promulgated by regulation but I understand that the likely minimum amount will be $30,000. A prescribed maximum amount is also to be promulgated and which will also be relevant in costs calculations. I understand that will be $50,000.

The costs allowed on a settlement of more than the prescribed maximum are to be the subject of regulations. The regulations have not been promulgated.

The new system is intended to encourage early settlement and savings of costs.

When introducing the *Personal Injuries (Civil Claims) Bill,* Northern Territory Attorney-General Dr Peter Toyne said that the aim is to "ensure that the parties may resolve as many issues as practicable prior to the commencement of formal legal proceedings". He went on "They should be able to do this between themselves, and without the need for costly judicial supervision".

It is worthwhile testing that last statement against the actual requirements of the legislation and the likely requirements of rules. Like the regulations, the rules under the *Personal Injury (Civil Claims) Act* have not yet been promulgated.

Before proceedings are issued

* The claim must be made within 12 months of the injury. The Court[3] may extend time but only if the claimant has a "reasonable reason" for the delay[4].
* The claimant commences the process by filling out a claim form and serving it on the respondent.
* The claim must include "all the information and documents that will enable the other party to identify any other potential party, assess liability and assess the amount of damages that may be payable in respect of the claim"[5]. The claimant must provide a medical report addressing the criteria in the Guides.
* Once the claim is given to the respondent the rules are likely to provide that if the respondent denies it is the right person it must say so and provide, if it can, the identity of the correct respondent. The respondent is also obliged to provide "all the information and documents etc."
* The rules are likely to provide for the Local Court to supervise the pre-litigation process, including compulsory settlement conferences. There will be sanctions (as yet unspecified) for non-compliance. The process is intended to result in "final offers" from claimants and respondents.

Careful assessment of the amount of these "final offers" is crucial because the costs regime described below depends on them. As any lawyer knows considerable preparation (and expertise) is required to get to the stage of an accurate assessment of loss.

I do not doubt that Dr Toyne is a sincere man but could anyone think that this procedure is something the parties "..should be able to do... between themselves"?

Clearly, much of this work, to be done adequately, requires legal assistance and, possibly, extensive legal assistance and I query whether it is then fair or just to disallow costs.

If the pre-litigation settlement process does not resolve the claim, a claimant may commence proceedings in the court of appropriate jurisdiction.

After proceedings are issued

A new costs regime has been imposed for litigation. The legislation introduces two costs "reforms"; the abolition of costs or reduction of costs for a successful party in smaller (but potentially substantial claims) and punitive costs consequences for a claimant of failing to not only exceed the respondent's offer but equal or exceed the claimant's own offer.

* If the damages award is equal to or less than the respondent's final offer the claimant must, from the time of the offer, pay 25 percent of the respondent's costs (on the applicable scale) if the damages are less than the prescribed minimum, 50 percent of the respondent's costs if the damages are equal to or more than the prescribed minimum but less than the prescribed maximum and 100 percent of the respondent's costs if the damages are equal to or more than the prescribed maximum.
* If the damages award is more than the respondent's final offer but less than the claimant's final offer the respondent does not pay costs to the claimant where the damages are less than the prescribed minimum, the respondent pays 25 percent of claimant's costs where the damages are equal to or more than the prescribed minimum but less than the prescribed maximum and the respondent pays 50 percent of the claimant's costs where the damages are equal to or more than the prescribed maximum.
* If the damages award is equal to or more than the claimant's final offer the respondent pays 25 percent of the claimant's costs where the damages are less than the prescribed amount, pays 50 percent of the claimant's costs where the damages are equal to or more than the prescribed minimum but less than the prescribed maximum and pays 100 percent of the claimant's costs where the damages are equal to or more than the prescribed maximum.

The changes penalise the claimant more than the respondent.

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The risk of costs is shifted to the claimant. Almost invariably the claimant will have the smaller pocket and be less able to bear that risk. The clear intention is to dissuade claimants from making smaller claims.

The shifting of risk to the claimant of failing to equal or exceed his or her own offer clearly favours the respondent. A prudent claimant will reduce his or her final offer well below the amount which he or she expects to achieve, in order to avoid the costs risk of failing to equal his or her own offer, even when the damages exceed the respondent's offer.

The negligent respondent is not at similar risk.

The consequences

For a large proportion of our community – and I am not referring only to Aboriginal people – it is simply a fantasy to expect them to successfully negotiate the pre-litigation settlement procedure unaided. I have not heard of any proposal to expand legal aid services or the community legal services. (Anyone else proposing to advise or assist would need to be aware of the serious criminal penalties in the *Legal Practitioners Act* for inducing someone to make a personal injury claim that were introduced as part of the "reform" package).

In reality, the defendants or their insurers will be legally represented. Claimants will not be legally represented except, perhaps, for the larger claims. Lawyers will have no incentive to "spec" smaller claims or, if they do, they will have to advise claimants that they are likely to see very little, if anything, of settlements or awards.

The new litigation costs regime is harsh for claimants. Claims will not be worth the risk of adverse or inadequate costs orders even in the event of the previous definition of success; exceeding the respondent's or defendant's offer.

The probable practical consequence will be the abolition of claims for permanent impairment for less than $50,000.

There is no doubt that legal costs make up a large proportion of small tort settlements and awards. That is hardly surprising. Often the issues are as complex as for the larger claims.

Some of the changes are probably worthwhile. For example, a person may now make an expression of regret without that being admissible in evidence. That might have the potential to minimize feelings of resentment and encourage settlement.

I hear you say that some restriction on claims is necessary to keep insurance premiums down for the rest of the community. I doubt that the rise in insurance premiums is directly related to litigation in the way the insurance industry and others have claimed. Insurers seem to be making big profits[7]. But even if that argument was correct, is the best or the most just solution removing the right of people to seek recompense for a wrong done to them? Is it just to deem the discount rate for damages for future economic loss to be five percent[8] rather than the historically realistic figure of three percent and thus expropriate tens or hundreds of thousands of dollars from injured persons?

These might be matters of opinion but I believe many of the changes are mean, unworkable, unnecessary or plain unjust.①

Endnotes

1 Section 24, Personal Injuries (Liability and Damages) Act
2 The rate of real return after inflation on a secure investment
3 The court with jurisdiction to hear the claim
4 Sections 7 and 8, Personal Injuries (Civil Claims) Act
5 Section 10, Personal Injuries (Civil Claims) Act
6 The Law Council of Australia's "Tort Law Reform Discussion Paper" claims that a KPMG study indicated that Australia's 12 biggest general insurers had a six fold increase in profits in 2002/2003
7 Section 22, Personal Injuries (Liabilities and Damages) Act

A media perspective on the Murdoch committal cont...

professional journalist in Jane Munday as a media liaison officer.

She was nothing but helpful, acting as a bridge between the media and the court, treading the delicate balance between the right to a fair trial and media access.

For openers, we had an odd situation where parts of the opening address given in open court by DPP Rex Wild QC were suppressed by Relieving Magistrate Alasdair McGregor.

Thank goodness the magistrate followed Mr Wild's suggestion to give us journalists the full text with the suppressed sections marked, so at least we knew what we could NOT report - particularly here in the Territory.

It must be recorded that Court 6, the new electronic court which became an extension of the magistrates court, worked really well - not even a technical glitch that I noticed.

Press and public could see the exhibits and the photos - even if some of them were also subject to suppression.

All in all, I believe the public was well informed through the media and a balance achieved between their right to know and a fair trial.

Maybe we should pause and be thankful that in the Territory we can report committals at all. Reporting them is prohibited in the UK and in a number of Australian states.①