



Accessing and Assessing Common Law Damages under the Accident Compensation Act 1985

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Introduction

In June 1863 the London papers reported that a young woman had died from "simple overwork". In 1906 Karl Marx told her story:

"Mary Anne Walkley, 20 years of age ... worked, on an average, 16 ½ hours, during the season often 30 hours, without a break, whilst her failing labour-power was revived by occasional supplies of sherry, port or coffee. It was just now the height of the season. It was necessary to conjure up in the twinkling of an eye the gorgeous dresses for the noble ladies bidden to the ball in honour of the newly-imported Princess of Wales. Mary Anne Walkley had worked without intermission for 26 ½ hours, with 60 other girls, 30 in one room, that afforded only just the cubic feet of air required for them. At night, they slept in pairs in one of the stifling holes into which the bedroom was divided by partitions of board. And this was one of the best millinery establishments in London. Mary Anne Walkley fell ill on Friday, died on Sunday, without, to the astonishment of Madame Elise [the proprietor], having previously completed the work in hand. The doctor, Mr Keys, called too late to the death bed, duly bore witness before the coroner's jury that "Mary Anne Walkley had died from long hours of work in an overcrowded workroom, and a too small and badly ventilated bedroom"¹.

Thankfully work conditions have improved somewhat in the last century, and in conjunction with that the hybrid legal area of 'workers' compensation law' has also evolved.

The particular focus of my paper today is the assessment of common law damages under the *Accident Compensation (Common Law and Statutory Benefits) Act 1985*.

Restoration of common law rights accessing damages

Workers' compensation is an area of law which, in the past, has been closely tied to the politics of the day. Major amendments were made to the *Accident*

¹ Karl Marx, *Capital: A Critique of Political Economy*, (Modern Library 1906, trans. Samuel Moore & Edward Aveling), p. 280.

Compensation Act ("the Act") by the previous Government in November 1997, including the abolition of common law rights for injuries sustained after 12 November 1997. Having been one of the major election platforms of the Bracks' Labour government, access to common law damages for seriously injured workers was restored as of 20 October 1999. Paul Mulvany of Slater & Gordon, a practitioner of extensive experience in the area recently said, "It is said that autumn in Melbourne is the best time of year. Some know the start of autumn by the reference to the crisp mornings, others by the changing of the leaves. I know it is autumn when I hear the rustle of the Minister's notes for the reading of another bill to amend the *Accident Compensation Act*".²

Mind the gap

The result of this volatility is that there is now a period between 12 November 1997 and 20 October 1999 in which there are no common law rights to damages for injured workers. However, the government did institute a managed program in an endeavour to minimise this lacuna of common law rights by ensuring that return to work options were fully explored and access to statutory lump sums was maximised. Compensation was to be available under the Commonwealth Social Security Scheme and the *Sentencing Act*. Under the *Sentencing Act* reparation is payable to victims of 'crime', those victims include workers who have been affected by a criminal breach of the *Occupational Health and Safety Act*.

Nevertheless, the fact remains that workers are effectively statute barred from bringing claims for injuries between 12 November 1997 and 20 October 1999 unless they come within the exceptional common law ambit of '*Rizza and Walker*' type cases. These are where the injury itself occurred within the prescribed periods, but the incapacity for work and subsequent application for common law damages did not eventuate until outside the time limits. This set of circumstances is now codified in the legislation by Section 135AC of the Act. This, a *Statute of Limitations* -type section, states that proceedings for damages must not be commenced:

"if the cause of action arose before 12 November 1997 and the incapacity arising from the injury was not known until after 12 November 1997, after the expiration of 3 years after the incapacity was known".

² Paul Mulvany. 'Interpretive Challenges of the new Serious Injury Test' in WorkCover: the Common Law Process, Leo Cussen Institute, Melbourne, p.1.21.

Case study

These procedural conditions are very strict in the Act. Consider the case where a worker had applied for a serious injury determination under Section 135A(2B) of the previous Act on 5 June 2001. The application was accompanied by an Affidavit detailing the worker's employment as a factory manager from 1974 to his retrenchment on 31 July 1998. He referred to the progressive onset of back pain, and a specific incident in September 1987. He was not referred for specialist orthopaedic care until August 1998, following his retrenchment.

He issued an Originating Motion under Order 56 of the Supreme Court Rules for an order in the nature of Mandamus, seeking a determination in relation to his application on or before 24 July 2001. This course of action appeared to be taken with the retrenchment date of July 1998 being treated as paramount and the date at which the worker became aware of the seriousness of his incapacity, not having been employed since.

The plaintiff was found not to be entitled to the Order sought because the VWA had not refused to make a determination in accordance with Section 135A(2B). It could not be said that the Authority had refused to perform its duties and powers under the Act while the 120 days allowed to make a determination, and gather all relevant material, had not elapsed. A response was however served fairly shortly after these proceedings³.

The new common law damages

According to Section 134AB(2) of the Act a worker can now only recover damages if their injury arises out of or is due to the nature of employment when employment of that nature was a significant contributing factor, and the injury is a serious injury which arose on or after 20 October 1999.

This restoration has been effected although there are practical tensions in the policy underlying the Act between notions of equity and scheme liability. These are spelt out at the beginning of the Second Reading Speech:

³ *Addot Tooling v Sultana* [2001] Supreme Court, unreported.

"The Government is committed to the restoration of common law rights for seriously injured workers within the context of a fully funded and financially stable system, which maintains competitive premiums. The Government promised the restoration of common law rights (but there is also an)...equal commitment to ensure that the costs of the restoration are confined and the number of common law claims and the cost of those claims can be actuarially measured in a reasonably predictable manner".

There was a massive surge of serious injury applications in the month of August 2000, with approximately 3000 applications served before the cessation of the previous common law rights. The court's decisions relating to these applications over the next 12-18 months will have an important effect on the future liabilities and viability of the scheme as restored by the current government. Mr Andrew Pinder, Director of the VWA Common Law, Impairment and Dispute Management Division has said, "In July of this year the independent actuaries considered the VWA would not be in a position of full funding for another 3 years".⁴ This highlights the importance of the accurate and sustainable assessment of common law damages under the Act.

Gaining access to common law damages

Section 104B governs claims for no-fault compensation, and it is now also the compulsory entry point for a serious injury application. A worker must now apply for an assessment of impairment for the purposes of Section 98C or E before they can apply for a serious injury certificate, and obtain the attendant 'leave' to bring an action for common law damages.

At this initial point, the worker must submit the material which is required by Section 103, but time limits may apply. All injuries must be included in the claim form, as another application cannot subsequently be made.

This 'once and for only' rule would potentially bar a worker from ever making a serious injury application if they did not fulfil the requirements of Section 104B and it should be noted that a worker can only make one application for 'serious injury' according to Section 134AB(21).

⁴ Andrew Pinder. 'VWA Overview' in WorkCover: the Common Law Process, Leo Cussen Institute, Melbourne, p.2.4

Following the application, the worker is assessed by an independent medical examiner who must not have seen the worker before. This doctor will be an accredited specialist in assessments under the 4th edition of the AMA Guidelines. This edition is a much tougher measuring stick for impairment, and assessments will generally be lower than those made under the 2nd edition.

When the worker is advised of the assessment, they then nominate whether they accept that impairment, or, if they reject it, it is referred to a Medical Panel whose Opinion will be binding.

Whether via independent assessment or Medical Panel Opinion, the worker comes out of this preliminary process with an impairment. If it is over 10% for physical injuries, or 30% for psychiatric, the worker will then be offered a Section 98C or 98E award.

Section 104B(11A) says that if a worker confirms in writing that they wish to receive compensation under Section 98C or 98E at that time, they are precluded from subsequently recovering damages for pain and suffering in respect of that same injury or injuries. If the worker elects to pursue a common law claim, the payment of the impairment benefit is suspended while the common law process is on foot. This means that the worker is now essentially being asked to nominate whether they intend to pursue a common law claim at a much earlier point than previously, and it requires plaintiff solicitors to have done a large amount of preparatory work. This requirement brings WorkCover claims into line with TAC claims where an application for a no-fault benefit is a necessary precursor to a common law claim.

30% AMA assessed injury

If a worker is assessed as having an AMA Whole Person Impairment under Section 134AB(15) of 30% or more, they are deemed to have a serious injury, however an application must still be made in the form prescribed by the Ministerial Directions.

Relatively few workers, when assessed in accordance with the AMA Guidelines were found to have injuries of 30% or more when assessed by the AMA 2nd edition and this could be expected to decrease further under the more stringent 4th edition.

This is somewhat at odds with the Minister for WorkCover's recorded statement that it is anticipated that the quantitative and not qualitative threshold will be the primary

gateway for common law damages under the current Act⁵.

'Narrative' serious injury

The qualitative, or 'narrative', test has been modified in the new Act. Much of the previous case law under this Act, and particularly the *Transport Accident Act 1986* has been codified in the legislation. For example, Sections 134AB(38)(b)-(d) codify the test in *Humphries v Poljak*⁶ and *Mobilio v Balliotis*⁷, whereby it is necessary to consider a comparison of the case under review with other cases in the range of possible impairments of losses of body functions or disfigurements, in deciding whether it is a serious injury.

Section 134AB(37) carries the definition of 'serious injury'. 'Permanent' has now been inserted to replace 'long-term', so that it reads:

"serious injury" means-

(a) permanent serious impairment or loss of a body function.

His Honour Judge Strong said in *Mitrevski v C Stokes & Co Pty Ltd*⁸ that 'permanent' means "so far as can be presently foreseen". The Government articulated their intention to adopt this view over the previous ambiguity of 'long-term' in its Second Reading Speech.

Principles in the assessment of damages

As in all other areas of law, damages under the *Accident Compensation Act* generally follow the main precepts of all common law damages, which are that they:

- Will cover all losses for the past and those anticipated for the future;
- Will act as a bar to a subsequent claim founded on the same cause of action;
- Are to be awarded as lump sums rather than an annuity or on any other contingency basis; and

⁵ *Hansard* (LA) 13 Apr. 2000, p.1001.

⁶ [1992] 2 VR 129.

⁷ [1998] 3 VR 833.

⁸ [2000] County Court of Victoria, unreported

- Are to be assessed on the basis of facts which are known as at the date of the assessment of those damages rather than as at the date on which the injury occurred.⁹

Compulsory conferencing

Following the granting of a serious injury certificate, the assessment and exchange of views about damages is the subject of a compulsory pre-litigated conferencing process intended to tease out all the relevant issues and make the calculation of the damages transparent to the other party.

The timetable and requirements are set out in Section 134AB(12). Within 49 days of the response date, a conference must be held between the parties. There are then 39 days in which the agent must make a statutory offer, and within 3 weeks of that offer being made, the worker must make a statutory counter-offer. The agent then has 21 days to accept or reject this offer. Only after those 3 weeks have expired can the worker issue proceedings for common law damages where quantum has not been agreed upon between the parties. Common law proceedings can only be issued between 22 and 51 days from the date of the rejection of the statutory counter-offer, and proceedings cannot be issued without complying with every part of this timetable, unless the VWA exercises discretion under Sections 134AB(20), (20A), (20B) or Sections 135A(6A), (6B) or (6C) of the Act.

These procedures ensure that in most cases full and complete information is available to the parties, and that conferencing has been exhausted, so that litigation is a last step and areas of contention can be focused upon.

New separation of serious injury damages

The most significant change under the current Act is that where a worker qualifies in terms of having a serious injury, they may not necessarily have access to unlimited damages as they did previously. They may be limited to pain and suffering damages or economic loss damages, and will not be entitled to both unless the earning capacity consequences are serious and the impairment results in a loss of gross income of 40% or more after rehabilitation and training. With this comes the risk of more 'soft' serious injury leave being granted for pain and suffering only, with

⁹ Harold Luntz, *Assessment of Damages for Personal Injury and Death*, 2nd ed., Butterworths, Melbourne, 1983.

the real substantive issues of the case being worked out in the assessment of damages, however, it could also be argued that once a worker does qualify as seriously injured their access in terms of quantum is far more limited.

General damages

General damages are defined in Section 134AB(37) of the Act. They are damages for pain and suffering, loss of amenities of life or loss of enjoyment of life.

Pain and suffering in the strict sense means actual physical pain and subsequent medical treatment.¹⁰ Loss of amenities, or loss of enjoyment of life, is the effect upon the worker's enjoyment of life caused by the physical or mental impairment resulting from personal injury.¹¹ It is a broad head of damage and practitioners must apprise themselves of as much information about the impact of an injury on a worker's life and non-work related activities as possible, in order to assess for it.

There is an informal 'tariff' used by solicitors in the area of common law damages for pain and suffering. Informal assessments are made and shared in the 'shadow of the law' and supposedly correlate with what the worker might reasonably be expected to be awarded by the court.

For the more commonly injured body parts such as backs and shoulders there are relatively well established ranges encompassing, say, a three-level spinal fusion and a bulging disc with no neuropathy. Of course attention needs to be paid to the details of that particular case, because a worker who has had a spinal fusion may actually have less pain than someone who has an inoperable back injury, although there is pain and suffering particular to having gone through major surgery which might counterbalance that.

However, for less common injuries, such as scarring on the inside of an arm caught in a plastic cutting machine, or the loss of the sense of smell and taste it is a more subjective and less predictable process. It can be difficult forming an opinion in your own mind and then having to explain your reasoning for that amount, let alone reaching some accord in your assessments¹².

¹⁰ *Skelton v Collins* (1966) 115 CLR 94.

¹¹ *Teubner v Humble* (1963) 108 CLR 491.

¹² Butterworths *Australian Current Law: Quantum of Damages* may be helpful in this regard. It publishes awards given for injuries nationally, and gives a precis of the particulars of the relevant factors of the case.

As was mentioned earlier, workers' lump sum no-fault compensation is suspended until the finalisation of their common law claim.

Pecuniary loss under the Act

At common law, loss of earning capacity means financial loss incurred as a consequence of being unable to earn income, temporarily or permanently, due to incapacity caused by a tort. The claim is for a loss of earning capacity, not the loss of the actual income itself.¹³ This is the area relating to damages where the most significant changes have been made by the new Act.

The new Act, at Sections 134AB (38) (e), (f), and (g), states that loss of earning capacity must be assessed at at least 40% for a worker to be entitled to pecuniary loss damages. There are three aspects to this:

Firstly, the worker's earning capacity is assessed for three years before and after the injury. Loss of career options or loss of flexibility of employment are not relevant unless the worker is under 26 years of age at the time of the injury. This was a response to the narrative test under the old Act as interpreted in *State of Victoria v Glover*¹⁴ and *Barlow v Hollis*¹⁵.

Then, the worker must establish that the loss of earning capacity is permanent, and that it is likely to continue indefinitely for the foreseeable future.

If the worker satisfies both of these tests, it must then further be shown that the loss can otherwise be described as "very considerable". For example, if a worker is near the end of their working life this may be mitigated against.

In order to allow for the proper assessment of this economic loss, the Ministerial Directions require quite extensive information from the worker relating to their loss to be submitted at the time the application is made. This will include tax returns or other proof of income for a period of 3 years prior to the injury to the date of application and the specification of the worker's employers and gross earnings in each employment for 3 years prior to the injury to the date of the application.

¹³ *Todorovic v Waller* (1981) 150 CLR 402.

¹⁴ [1998] VSCA 93.

¹⁵ [2000] VSCA 26.

Assessing pecuniary loss

Future economic loss

There is no exact science to calculating future economic loss because by its very nature, it is something which stretches into the future; there are many variables to be taken into consideration not all of which are stable or predictable. This is so even in the case of a wage earner where the income is fairly steady, because one is still estimating what job they might have had, to what age they might have worked, and what other factors may have influenced the length and continuity of their employment. The longer a person has left in their working life, the more these factors need to be factored into consideration¹⁶.

An illustration of this is contained in the case of *Glenelg Cleaning Services v Kelly*¹⁷, in which the worker had never worked full-time and resigned from her part-time job because her husband had received a raise. The worker was originally awarded a full economic loss for 3 years, and a partial loss to 65 years, which the Court of Appeal found not to be supported by the evidence. They revised the damages so that they were distributed on a sliding scale from the injury as the likelihood that she would have remained in employment, all other things being equal, decreased.

*Coulahan v Clissold*¹⁸ was a transport accident case in which the employer appealed in relation to quantum of damages.

The worker was a young man who had injured his back at the age of 18, but had gone on to complete his panel-beating apprenticeship and to work as a panel beater. He was awarded damages based on a very low work capacity to continue his pre-injury employment, but there was little evidence that the jury had allowed for the probability that the worker would take up a more sedentary occupation in the future and that he would be able to do so for a considerable portion of his life. The Court of Appeal accepted that the pecuniary loss for future damages was too high but it did not, as invited, also find that it followed that general damages must fall with the future damages if they were found to be too high.

The court was also requested to reassess damages rather than ordering a new trial limited to the assessment of damages for the sake of minimising cost and delay,

¹⁶ See *Abdul-Massih v Abdul-Massih* [2000] Supreme Court of Victoria No 4621 of 1999, unreported, for a comprehensive general discussion of the calculation of damages.

which it declined to do on the basis that it could not fairly be done in the absence of the worker in the witness box. A new trial was ordered.

Section 134AB(32) makes another significant change in terms of quantum in that it raises the discount rate for economic loss to 6% from 3%, another amendment which puts the Act in line with the *Transport Accident Act*. The discount tables are a checking mechanism to counterbalance the interest a worker has built into their future damages; it is a discount for the early receipt of a lifetime's earnings.

Increasingly, more people are continuing to work beyond the traditional retirement ages of 60-65. This will have a significant impact on the amount of future economic loss workers can argue they are entitled to. For instance, a former hospital orderly in Western Australia is appealing the termination of his weekly compensation at the age of 66 in the Full Court of the Federal Court¹⁹ on this basis.

Section 135D provides a new mechanism in the Act whereby, by consent only, future pecuniary loss can be paid as a structured settlement, such as by annuity.

Past pecuniary loss

In the same way that discretion can be applied to future pecuniary loss it can also be applied to the past. For example, a judge may look at a worker who had a poor employment record and use that to discount their past loss. This may be done even if the worker has since become a more reliable and employable worker.²⁰

Another example of how this discretion has been applied by the court is seen in *Pufek v Ansett Australia*²¹. In this case, the worker had been granted a serious injury certificate by the Court but damages negotiations were not successful at the pre-litigation stage and he proceeded to court. The worker had strong credit issues against him and although he was incapacitated for work due to drug and psychiatric problems, these were not thought to be directly linked to his injury. The incident and effects of the serious injury had since been subsumed to other incapacitating factors

¹⁷ [2001] VSCA 6..

¹⁸ [2000] VSCA 196.

¹⁹ *Workers Compensation Report*, 26 September 2001, 407.

²⁰ *Woods v Ross* [2000] VSC 501 (30 November 2000)

²¹ [2001] County Court of Victoria No 5639, unreported.

and accordingly, he was only awarded past economic loss for a limited period on a diminishing scale.

There are a large number of considerations to be applied to the calculation of general and pecuniary damages, and there is no exhaustive list for this as they are always particular to the circumstances of the case but this case law gives an indication of how they might be handled. Weekly compensation already paid is deducted from past economic loss.

A case study

The worker was a share farmer in a partnership with her husband in rural Victoria. Their family was provided accommodation on the dairy farm on which they work, as part of their employment agreement but the value of this arrangement was not quantified. Their partnership was paid 17.5% of the total income the farm obtains from the sale of milk. Milk prices vary from year to year and in the last 5 years straddling the worker's injury, milk prices have fluctuated from below \$5.00 to nearly \$9.00.

Nearly a third of the money which was paid into the partnership was then used for the benefit of the worker to do things like run the family car and make other tax deductible purchases. After all these deductions had been made, the worker and her husband then both drew an equal salary although the worker actually did fewer hours work in the partnership.

The worker was only in her early thirties and so arguably still had a long working life ahead of her, although she had had periods of unemployment in the past and she had extremely limited education having failed Year 9 twice. Since the worker's injury both she and her husband have been unable to work as they were unqualified and inexperienced in any other kind of work and share farming must be done in pairs. They had also lost their free accommodation.

The worker's injury was variously described as a bulging or prolapsed disc, but there was no neurological involvement. The general damages in this case were agreed upon relatively early but the pecuniary loss calculations were more contentious.

Contributory negligence

The common law principle of reducing damages for contributory negligence is also applied under the Act although it is not encoded within it. The court apportions responsibility for the damage to the parties and then reduces the damages recoverable by the worker proportionally. The apportionment of responsibility between the parties is made on the basis of culpability, that being the difference between what the worker did and what the reasonable man would have done²².

In a Victorian Supreme Court of Appeal case²³, an appeal was heard on the matters of contributory negligence and apportionment. The worker allegedly injured his back while working with a hose running between a suction pump and a tank which had a blockage in it. It was important to keep the contents of the hose moving as they were sucked out of the tank so as not to block the hose, and overheat the suction equipment.

In order to do this, the worker claimed that he would lift the hose in a “clean and jerk” movement. This was only one method of clearing a blockage, and the employer denied any knowledge of such a vigorous method of clearing a block, although they did acknowledge that lifting the hose to knee height and dropping it was standard practice.

At the initial hearing, the jury found that the employer had been negligent and in breach of its statutory duty under the *Occupational Health and Safety Act 1985*. However, the jury also found that the worker had been guilty of contributory negligence and accordingly reduced his assessed damages by 85%. This verdict, and the judicial charges in relation to it, were appealed. On appeal, it was found that the jury’s conclusion of contributory negligence was open to them but it was also found that the assessment of 85% was not reasonable in circumstances where there had also been a breach of statutory duty.

The appeal was successful because the jury were not told that they needed to make a comparison of the degrees of the culpability of the worker and employer, and their departure from standards of care. A re-trial was ordered on the issues of liability and contributory negligence, but not on the quantum of damages as the amount itself had not been shown to be unreasonable.

²² This is enunciated in *Pennington v Norris (1956)* 96 CLR 10 at 16 as cited in Luntz, op.cit., p. 110.

²³ *Kenyon v Barry Bros Specialised Services Pty Ltd* [2001] VSCA 3.

In 2001 a case of apportionment of contributory negligence was appealed to the High Court²⁴. The Court of Appeal had substituted a finding of 20% liability against the plaintiff, where the jury in first instance had found his contributory negligence to be in the order of 60%. The High Court held that in the circumstances, the finding of 60% contributory negligence of the worker was a reasonable apportionment and the Court of Appeal should not have substituted its own assessment.

Conclusion

There have been significant changes made to the access and assessment of common law damages under the *Accident Compensation Act*. New and significant case law will flow from it, particularly in the more contentious areas such as the limitation to pain and suffering or pecuniary loss damages.

I hope that this paper provides some practical advice as to how one might begin to approach their assessment.

²⁴ *Liftronic Pty Ltd v Unver* [2001] HCA 24.