Plantiffs Lawyers Association

Plantiff Litigation in the Work Health Court

The nature of a statutory jurisdiction in general and the idiosyncrasies of the Work Health Act in particular mean that solicitors in the Work Health jurisdiction are faced with a number of issues which do not face applicants' solicitors in other jurisdictions. The most fundamental problem is that local practitioners are virtually unable to settle matters before the Work Health Court and the purpose of this article is to identify this and other problems facing applicants in this jurisdiction, to promote discussion of possible solutions and action within the profession.

1. Restriction on contracting out of the Act - Section 186A

The concept behind a prohibition on contracting out of socially beneficial legislation was to ensure as far as possible that a safety net existed for all workers within the meaning of the Work Health Act ("the Act"). The difficulty raised by the provisions of Section 186A in its current form is that it is not possible to settle or negotiate in relation to a payment which is not calculated or is not directly referable to a Worker's entitlements pursuant to the Act.

Workers, insurers and employers (to the extent that employers are involved in the process) seem to be unanimous in a desire to have the ability to settle matters for sums which are not strictly referrable to the amount of earnings. There are many factors which must be considered by both parties to litigation and the restriction imposed by section 186A means that in many cases it is not possible to achieve a sensible and mutually advantageous result. If for example a claim has causation or legal difficulties, but is otherwise for a closed claim, a worker is prevented from agreeing to accept an amount less than their entitlement calculated in accordance with the Act. Particularly in light of the new amendments to the Act, which both the APLA and the Law Society have been advised are based on a desire to limit the number of cases going before the Court and to encourage resolution of claims by other means, it is incongruous to retain Section 186A in its current form and in effect require parties to proceed to hearing in many instances which would otherwise be capable of resolution.

For instance, the recently passed Work Health Amendment Act 1988 expands the role of mediation which will soon be a prerequisite to commencing proceedings. It is difficult to envisage what "recommendations to the parties in relation to the resolution of the dispute" (Section 103E) may be made by a mediator, other than that the claim be accepted or refused, without contravening Section 186A (3).

Apart from lobbying for further amendments to the Act to cure this problem, and suggestions for reform from both APLA and the Law Society have to date fallen on deaf ears, practitioners in this jurisdiction will have to resolve matters without contravening the section.

2. Methods of Settlement

Since a decision of Mr Trigg SM in 1994[1] it has been clear (if it was not before), that parties cannot settle Work Health matters simply by entering into consent orders.

Some scope for negotiation, in the appropriate case, exists in relation to the economic value of a worker's incapacity. By agreeing a Worker's capacity for the purposes of a settlement the parties are not contracting out of the Act, but are resolving factual issues in order for a payment of compensation to result. Any such agreement must of course be the subject of a Section 108 Agreement. Interest pursuant to the Act also provides some scope for negotiation.

The concept of a discontinuance has provided a mechanism in recent times for the settlement of some disputes separately to a Section 108 Memorandum of Agreement. If an insurer on behalf of an Employer agrees to pay an amount to a Worker in relation to proceedings before the Court in return for a Notice of Discontinuance in those proceedings, the Worker in theory retains all the rights that he or she has pursuant to the Act. Even if the Worker is required to pay the settlement sum as a pre condition to being able to proceed with the claim in the future the rights themselves are retained. This is the effect of the decision of his Honour Justice Angel in *Hopkins v. Collins/Angus and Robertson Publishers Pty Ltd*[2]. This decision allows the parties to come to an agreement, specifically not a settlement of work health rights but an agreement nonetheless, pursuant to which a sum can be paid and at least some proceedings finalised. This method of settlement has been used in a number of matters however the categories in which it is acceptable particularly to Insurers are limited as the Employer's liability has not been decided and there is no guarantee that the claim will not resurface.

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From a Plaintiff's point of view, while the payment is not a payment of compensation care should nevertheless be taken to obtain the usual preliminary assessment of repayment or exclusion period from Centrelink and to ensure that the HIC has been advised. While the obligation to advise the HIC is on the Insurer the consequences of not doing so will effect the Worker.

3. Calderbank Offers

The only scope for a Calderbank offer is in relation to these negotiable quantities. As a Worker's entitlement are, in theory, fixed by the Act on a weekly basis it is arguable in any event whether these offers are of any use in arguing costs. Negotiation in relation to incapacity are clearly not contracting out of the Act, but once the Court fixes the economic value of that incapacity it is difficult to suggest that an offer on different and lesser terms should be considered in the manner of a Calderbank offer. Offers such as this can and should however be used in general submissions on costs and the conduct of the parties.

4. Settlement of future entitlements - Section 74

Section 74 of the Act allows a commutation of future payments but not in any amount greater than $110,760.00 (in 1998). In the real world this means, particularly combined with the other requirements in the Section, that in many cases it is difficult if not impossible to settle the claimant's entitlements to future benefits. This is so notwithstanding the amendment allowing the Court to approve a compromise in the maximum sum even if the commuted amount is greater than that sum, providing it is just to do so.

Because a commutation requires and allows only a calculation of the discounted present values, in most cases which involve substantial ongoing incapacity a worker is in a "sink or swim" position in which the trial is unavoidable unless the Employer admits liability or the Worker chooses to discontinue.

The problem set out above in relation to Section 186A is compounded by Section 74. Fixing the ability to settle a future entitlement by reference to the payments alone ignores the other factors such as difficulties of proof, legal arguments etc which effect whether a Worker is clearly entitled to payments. Cases in which liability is clear cut are relatively rare. Even in the strongest case there may be problems but it is impossible to settle for anything less than the commuted value of the entitlement to future payments.

5. Punitive interest

Another function of the statutory scheme is that an Employer's exposure is relatively clear. There is not the wide range of calculations, interpretations and application of principles which lead to varying assessment of amounts of damages as there is in actions at common law for damages for personal injury. Arguments continue in relation to the calculation of benefits or the meaning of various provisions however in the majority of cases the effect of those arguments on the quantum of matters is not great. Unfortunately the penal provisions which allow the Court to make orders requiring payment of punitive damages relate to the interest on late payments of weekly payments. Unless the matter is particularly long running or the Worker was receiving substantial weekly payments this interest will be relatively small and in almost all cases difficult to calculate. An Employer's exposure is therefore limited except in terms of costs.

Applicant's solicitors should take every opportunity to seek punitive interest whenever appropriate and to lobby, through APLA or otherwise, for the Court to be given a wider discretion in relation to the quantum of any punitive order.

6. What this means to a Solicitor for a Worker

Solicitors for Workers need to prepare their cases early and properly. It is really an "all or nothing" jurisdiction. From the very outset you must make a decision whether your client's case is going to succeed and then abide by that decision until the Employer agrees to pay the benefits or accept liability in accordance with the Act. The scope for settlement on any basis other than complete victory or complete capitulation are limited and a Worker contemplating litigation needs to be made fully aware before starting of the long and involved process on which they are embarking.

Apart from the factual and legal issues facing a worker, the most significant factor in the course of the litigation is the identity of the insurer

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and their legal representatives.

Insurance being a business the same as any other, no insurer having made a decision will change its mind without persuasion. Most are however willing to consider arguments raised and to enter into realistic negotiations within the limited scope available pursuant to the Work Health Act. Some are not.

Rather than speculate upon the reasons for what are on many occasions strange decisions, the point to be made is that knowledge of the "personalities" of the various insurers and a working knowledge of the claims managers from time to time are important factors to consider when making the initial decision to commence proceedings. Likewise the solicitors retained by that insurer affect the way in which a matter progresses, the costs involved and the chances of resolution. Being aware of these factors allows you to advise your client upon, in addition to their chances of success, the prospects of a negotiated resolution occurring at any time prior to the hearing.

It is a difficult matter for any worker to be involved in legal proceedings. Unlike lawyers and claims officers, it is not their job to be involved in litigation. In addition to the financial pressure of being without wages, a worker runs a very real risk of having to bear tens of thousands of dollars in legal costs if he or she loses, and the scope for settlement is limited. It is not being too melodramatic to say that most worker's entire financial future depends upon the assessement made by the legal practitioner the worker first comes to see. The importance of advice to a client before the application is served should not be underestimated.

James Hebron
NT President

Ogilvie v. Woolworths (SA) Limited Work Health Court No. 9013789 - 6 December 1994.1

Hopkins v. Collins / Angus and Robertson Publishers Pty Ltd Angel J (unreported) 21 May 1997.2