

Contributions for Medical Expenses

Calculating "contribution" medical costs in personal injury cases has been clarified in a recent notice issued to the legal profession by the Health Insurance Commission.

The Notice, which applies to settlements made after 1 March 1999, deals with how Medicare and nursing home costs should be calculated under the Health and Other Services (*Compensation*) Act 1995.

Responding to the Notice's release, HIC General Manager, Program Management, Jackie Wood said "Legal practitioners and their clients have been asking for guidance on the issue for some time."

"This Notice helps them by making it clear that reductions are allowed when there has been an apportionment of liability between the parties" she said.

But Ms Wood explained that the Act does not permit reductions to be made when plaintiffs settled for a lesser sum when their case turned out not to be as strong as first thought.

"In that situation what has occurred has nothing to do with apportioning liability. Rather, the parties have made a simple commercial judgement. The reduction provisions do not arise.

"To see it any other way would open up the risk of "double dipping" which the HOSC Act was designed to remove" she said.

Ms Wood acknowledged that this issue had been a difficult one for the HIC in the time since the HOSC Act had commenced.

"We know that there has been some ambiguity about the HIC's stance. Our aim in releasing this Notice is to remove that doubt and to give lawyers every reasonable opportunity to make the necessary adjustments for themselves and their clients.

"To ensure this we have decided that claims currently under consideration or received by the HIC prior to 1 March 1999 will be "grandfathered" and dealt with as in the past. From 1 March 1999, however, practitioners should be aware that the HIC will be applying the contribution provisions in the manner indicated."

Ms Wood said she was confident that the majority of legal practitioners would support the approach taken.

"I look forward to working with them to implement the Notice over the next few months" she said.

Notice to Legal Practitioners *Health & Other Services (Compensation) Act 1997*

The Health Insurance Commission ("HIC") wishes to advise all legal practitioners that it has recently reviewed its approach to assessment of medical costs in cases involving apportionment of liability under the Health and Other Services (*Compensation*) Act 1995 ("the HOSC Act").

Background

Under the HOSC Act, provision is made, *inter alia*, for a reduction to apply to the overall amount recoverable by the HIC in respect of Medicare and Nursing Home costs where an apportionment of liability is made. Specifically, s8(2) relevantly provides:

(2) Subject to subsection (3), if:

- (a) the judgment or settlement fixes the amount of compensation on the basis that liability for the injury should be apportioned between the compensable person and the compensation payer; and
- (b) as a result, the amount of compensation is less than it would have been if liability had not been so apportioned;

the amount payable to the Commonwealth under subsection (1) is reduced by the proportion corresponding to the proportion of liability for the injury that is apportioned to the compensable person by the judgment or settlement (emphasis added).

It has come to the attention of the HIC that there has been a diversity of views amongst practitioners about the exact extent to which the "apportionment" provisions of the HOSC Act may be taken to apply.

The HIC acknowledges that there has been some instances of ambiguity in relation to its own response to these types of case in the past.

Apportionment of Liability - What Qualifies

Accordingly, with effect from 1 March 1999, the HIC wishes it be known that it will only regard cases in which there has been a formal finding of contributory negligence as meeting the criteria for a distribution under the Act. Such a finding may be satisfied in one of two ways:

1. Judgments (including by consent)

Where there has been a finding of contributory negligence on the part of the plaintiff (or equivalent finding under legislation providing for the apportionment of liability as between parties) which finding nominates either as a percentage or as a fraction the extent to which that plaintiff is to be regarded as having to bear legal responsibility for the damages sustained.

2. Settlements

Where the terms of settlement formally record the agreement of the parties that the plaintiff should bear legal responsibility for the damages sustained to an extent nominated either as a percentage or as a fraction with the result that the amount that the defendant would otherwise pay is reduced commensurately.

Apportionment of Liability - What Doesn't Qualify

Practitioners should note that the statutory requirements are not met in any of the following situations:

- where the amount originally sought or claimed by the plaintiff is reduced to reflect professional or commercial judgements about the prospect of success in the litigation (ie the risk that the plaintiff may not establish liability);
- where the amount paid in settlement is reduced to reflect an advantage to the plaintiff in early payment of the claim; and
- where the amount paid sought or claimed by the plaintiff is reduced to reflect professional or commercial judgements about the probative value of evidence.

Commencement Arrangements

Arrangements advised in this Notice will commence with effect from 1 March 1999. All notices of Judgments or settlements received after that date will be dealt with in accordance with these requirements.

Further Information

For further information please call Mr Graham Mynott on (02) 6203 6282.