

With the Transport Accidents Compensation Act, 1987 and the new Workers' Compensation Act, 1987 introducing "Transcover" and "Workcover" respectively, the NSW Government has dramatically altered the rights of NSW citizens to recover damages for injuries suffered in motor vehicle accidents and at work. Much has already been written of the loss of these rights.

In these two articles Larry King and Chris Branson examine the new schemes and, in particular, their impact on the Bar

Transcover

Nature of Scheme

The Transport Accidents Compensation Act, 1987 ('the Act') replaces the Common Law rules pertaining to the assessment of the liability of owners or drivers of motor vehicles (and other forms of transportation or conveyance operated by the UTA or SRA) and the assessment of damages for persons whose injuries have been caused by or which have arisen out of the use of such a vehicle or conveyance.

In place of the Common Law, there have been created an extremely detailed and in many respects more complicated set of definitions and rules governing the way in which entitlement to benefits will be determined. All decisions regarding such entitlement will be made by bureaucrats without any relevant training or experience and whose decisions, with the exception of a limited right of appeal, are not reviewable in any fashion.

By virtue of ss.31 and 37 the notion of fault in accordance with the civil law is retained. It would appear that the assessing officer will still have to determine whether some person as owner or driver of a vehicle is negligent under the law of tort.

Moreover, by s.37, the Act purports to make the doctrine of contributory negligence applicable to claims for benefits thereunder and, whilst it is stated that negligence by a claimant will reduce only benefits for loss of earning capacity or in respect of a permanent impairment, it nevertheless involves the assessing officer in making the same kind of legal determination as on the question of whether an owner or driver is liable for the accident.

There are, in addition, certain sections (34, 35 and 36) which exclude the entitlement to benefits and certain other sections (37 and 38) which impose further reductions on entitlement to benefits. It is not clear how those reductions are to be applied in relation to the survival of the doctrine of contributory negligence.

Injured persons are entitled to five types of benefits as follows:

- (1) Payment of hospital and medical expenses and the like.
- (2) Compensation for loss of earning capacity.
- (3) Rehabilitation

- (4) Support services being household and attendant care services.
- (5) Lump sum compensation for permanent impairment.

Dependants of a deceased person may receive:

- (1) A lump sum, and
- (2) Periodic compensation for surviving spouses and children.
- (3) Replacement household services.

The principal changes effected in the benefits available to injured persons are the ceilings imposed upon lump sum benefit for permanent impairment, compensation for loss of earning capacity and payment for support services.

The maximum amount for loss or permanent impairment is the sum of \$120,000.00 (s.105) and Regulations yet to be promulgated will make provision for or with respect to the basis on which the degree of a permanent impairment is to be assessed.

The maximum amount of compensation payable in respect of loss of earning capacity is 80% of \$500.00 per week. That figure is further eroded by a complicated set of parameters constructed for determining the actual and probable earnings of 'earners' and 'non-earners' and 'employees' and 'self-employed persons'. There are 40 sections of the Act which prescribe how compensation for loss of earning capacity is to be determined by the assessing officer.

It is notable that by virtue of s.85 if an injured person is permanently unconscious or otherwise totally and permanently unaware of his or her bodily injury, no compensation for loss of earning capacity shall be paid.

Pursuant to s.99, the maximum amount payable for household and attendant care services which are voluntarily provided shall not exceed the sum of \$344.00 per week.

There is a ceiling imposed by s.126 in the sum of \$80,000.00 being the lump sum payable to the dependant members of the family of a deceased person. The maximum amount of weekly benefits payable to a surviving spouse is \$322.50 and a surviving spouse's earning capacity is to be taken into account in assessing such weekly benefit. Where there are more than four children dependent on a deceased person, the maximum weekly benefit does not increase beyond the sum of \$137.60 per week.

Effect on the Bar

At first blush, it would seem that the Act has succeeded in taking away from the legal profession involvement in the determination and assessment of entitlement to benefits under the Transcover Scheme.

In particular, the combined effect of ss. 184(2) and (3) and 200(b) is to make the determination of an appeal by a Medical Review Panel, insofar as it relates to medical assessment, final and conclusive. Those sections preclude an appeal from such a decision or making such a decision the subject of any proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief.

To the extent that an application for benefits under the Act necessarily involves a medical assessment of a person's medical condition, fitness for employment or degree of permanent impairment (see definition in s.183) much of the decision-making by the Government Insurance Office officers will not be reviewable.

However, s.184(1) gives a person who is aggrieved by a determination of the Government Insurance Office a right to appeal to the District Court in respect of any matter affecting the **amount, nature or extent** of benefits under the Act. Those are very broad words indeed and, if they are construed liberally, it is likely that the District Court will be called upon to determine appeals in almost every case.

Section 191 makes certain provisions as to the payment of costs in the event of an appeal to the District Court. Whilst this does provide a certain lack of incentive to lawyers, it may very well be that the more junior members of the Bar will be as actively engaged as ever in dealing with appeals pursuant to s.184(1) of the Act.

In broad perspective, there is little doubt that the passing of the Act will substantially affect the volume of personal injuries litigation presently conducted by the Bar. Happily, there is a fairly long tail on the dog in respect of transport accidents occurring prior to 1 July, 1987. One wonders also just how efficient and cost-effective the new Scheme will be. Looking at it dispassionately, it may well be that within two or three years the Scheme will be seen to be an unworkable bureaucratic mess so that substantial amendments and even abolition of it will occur.

There is also a very real question as to the effect of s.40 of the Act which seeks to limit the right to a claim for damages or compensation for or in respect of the death of or bodily injury to a person caused by or arising out of a transport accident occurring on or after 1 July, 1987. It would seem that where it can be shown that a contributing cause of a transport accident (see the definition in s.4) is a matter unrelated to the manner of controlling or driving the vehicle or conveyance, then s.40(1) will have no operation. Many examples spring to mind such as the liability of a manufacturer or repairer of a vehicle, or the collapse of a bridge over which a road passes. In such cases, the rights of those injured by the action or omission of persons other than the owner or driver of a vehicle are not affected by this legislation.

In the medium to long term, the resilience and ingenuity of the advocate ought to ensure that the consequences of transport accidents are not the sole province of Transcover.

□

Chris Branson.

ENGINEERING-SCIENCE-ENVIRONMENT

Campbell Steele, Fellow Inst. of Engineers Aust.
Mem. Royal Soc. of NSW, Aust. Acoustical Soc.
Cert. Env. Impact Assess., etc. Expert Witness.
17 Sutherland Cresc. Darling Point (02) 328 6510

Work Cover

The Workers' Compensation Bill, 1987, is expected to come into effect on 1 July. It will make significant changes in the law relating to claims for damages for personal injuries and for Workers' Compensation benefits by employees against their employers. These changes are both substantive and procedural. In their impact on the availability of rights and the method of their enforcement they will modify the present type of litigation and the involvement of members of the Bar.

First, in relation to claims for damages, the relevant provisions of the Bill are Section 149 and Part 14 of the Transitional Provisions. Section 149(1) abolishes the employee's right of action against his employer, any person vicariously liable for the employer's acts or omissions, and any person for whose acts or omissions the employer is vicariously liable, in respect of an injury for which compensation is payable. Section 149(2) makes corresponding provisions in the case of death. Reference should be made to Section 149 which clearly does not do away with claims:

- a) Against persons other than employers such as contractors the employer brings onto his premises or other contractors for example on a large building site.
- b) Against occupiers of premises. Apart from the well known "public liability" situations this may leave open scope for "back door" claims against employers who own and occupy their premises through the medium of a different company from the one which pays the employees' wages.
- c) Against manufacturers of goods.
- d) Against persons who provide professional and other advice or services.
- e) Against employers **pro hac vice**.
- f) In respect of injuries for which compensation is not payable.

Part 14 of the Transitional Provisions provides that Section 149 does not apply to a cause of action in respect of an injury received by a worker before it commences or the death of a worker resulting from such an injury. Therefore, subject to a possible difficulty in cases of insidious conditions about when the 'injury' is received, the old law will apply to cases involving injuries occurring before 1 July 1987.

In such cases and in cases of the types left untouched by Section 149, there seems no reason (in the absence of further legislative intervention) why there will be any alteration in the need for the services of the legal profession.

The position is different in relation to claims for Workers' Compensation benefits and in relation to all matters involving injuries after the commencement of the Bill. The abolition of the employee's right to damages must alter the volume of fresh litigation.

However from the point of view of claims for Workers' Compensation benefits alone, there is a marked procedural change effected. At the moment upon the commencement of proceedings any reasonably substantial claim is allocated to the Compensation Court and heard by the Judges in the time honoured way. Smaller claims are heard by Commissioners. After 1 July 1987 all claims