

Client Newsletter

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A free quarterly legal update for our clients.

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Disclaimer:

The information in this newsletter is not intended to be a complete statement of the law relating to the issues raised. Accordingly, no person should rely on this information without first obtaining specific advice from our office.

▪ WHY ARE INSURANCE RATES STILL HIGH?

Injury claims down by 95%

Children, aged disadvantaged

by Mark Dunn, Herald Sun.

Public liability law suits have fallen by 95 per cent since the Government ended Victorians' rights to sue for pain and suffering in many cases. Only 40 public liability law suits were lodged in the County Court in the year after October 2003 when the laws changed - compared with 1734 writs the previous year.

The number of law suits seeking damages for sexual assault has also fallen, from 79 to nine; school accident suits dropped from 94 to two; dog bites from 42 to none and so - called slip and trip claims have gone from 553 to 13.

Jessica Woodcock, 9, almost died after breaking both arms, a leg, her nose and cheekbone and split her pancreas and spleen when she fell from a flying fox last year. But because she has partly recovered she faces the inability to sue for pain and suffering.

Law Institute of Victoria chief executive John Cain said the state Government had misjudged the new laws' impact. "I think they anticipated the changes may have led to a 20 to 30 per cent drop in claims where it has led to a 90 per cent plus drop, I don't think they intended it to be that harsh," Mr Cain said.

"Where this hits hardest is on children and the elderly because they are the group more likely to have injuries in public places." The Law Institute would keep pushing for rights to be reinstated. "The winners in this have been the insurers and their shareholders," Mr Cain said. "What we have seen in this period is a huge increase in their profits."

Maurice Blackburn Cashman partner Eugene Arocca said product liability lawsuits - including against tobacco and alcohol - were unlikely to be pursued because of wider tort reforms. Mr Arocca said the government had been divided over the effect of the new laws.

Senior legal sources claimed Attorney General Rob Hulls had argued against the extent of limitations to personal injury claims but was overridden by Finance Minister John Lenders.

Mr Hulls' spokeswoman said the changes were driven by the Federal Government. Despite the huge fall in claims, insurance premiums had not fallen nearly as much, except in medical insurance where premiums for doctors' own indemnity funds had reduced dramatically, in some cases from \$100,000 a year to \$20,000.

But Insurance Council of Australia spokesman Peter Jamvold said there had been an average premium reduction of 15 per cent and community groups that struggled to get liability insurance now had greater access. "The thing that drives insurance is claims cost," Mr Jamvold said.

The Woodcock case and others like it was "the price the country was paying" for reducing premiums and increasing availability of insurance. "You regret the girl's suffering and no one would wish it on her or anyone else, but the imposition of a threshold means that there is now public liability insurance available more widely," Mr Jamvold said.

Injured should not lose their rights to sue, says judge

Care must be taken in increasing personal responsibility, Justice Michael Kirby warns.

By FERGUS SHIEL LAW REPORTER **The Age**

HIGH Court judge Michael Kirby has warned that Australia must be careful not to unfairly curtail the rights of injured people to sue. Justice Kirby says the courts and government need to be cautious in advancing notions of personal responsibility at the expense of an injured plaintiff's rights.

Speaking in Sydney on Wednesday night, Justice Kirby said much was at stake. In rolling

back the entitlements of those who suffered damage in the name of personal responsibility, care had to be taken not to reject just claims, he said. "These are important questions for the insurance industry. It will not thrive if it becomes known, or suspected, that high premiums are paid when its liability is being significantly and constantly reduced.

"The sharing of risks is the essential brilliant idea of insurance. We must not kill the goose that laid the golden egg of insurance." Justice Kirby said the sharing of risks ought not to be reduced unfairly in cases where things had gone seriously wrong.

Low Council president John North said Justice Kirby's comments confirmed the Law Council's fears that tort

reform was denying many deserving Australians the right to claim compensation for personal injuries. Mr North said: "Justice Kirby is echoing our fears that insurance is becoming Clayton's insurance - that premium payers are still paying high rates, while on the other side of the equation thousands of reasonable and genuine claims are denied because of so-called tort reform. "And who pays for the cost of those accidents if insurers don't? It is victims and their families, and the taxpayer, through social security and public health," Mr North said.

Justice Kirby said society had to take care not to remove entirely the role of the common law as a standard for caution and accident prevention. He said he did not doubt the benefits of a 1992 High Court ruling demanding full explanation of the risks of medical procedures in a case involving a surgeon and a patient who became almost totally blind after eye surgery. Demanding the, explanation had benefited patients nationwide, he said.

"The duty to inform and to warn patients, laid down by the courts has, I feel, improved the accountability of the medical profession," he said. "The notion that such matters can be left entirely to the 'club' of a profession, however brilliant and distinguished, is not one that is attractive to me. Nor is it the law in most countries." In 2003, in response to powerful lobbying from insurers and doctors and deep concern over rocketing premiums, the Victorian Government curbed the right to sue for damages.

In the face of fierce opposition from lawyers and unions,, the Government introduced impairment thresholds before a person could sue for general damages for pain and suffering, although not lost earnings and medical costs. Claims for general damages in relation to public liability, assault, dog.& bites, slipping and school accidents all plummeted in the wake of the changes.

Lowering the pain threshold

By JOHN CAIN *ceo@jiv,asn,au*

RECENT COUNTY COURT FIGURES ARE AN INDICATION OF THE HARSH EFFECTS TORT LAW "REFORM" HAS HAD ON INNOCENT VICTORIANS.

We will be urging the government to give serious consideration to winding back the harsher elements of its tort law reform package.

The changes to tort law came into operation in September 2003 in Victoria. Eighteen months on, it appears that the insurance industry and the shareholders of insurance companies are clearly the big winners while injured Victorians, particularly the young and older Victorians, are the losers.

The changes saw the introduction of a threshold that required a person to have a disability greater than 5 per cent, calculated on the American Medical Association Guidelines, prior to being able to make a claim for general damages.

These changes were introduced following significant pressure on the government by the insurance industry. At the time there were grave concerns being expressed about the availability and cost of public liability insurance.

On 28 March 2002 Mr Lenders said: "Victoria would only consider the agreement between the states to examine broad based tort reform if there was clear evidence that it would reduce

insurance premiums and increase the availability of insurance".

Given that statement, it is disappointing that there has been little or no evidence of reduction in insurance premiums while there have been clear indications that insurance companies' profitability has improved dramatically.

In the last six months of 2004 a number of insurance companies' half-yearly reports showed a spectacular turnaround in their performance. QBE, IAG and Prominar all reported strong financial performance, not only in their general investment area, but in their insurance businesses. Unfortunately, while insurance companies' profits have increased, public liability insurance premiums for businesses have remained high, so from that perspective tort law reform has failed to deliver.

More troubling is the substantial reduction in claims for compensation filed with Victorian courts. County Court figures on the lodgment of new proceedings in the 12-month period up to 30 September 2003 and the 12 months up to 30 September 2004 show a greater than 90 per cent reduction in the number of public liability claims issued in the County Court.

These are alarming figures. It is unlikely that there has been any reduction in the number of injuries that have occurred, so it seems the 5 per cent threshold is preventing injured Victorians making claims.

In the absence of a reduction in premiums, injured Victorians are paying the price while insurance companies reap the benefits. The position of insurers in these circumstances is indefensible.

The Victorian government needs to do two things. First, it needs to take swift action to force insurance companies to be accountable. It must bring pressure to bear on the insurance industry to reduce premiums. It must undertake vigilant monitoring and reporting, as it indicated it would do at the time of the introduction of these reforms.

Second, the government needs to conduct an urgent review of the laws and have a careful look at the impact of these so-called reforms, viewing them from the perspective of the thousands of Victorians who are now not able to claim compensation, despite the fact that they have suffered significant injury.

▪ **SWAIN V WAVERLEY MUNICIPAL COUNCIL**

February's 3-2 High Court decision in *Swain v Waverley Municipal Council* has put the spotlight back on to personal injury payouts and tort law reforms.

The High Court decision reinstated a \$3.75 million negligence payout awarded to Mr Swain in 2002 after a swimming accident five years earlier left him a quadriplegic. The 2002 decision was one of a series of high-profile cases at the time, which led to nationwide reforms in tort law.

In 2002 Mr Swain successfully sued Waverley Municipal Council for negligence after he jumped into the waves at Bondi Beach and suffered spinal injuries after striking a sandbank. Mr Swain successfully argued the council was negligent in not warning of the sandbank running through the designated swimming area that had been marked out by flags.

The decision was overturned on appeal a year later. The majority decision of the Court of Appeal determined that there was insufficient evidence for the jury to find that the Council had been negligent.

Mr Swain then took his case to the High Court of Australia, with the majority deciding that the Court of Appeal decision was incorrect. The High Court decided there was sufficient evidence for a jury to be reasonably satisfied that Waverley Council had been negligent.

The 2002 decision led to sweeping reforms of tort laws in all states. Under Victorian tort law reforms, people injured in Victoria cannot seek damages for pain and suffering unless they have a *significant injury* – either 5 per cent physical (non-psychiatric) impairment or 10 per cent for psychiatric injuries. There is no discretion for individual circumstances. This has left many people without a right to compensation.

County Court figures for the first 12 months since the reforms were introduced in Victoria show an 88 per cent drop in personal injury writs filed in the County Court. Injured people are missing out on compensation because they cannot satisfy the threshold test.

The Law Institute of Victoria (LIV) and Law Council of Australia maintain the belief that the government has over-reacted to high profile cases such as that of Mr Swain, resulting in the unfair erosion of significant legal rights from injured people.

Useful web links

The LIV website contains information on personal injuries and compensation at www.liv.asn.au/public/legalinfo/personalinjury.

▪ **LEGAL PROFESSION ACT 2004**

On 7 December last year both Houses of Parliament passed the *Legal Profession Act 2004* (the Act), five years after the review of the *Legal Practice Act 1996* began. The major reforms of the new Act introduce a new regulatory system for the profession and pave the way towards a unified national profession.

For clients, the most relevant reforms are the regulatory changes. The Legal Practice Board and the Legal Ombudsman will be abolished and replaced by a Legal Services Board and a Legal Services Commissioner.

The new board will be the peak regulatory body responsible for funding, policy setting and all non-disciplinary regulatory functions.

The new commissioner will be a single entry point for complaints against solicitors and will be responsible for investigating complaints, prosecuting solicitors and barristers over conduct matters and resolving disputes. The Victorian Civil and Administrative Tribunal (VCAT) will replace the Legal Professional Tribunal (LPT) as the venue for hearings and will take over the LPT's functions.

The Act also provides that a complainant can make a complaint to the commissioner that involves a civil dispute, a misconduct matter or both. Civil disputes involve disputes about costs or financial loss as a result of the provision of legal services. The jurisdiction for costs disputes and pecuniary loss disputes has been increased from \$15,000 to \$25,000. For disciplinary complaints, the commissioner (or delegate) will investigate a complaint about a legal practitioner's conduct. Following the investigation, the commissioner must deal with the matter.

▪ **THE DEFENCE OF PROVOCATION**

Victorians on trial for murder will no longer be able to use provocation as a defence under law reforms to be implemented later this year.

Provocation as a defence has historically been a means for a person (predominantly men) to have a murder charge reduced to manslaughter. The defence of provocation dates back to an era when it was acceptable, especially for men, to respond to challenges to a person's honour with violence. It was also a time when the offence of murder carried a mandatory death penalty.

In November 2004 the Supreme Court acquitted James Ramage of murder after finding he had been provoked prior to the murder by his wife's disparaging comments about him and his sexual prowess. James Ramage was instead convicted of the lesser offence of manslaughter and sentenced to 11 years jail. The resulting public outcry from this case led to the early announcement of the revocation of the defence of provocation for future murder trials.

The abolition of provocation as a defence was one of 56 recommendations from the Victorian Law Reform Commission's *Defences to Homicide Final Report*. It is anticipated that the removal of provocation as a defence will be accompanied by changes to self-defence laws and the use of hearsay evidence in trials.

Useful websites

Defences to Homicide Final Report is available at www.lawreform.vic.gov.au.

▪ **WORKPLACE RELATIONS – CHANGES ON THE WAY**

With the Howard government taking control of the Senate in July 2005, changes to workplace relations laws seem inevitable. The government has already signalled its intention to reintroduce the raft of workplace legislation it had failed to introduce over the past eight years. It is anticipated these changes will tip the balance of power heavily in favour of businesses and employers.

Changes to small business

- The government proposes to exempt small business (fewer than 20 employees) from the operation of the unfair dismissal laws via the *Workplace Relations Amendment (Fair Dismissal) Bill*.
- The *Workplace Relations Amendment (Protecting Small Business Employment) Bill* will exempt small business from redundancy obligations.
- The *Workplace Relations Amendment (Choice in Award Coverage) Bill* 2004 will provide small business with new avenues for resisting award roping-in applications.

Changes to agreement making in favour of individual bargaining and independent contractor arrangements.

- Reforms include extending and streamlining the use of Australian Workplace Agreements (AWAs), and extending the operation of Enterprise Bargaining Agreements (EBAs) from three to five years via the *Workplace Relations Amendment (Simplified Agreement Making) Bill* 2002.
- Introduction of an *Independent Contractors Act*, which will protect and promote the status of independent contractors. It aims to restrain unions from seeking orders from the Australian Industrial Relations Commission (AIRC) that limit the use of contractors.
- The *Workplace Relations Amendment (Better Bargaining) Bill* aims to enhance the AIRC's power to terminate bargaining periods and introduce "cooling-off" periods.

Building industry reforms

The government will be looking to implement the *Building and Construction Industry Improvement Bill* 2003. This includes the establishment of the Australian Building and Construction Commission, placing limits on pattern bargaining and strike action and substantial constraints on union organising rights and activities in the industry.

Overriding of state industrial relations systems

The government is likely to implement even more far-reaching changes such as a comprehensive national system of industrial regulation overriding the state systems. While many of the government's previously introduced Bills seek to achieve this in specific areas, the possibility now exists for a more comprehensive coverage of federal laws, using the corporations power in the Constitution as the mechanism to achieve this result.

Useful web links

Department of Foreign Affairs and Trade,
www.dfat.gov.au/facts/workplace_relations.html.

Industrial Relations Victoria, www.irv.vic.gov.au.

Human Resources Magazine, www.humanresourcesmagazine.com.au, type *workplace relations reform* into the search field.

▪ **SEXUAL HARASSMENT**

A recent survey by Victoria's Equal Opportunity Commission (EOC) has revealed sexual harassment has become a growing problem for men in the workplace. The number of claims involving males has risen from 5 per cent in 1996 to 25 per cent in 2004. The survey also found most workers had either witnessed or experienced sexual harassment but many had not reported it.

The *Equal Opportunity Act 1995* (Vic) prohibits sexual harassment and this applies to employers and employees. The Act defines sexual harassment as:

- an unwelcome sexual advance; or
- an unwelcome request for sexual favours; or
- any other unwelcome conduct of a sexual nature in circumstances where a reasonable person would have anticipated the other person would be offended, humiliated or intimidated.

The *Sex Discrimination Act 1984* (Cth) also defines the nature and circumstances in which sexual harassment is unlawful. The Act complements and overlaps the provisions of the *Equal Opportunity Act 1995*.

Examples of sexually harassing behaviour include:

- unwelcome touching;
- staring or leering;
- suggestive comments or jokes;
- sexually explicit pictures or posters;
- unwanted invitations to go out on dates;
- requests for sex;
- intrusive questions about a person's private life or body;
- unnecessary familiarity, such as deliberately brushing up against a person;
- insults or taunts based on sex;
- sexually explicit physical contact; and
- sexually explicit emails or SMS text messages.

Every employer should have in place a written policy prohibiting sexual harassment and an effective complaint handling procedure.

If an employee believes an employer has sexually harassed them, they can make a complaint to the EOC. The EOC has authority to investigate complaints, negotiate with the employer and seek a resolution of the problem. It is unlawful for a person to be victimised for making, or proposing to make, a complaint of sexual harassment to the Human Rights and Equal Opportunity Commission.

If the complaint remains unresolved, it may be referred to VCAT's Anti-Discrimination List.

Useful web links

EOC, www.eoc.vic.gov.au.

Human Rights and Equal Opportunity Commission, www.hreoc.gov.au.

▪ **WILLS – A LIVING LEGAL DOCUMENT**

Your will is a legal document that sets out how you want your assets to be distributed on your death.

If you do not leave a will your estate will be distributed according to a formula set out in legislation. In some circumstances, the result of dying without a will can be disastrous for your family or loved ones. Having a solicitor prepare your will ensures your assets will be distributed according to your wishes.

Wills, however, are not static documents. They change and evolve as your own circumstances change and evolve. Revise your will at least every five years or when a significant event such as marriage, the birth of a child, or the death of a family member takes place.

Even if you haven't changed your will, certain events such as marriage and divorce will still affect it. For example:

- a will made prior to a marriage is not valid;
- separation (but not divorce) from a spouse will not affect the will;

- any gifts to your spouse or their appointment as executor will be automatically revoked on divorce; and
- it may also be necessary to appoint a guardian for your children after their birth or to review your appointed executor.

Your solicitor can give you an unbiased and objective opinion on how you should go about disposing of your estate. Consulting a solicitor ensures your will is properly drawn, signed and witnessed. Your solicitor can also discuss the more complicated issues of:

- who should be your executor and what powers they should have;
- selecting a guardian for your children and how your estate can provide for their future financial needs;
- which assets you can dispose of in your will and which assets you cannot, such as those owned by a family discretionary trust;
- minimising capital gains tax liability;
- what liabilities you need to provide for in your will and whether your life insurance is adequate in the circumstances;
- who could make a claim against the estate and how to avoid a testator's family maintenance claim?;
- options for providing for a de facto spouse, second marriages and blended families;
- the appropriate age for beneficiaries who are minors to take control of their share of the estate;
- funeral arrangements;
- where to keep your will, who should know where it is kept, and in what circumstances it should be reviewed; and
- the uses and benefits of appointing a power of attorney.

Useful websites

LIV website, www.liv.asn.au/public/legalinfo/wills/wills-Wills.

▪ **VICTORIAN POLICE AUDIT OF FIREARM OWNERS.**

You may have seen news items in the past few weeks stating that the Victoria Police are planning to inspect all licensed firearms holders storage facilities to ensure that they comply with the requirements set under the Firearms Act 1996. This "audit" is planned to take place over a 12 month period and will obviously take up thousands and thousands of hours of police time and resources that can hardly be justified for this purpose.

Storage checks are already policy for the police when new firearm owners purchase their first firearm and again when the owner exceeds 14 firearms and is require to install a security system. In addition all handgun owner's storage facilities are checked at least once for compliance. Why is there a need to do further checks and waste our valuable policing resource? Wouldn't these valuable police resources be put to better use fighting crime on the streets and protecting the community from criminals?

In Victoria there are around 200,000 Licence holders that would need to be checked. The SSAA (Vic) would expect that this process will take up anywhere from 200,000 police hours to 500,000 police hours - these are conservative estimates - to cost between \$6 Million and \$15 Million at least. The question that needs to be asked by you - the member and citizen - is "What will these inspections achieve?" and "Could these police resources be better utilized elsewhere?"

We urge you to write to the newspapers both local and state-wide, visit or write to your local member, the Premier and to the Police Minister directly to ask how they are able to justify spending police hours checking the storage requirements of 200,000 firearm owners in Victoria.

Message from SSAA (vic) Phone:03 8892 2777.

▪ **WEBSITE REVIEWS**

Activist rights

www.activistrights.org.au

This site is a comprehensive online legal guide on activism that provides activists and lawyers with a clear and updated guide to the relevant law. The site contains hundreds of pages of legal information on subjects ranging from police powers, arrest and imprisonment, responding to legal threats and the new anti-terrorism laws. There is also information on issues for activist organisations such as income tax, deductible gift recipient status, fundraising regulations, protection against civil liability and public liability insurance.

Play by the Rules

www.playbytherules.net.au

Play by the Rules is an excellent site for accessing information on sports law. This site, which is supported by commonwealth and state governments, provides access to practical information on model codes of practice, sample policies and legislation. Access is also provided to case law that is deemed to be significant in this area. Play by the Rules is also an online training and information resource for sport and recreation clubs and associations.

Australian Sports Commission

www.ausport.gov.au

Another impressive resource for all aspects of organised sport is the Australian Sports Commission website. The Policies/Issues section contains useful information on privacy, child protection, harassment and pregnancy in sport. Other items on the site include governance and management, volunteers, legislation, advice and policies.

Your Lawyer

Owed money? Recover your debt

If you have a small debt owed to you (less than \$1,000.00), send a letter requesting payment to the debtor (the person who owes you money). Telephone them or visit to collect the payment.

A more formal letter of demand can be sent to the debtor by your solicitor. If this is not successful you may decide to issue a complaint at your local Magistrates' Court.

Your solicitor can arrange for the complaint to be issued and served correctly on the debtor. Your solicitor can also conduct legal proceedings and arrange to recover the debt on your behalf.

Before deciding to take legal action to recover a debt you must decide whether the debt is worth pursuing. You should consider:

- can you find the debtor? If they are interstate, debt recovery will be more expensive;
- can the debtor pay the money owed? If the person can't pay and is likely to be declared bankrupt by legal proceedings, the debt may not be worth pursuing;
- how much are your legal costs going to be? You may spend more on legal costs than you recover; and
- is there a chance you could lose the case? Recovering the debt may not be worth the financial risk. Debtors of less than \$500.00 are simply not cost effective to litigate.

All of these issues should be discussed with your solicitor before proceeding.

Giving credit is a hidden cost of business and you must decide whether and how much of the cost of that you are will to bear.

The legal processes are varied and can be complex - if you have a problem do something about it and seek advice. Remember your first interview is free!