Compensation for pain & suffering for workers injured after 12 November 1997


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Personal injury lawyers in Victoria will be well aware that the right to recover common law damages in that state no longer exists for workers injured in negligent circumstances on or after 12 November 1997.

That was the effect of the Victorian Government's latest round of amendments to the *Accident Compensation Act*. Those amendments also abolished no fault lump sum benefits for pain and suffering for injured workers who were left with a permanent disability. In one fell swoop the Victorian Government had wiped out both the common law and no fault rights of injured workers to recover compensation for their pain and suffering.

However, there still exists an avenue by which some injured Victorian workers might be able to claim compensation for their pain and suffering.

The *Victims of Crime Assistance Act* 1996 came into effect on 1 July 1996. That Act scrapped the Crimes Compensation Tribunal and replaced it with the Victims of Crime Assistance Tribunal. The new scheme also abolished the right of victims of crime to apply for compensation for pain and suffering which had existed under the former *Criminal Injuries Compensation Act 1993*. However, in doing so, the Act also made specific provision for a criminal court to make a compensation order for pain and suffering where an offender is found guilty.

Section 74 of the Act amended section 86(1) of the *Sentencing Act* to read as follows:

86.(1) - If a Court finds a person guilty of, or convicts a person of, an offence it may, on the application of a person suffering loss or destruction of, or damage to, property or pain and suffering as a result of the offence, order the person to pay any compensation for the loss, destruction or damage (not exceeding the value of the property loss, destroyed or damaged) or for the pain and suffering that the Court thinks fit.

Clearly, an aim of the new criminal injuries compensation scheme was to shift liability to pay compensation to injured victims away from the State and onto the offender.

Consistent with this, there would seem to be no reason why an employer who is found guilty of an offence under the *Occupational Health & Safety Act* 1985 would not be considered to be an offender for the purposes of section 74 of the *Sentencing Act*. A worker who is injured as a result of the offending employer's breach of the *Occupational Health & Safety Act* could then apply to the Court for an order that the employer pay them compensation for their pain and suffering.

Section 134A of the *Accident Compensation Act* removes the right of a worker injured on or after 12 November 1997 to commence proceedings to recover damages of any kind. However, it seems clear that an order by a Court under section 86 of the *Sentencing Act* is an order to pay compensation as distinct from damages. Also an application to the Court by a victim under section 86 would not involve commencing proceedings in the strict sense referred to in section 134A of the *Accident Compensation Act*.

Section 86(2) of the *Sentencing Act* provides that if a court decided to make an order for compensation it should, in determining the amount and method of payment of the compensation, take into account the financial circumstances of the offender and the nature of the burden that payment of the compensation would impose. The Court may order that the compensation by paid by instalments. Accordingly, in considering an application for an order for compensation for pain and suffering on behalf of an injured worker, a Court would want to know the financial position of the offending employer to ascertain its ability to pay compensation. Where payment of substantial lump sum compensation by the employer might not be viable, it might be appropriate to seek payment of compensation by instalments over an extended period.

An application for an order or compensation under section 86 of the *Sentencing Act* must be made as soon as practicable after the offender is found guilty or convicted of the offence.

Of course, a pre-condition for an application for an order for compensation under section 86 is finding that the employer is guilty of an offence. An injured worker will then have to rely on the Health & Safety Division of the Victorian WorkCover Authority to successfully pursue a prosecution on their behalf.

In 1996/97 the Victorian WorkCover Authority successfully prosecuted only 76 employers for breaches of the *Occupational Health & Safety Act*. Clearly, if prosecutions were to remain at this low level, the potential entitlement to compensation for pain and suffering would be restricted to a small number of injured workers who are fortunate enough to have the VWA vigorously pursue a prosecution in their case.

However, maybe if plaintiff lawyers were to actively encourage and, where possible, give assistance to the VWA in prosecuting negligent employers for breaches of the *Occupational Health & Safety Act*, this might give some real bite to the penalty provisions of the legislation and also lead to an increased number of injured workers being given the opportunity to be compensated for their pain and suffering. ■

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