

# **Avant Mutual Group Limited**

## **Submissions to the Victorian Competition and Efficiency Commission Inquiry into Aspects of the *Wrongs Act 1958***

### **1. Introduction**

Avant Mutual Group Limited ("Avant") is Australia's leading medical defence organisation and one of Australia's leading mutuals, offering a range of insurance products and expert legal advice and assistance to over 60,000 medical and allied health practitioners and students in Australia. Our insurance products include medical indemnity insurance for individuals and practices, as well as private health insurance, which is offered through our subsidiary The Doctors' Health Fund Pty Limited.

We also provide extensive risk advisory and education services to our members, as well as access to medico-legal assistance via our Medico Legal Advisory Service. We have offices throughout Australia, providing personalised support and rapid response to urgent medico-legal issues. Among other things, our Victorian office assists members in claims for personal injuries damages arising out of alleged medical negligence.

It is from this perspective that we provide our submissions into the Competition and Efficiency Commission's (the Commission) Inquiry into aspects of the *Wrongs Act 1958*.

### **2. General Comments on Tort Reform**

Avant takes the following position on national tort reform:

- We support the underlying objectives of the tort reforms (stated in the Commission's Issues Paper as reducing the price of and increasing availability of professional indemnity insurance)
- We do not support any changes to the legislation that would lead to a winding back of the reforms or that would undermine the underlying objectives of tort reform
- We are in favour of national consistency, and as far as possible tort laws around the country should be consistent.

### **3. Limitations on damages for economic loss**

#### **3.1 Threshold on damages**

Avant does not support imposing a threshold for access to damages for economic loss.

Imposition of a threshold test for economic loss would not be consistent with the national approach and is unnecessary to achieve the purposes of tort reform within the existing range of measures.

## Limitation on damages

Avant supports the current legislation which restricts the amount of damages that can be awarded by the courts for loss of earnings to three times total average weekly earnings (AWE) for all employees in Victoria (s 28F).

Any comparison between the *Wrongs Act 1958 (Vic)* and the *Accident Compensation Act 1995 (Vic)* and *Transport Accident Act 1986 (Vic)* should take into account that the *Wrongs Act 1958 (Vic)* does not impose the threshold test for access to damages for economic loss. We do not support the imposition of a threshold test.

The *Wrongs Act 1958 (Vic)* is consistent with legislation in New South Wales, Queensland, Western Australia, Tasmania, Northern Territory and Australian Capital Territory. These jurisdictions place a maximum earnings limit upon the assessment of economic loss.

The national exception is South Australia which has a maximum award limit on damages for economic loss which is consistent with the approach taken by the *Accident Compensation Act 1995 (Vic)* and *Transport Accident Act 1986 (Vic)*.

The maximum earnings model is preferable to the maximum award approach because damages are restricted based on the earning capacity of an individual at any point in time rather than over the total earnings history. The maximum award approach favours a plaintiff who may have a short period of high earnings over a plaintiff who has high long term earning potential. For example, an older high income earner may have relatively more of their annual income compensated than a younger plaintiff on the same income. The maximum earnings model best achieves the aim to provide "*high income earners with a desirable incentive to insure against loss of the capacity to earn more than the amount of the cap*" (Negligence Review Panel 2002, 197).

Further, the imposition of a limit on maximum earnings provides equitable restraint upon access to compensation by a very small proportion of high income earners in comparison with the broader community.

## 4. Limitations on damages for non-economic loss

### 4.1 Threshold

Avant supports the current legislation which imposes a threshold for recovery of damages for non-economic loss. Section 28LE of the Act sets a threshold that restricts the damages recoverable for non-economic loss to circumstances where a person has suffered a 'significant injury'.

'Significant injury' is defined in s 28LF as:

- in the case of injury (other than psychiatric injury), whole person impairment of more than 5%
- in the case of psychiatric injury, impairment of more than 10 per cent.

While there is little national consistency, most jurisdictions impose a threshold on non-economic loss. In New South Wales no damages are awarded for non-economic loss where the severity of the injury is less than 15% of a most extreme case. In South Australia damages may only be awarded for non-economic loss if the injured person's ability to lead a normal life was significantly impaired by the injury for a period of at least 7 days or medical expenses of at least the prescribed minimum are reasonably

incurred in connection with the injury. In West Australia a threshold applies for damages up to Amount A and reduces damages up to a secondary threshold level Amount C. Tasmania has a similar approach although the thresholds are different. In the Northern Territory the threshold level is 5% impairment of the whole person. No threshold applies in Queensland. Each jurisdiction takes a different approach to calculating non-economic loss.

The national picture favours imposition of a threshold to reduce minor claims. The threshold test imposed in Victoria is clearly defined and is broadly in line with other jurisdictions.

Reduction or removal of the threshold is likely to encourage smaller claims. If such a change is to be considered then we submit that there should be appropriate modelling done to identify the potential increase in claims and their likely economic cost before the change is considered.

## **4.2 Narrative test**

Avant does not support the implementation of a narrative test in relation to the threshold for non-economic loss. A narrative test is uncertain and is likely to result in greater litigation and cost to all parties. In many cases the cost of litigating the narrative test issues is likely to outweigh the value of the potential damages. This is contrary to the objectives of tort reform.

The issues paper (at page 12) refers to an anomaly existing between the *Wrongs Act 1958 (Vic)* and the *Accident Compensation Act 1995 (Vic)* and the *Transport Accident Act 1986 (Vic)*. At the time of the amendments to the *Wrongs Act 1958 (Vic)*, the relevant provision in both the *Accident Compensation Act 1995 (Vic)* and the *Transport Accident Act 1986 (Vic)* were known to the parliament. The amendments to the *Wrongs Act 1958 (Vic)* specifically excluded pain as being an assessable impairment even though the AMA Guides 4th edition provides a mechanism for the assessment of pain as an impairment. It was clearly the intent of parliament to exclude pain as an assessable impairment and was not an anomaly as suggested.

## **4.3 Procedure**

Avant proposes that a certificate should be required to be served before or at the time of serving the statement of claim, so as to give certainty to the defendants as to what head of damage the plaintiff will pursue.

## **5. Limitations on damages for gratuitous attendant care**

Avant supports the current legislation which limits the award of damages for gratuitous care services.

### **5.1 Threshold test for gratuitous attendant care**

We support amendment of the *Wrongs Act 1958 (Vic)* to bring the threshold requirement for gratuitous attendant care into line with New South Wales and restore the initial intention of the tort reform measures.

Following the NSW Court of Appeal decision in *Harrison v Melhem* [2008] NSWCA 67 the NSW legislation was amended in the following terms:

15 (3) Further, no damages may be awarded to a claimant for gratuitous attendant care services unless the services are provided (or to be provided):

- (a) for at least 6 hours per week, and
- (b) for a period of at least 6 consecutive months.

A threshold test for services to be required for six hours per week and for not less than six months restricts small claims for care services. Such claims are difficult to disprove without incurring the expense of care assessments and expert opinions. In many cases the cost of investigating the care claim is likely to outweigh the value of the potential damages.

The threshold test for gratuitous care services is nationally consistent. Equivalent provisions are in place in New South Wales, Queensland, Tasmania, ACT and the Northern Territory.

The requirements that the claimant have a reasonable need for the services and that the claimant must establish the relationship of the care to the injury reflect issues of principal and remain appropriate.

## **5.2 Rate of damages for gratuitous attendant care**

Avant supports the existing limit on the rate of damages for gratuitous attendant care.

The limitation of damages to average weekly earnings is a nationally consistent approach.

The common law approach to assessing the 'market value' of gratuitous care has been contentious. (See: *Waller v Suncorp Metway Insurance Limited* [2010] QCA 17) The market value may be determined by reference to agency rates for the service or to industry rates for labour to provide the service. The use of average weekly earnings as a benchmark for valuing the cost of gratuitous care removes an issue for dispute in litigation and creates certainty for defendants. Removal of the limit would increase the extent of litigation in relation to the market rate for gratuitous care services.

## **5.3 Gratuitous care to others**

No award for damages for the care to family members will be allowed at common law (*CSR Limited v Eddie* (2005) HCA 64). Section 28ID purports to limit damages that are not available to the plaintiff at common law. The provision does not create a legal basis for damages for the loss of capacity to care for others. Avant supports the removal of this provision.

There is no nationally consistent position in relation to providing for damages for the ability to care for others. In New South Wales, Queensland, and the ACT legislation has created a right to damages for the loss of ability to provide domestic care services. This has not been followed in other States and Territories.

## **6. Discount rate**

Avant supports a 5% discount rate on future losses.

The use of a 5% discount rate is nationally consistent. Reduction of the rate would directly increase the cost of claims and the cost to the community through insurance premiums.

From 1969 until 2013 the rate for Australian Government Bonds (10Y) averaged 7.9%. However, compensation funds are routinely invested in a range of investments including property and shares. Moneys held by the Supreme Court under the *Guardianship and Administration Act* 1986 are invested in Common Fund No. 3 which invests in a portfolio of listed Australian shares with a small balance also invested in cash. According to the Fund's website the rate of return achieved by Common Fund No. 3 since its inception in December 1992 is 11.7%. This compares with returns based on the index of Australian shares of 10.6%.

Any recommendation for a change to the discount rate should be supported with actuarial evidence and discussion of the relevant assumptions. Modelling would be required of the impact of a change in the discount rate upon claims and insurance premiums.

## **7. Conclusion**

Avant supports the objectives of national tort reform. The reforms implemented in 2002 have been largely successful in moderating personal injuries claims against medical practitioners. We do not support any changes to the legislation that would lead to a winding back of the reforms or that would undermine the objectives of tort reform.

### **Avant contact details**

Should you have any further queries in relation to this submission, please contact:

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