legal check-up

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Message from the editor

In this edition of the Legal Check-Up, we discuss a terminal patient's right to claim damages, what a GP's role is in facilitating a worker's return to employment, a legislation update and the great result we achieved in a bullying claim ($1 million dollar settlement!)

In more TAC news, the TAC has recently launched an app which opens the lines of communication between injured persons and the TAC. The app further enables direct lodgement of documents. Another great step forward!

A number of our team members are being celebrated this month. Congratulations to Lauren Freeman from our Epping office for her promotion to Special Counsel; and Genna Angelowitsch from our Melton office who has been promoted to Senior Associate!

If you require further information about any of the topics discussed in this edition of the Legal Check-Up, contact us on (03) 9321 9988.

- Bree Knoester, Partner

Terminal patients and their right to damages

Depending on the circumstances of a patient's injury, their right to sue a wrongdoer for damages may be lost if they do not resolve their claim prior to their death.

For example, if a person develops an illness through their employment (that is not asbestos related) and they subsequently die from that illness, their estate cannot make a claim for the pain and suffering the worker went through prior to their death. If the condition is related to asbestos, court proceedings must be issued prior to the death of the worker, but do not need to have resolved in order for their family to recover compensation.

Even if their right to compensation survives their death, it may be desirable to institute court proceedings prior to the patient's death so that their testimony can be formally recorded and relied upon as evidence later on. This type of hearing is referred to as a *"de bene esse"*, and is invaluable in ensuring the evidence of the deceased is still relied upon in subsequent proceedings.

For these reasons, the Courts have developed a much faster system for addressing claims where the patient's condition is terminal to ensure the risk of them losing their rights is minimised. This can even apply where court proceedings have already been issued but the patient's condition deteriorates considerably.

In order to access the quicker court processes, it is necessary for the patient's legal representatives to obtain evidence of their condition in the form of a report from their treating doctor. This evidence does not need to be lengthy, and is frequently confined to a letter containing two sentences, outlining the patient's diagnosis and their likely prognosis. Once the Court is satisfied that the patient's condition is terminal (and in some circumstances, that they are at "imminent risk of death"), the Court will make orders facilitating a faster timetable for the patient's claim.

It is therefore essential that, in the event a patient's condition becomes terminal, any requests for information are addressed as promptly as possible so as to avoid jeopardising their potential entitlement to compensation.

- Genna Angelowitsch, Senior Associate

Return to work processes

There is currently a strong focus on injured workers returning to work as soon as possible.

WorkSafe in particular have a firm view that "the longer someone is off work, the less likely they are to ever return." Through the insurance companies who act as their agents, WorkSafe are very active in encouraging, promoting, and at times, demanding that an injured worker return to work in some capacity.

What is the role of a treating practitioner?

General Practitioners in particular play a crucial role in the timing of when someone can go back to work, and the duties that can be performed. GPs are often the ones responsible for issuing a WorkCover Certificate of Capacity every 28 days. This certificate goes into detail about a workers physical capabilities after injury and is used by the employer, insurer or return to work co-ordinator (rehabilitation companies appointed by the insurer) to determine what duties, if any, the worker can perform.

It can be difficult to strike the right balance between allowing the injured worker enough time off work to heal, whilst not keeping them home so long that they become depressed and isolated from the workplace.

The paramount consideration must be recovery, with return to work only allowed if you are satisfied that the duties to be performed will not aggravate or exacerbate the condition. Even if there is some doubt about the duties, but you feel that the worker would benefit psychologically from returning to the workplace, you should not hesitate to suggest an alteration to those duties to allow the return to commence.

What is the employers obligation to offer alternate duties?

The obligation on employers to provide suitable duties for a return to work (on reduced hours if recommended) only lasts for 52 weeks.

Do I have to let the employer come to my patient's appointment?

We have noticed an increasing trend of employers or return to work co-ordinators asking to come to the patient's next appointment. Whilst this may assist in the communication surrounding capacity for particular duties, there is no legal obligation on either the medical practitioner or injured worker to allow this.

You are entitled to refuse to have anyone else present at the consultation and insist that the body seeking the information from you put this request in writing, to which you can respond in writing, for a fee.

Treatment consultations are for treatment and management of the patient, after all.

- Lisa Paul, Partner

Bullying verdict exceeds $1 million

An employee subjected to bullying, harassment and their employers breach of duty of care has secured an award of damages exceeding $1 million.

Our client was employed as a full-time boilermaker with Melsteel. In 2009 he had an accepted WorkCover claim for stress resultant from bullying by his supervisor, whom he alleged pushed him and verbally abused him. He took four days off and then returned to full-time work. Upon his return to work he was assigned the same supervisor.

Throughout 2009 and early 2010, our client continued to complain of bullying by his co-workers and his supervisor. Little, if anything, was done by Melsteel in response to these complaints.

In August 2010 our client was again assaulted by the same supervisor whom he alleged previously assaulted him in 2009. Our client was struck in the face three times and attended his doctor with a fat lip and complained of neck pain. Melsteel denied the assault occurred. Our client made a further WorkCover claim which was rejected.

New Legislation for medical treatment

New legislation will come into effect on 12 March 2018 that will repeal the *Medical Treatment Act 1988* and amend the *Mental Health Act 2014*.

The new Act will allow people to give binding instructions or express preferences and values in relation to medical treatment that may be required in the future when they are no longer in a position to consent or refuse treatment. It will also allow people to nominate another person as a 'decision-maker', who will be able to make decisions if the nominator themselves lacks decision-making capacity.

Both adults and children can be held to have decision-making capacity as long as they can understand the information relevant to the decision, and also the consequences of the decision. Instructional directives, which are express statements regarding consent or refusal of treatment; and values directives, which suggest overall preferences as to treatment options, can be made by those with decision-making capacity. However, doctors are not obliged to provide futile or non-beneficial treatment, regardless of any directives.

Medical treatment decision-makers can be appointed. They are required to make decisions on behalf of the appointor taking into account their values and preferences, and must make the decision that they reasonably believe the appointor would have made. Support persons can also be appointed, and their role is to represent the appointor, and to help the appointer make, communicate and give effect to medical treatment decisions.

Doctors have an obligation to locate directives or medical treatment decision-makers as far as reasonably possible, with an exception that applies to emergency situations. A contravention of the section that dictates that reasonable efforts must be made to locate either advance care directives or medical treatment decision-makers will be considered unprofessional conduct. Doctors are also permitted to provide palliative care regardless of any advance care directives or decision by a medical treatment decision-maker. It is also important to note that the Act does not address physician-assisted dying.

Victorian and Civil Administrative Tribunal (VCAT) and the Public Advocate are the avenues for any disputes in relation to decisions or directives made under the Act. The Act also deals with administering medical research procedures to those lacking decision-making capacity. The requirements for undertaking such procedures are located in the Act, and we encourage those who may encounter this to ensure that they are aware of their responsibilities.

This Act will encourage people to think about end-of-life planning. It allows the community to engage with and take responsibility for future medical decisions, and provides a system in which one can exercise autonomy in relation to potential medical decisions that are required.

- Catherine Sim, Associate

In 2013, this WorkCover claim was eventually accepted as a result of Court action we initiated in the Magistrates Court.

Ultimately, our client developed a psychiatric injury and also a physical injury to his neck. He underwent six ECT treatments and neck surgery. He has not worked since August 2010 and continues to be plagued by depression and physical pain and restriction emanating from his neck.

This case ran for 4.5 weeks in the Supreme Court, and a jury returned a unanimous verdict in his favour.

An example of why claims should be pursued

A 'Return to Work' study concluded that GPs are "reluctant" to follow through with psychological WorkCover claims due to their onerous and challenging nature. While we acknowledge the harshness of this regime, if patients present complaining of work-related psychological problems, we recommend that claims are followed through.

A successful claim will assist employees achieve financial security and access optimal medical treatment. Claims also ensure that employers who breach workplace laws and cause injuries to employees are brought to account and made to pay fair and appropriate compensation.

- Naomi Riggs, Senior Associate

The TAC gets an app

Victoria's Transport Accident Commission (TAC) has produced an app specifically designed for people injured in accidents.

Anyone injured in a transport accident who has lodged a claim is now able to download the "MyTAC" app from the app store.

This clever innovation allows injured people to be informed of the benefits and services available to them. It has long been a major flaw in the TAC system that the injured are not told what help is available. This is a great step forward.

The app also allows claimants to send messages to the TAC and hopefully have their queries answered expeditiously. Similarly, the TAC can now send messages to their clients through this available line of communication.

A significant and extremely useful feature of the "MyTAC" app is that injured people now have the ability to lodge documents by submitting a photo of a certificate, or filling in a form on the app.

Things have come a long way from the time when TAC wouldn't accept a faxed form!

Under this new system, the all-important incapacity certificates should never again be lost and payments not be interrupted.

Combined with the new "Lantern Pay" payment system for service providers (see our Autumn edition for details), posting in documents to the TAC may soon become a thing of the past.

- Michael Lombard, Partner

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