Legal Check-up
Get the latest on legal and health issues
adviceline injury lawyers
SUMMER 2019

Message from the
Editor

In this edition of the Legal Check-Up, we discuss key changes to the law in 2018, and share with you some of our most rewarding cases.

Adviceline are continuing to expand, and following strong demand in the North East region of Victoria we opened permanent premises in Wangaratta. Now open for six months, we have seen extensive client growth and are pleased to have found premises which allows us to provide a convenient contact point for locals to access their rightful entitlements.

To develop relationships with local client treaters we continue to offer free 'Legal In-Service' lunches where practitioners can enjoy a free lunch and learn more about WorkCover & TAC compensation. We will soon have some exciting news to share about our seminar offering - so watch this space!

Thank you for your support in 2018. We look forward to continuing to help your patients in 2019 and beyond.

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

Personal injury Yearly Review

Treaters of patients with compensable injuries play a vital role in assisting with their claim. With your help, we have achieved some great legal results for your patients, allowing them to focus on recovery

Rewarding WorkCover cases:

- A 67 year old female was diagnosed with a right shoulder supraspinatus tendon tear and various disc bulges after sustaining an injury while working as a seamstress. Although she had an accepted claim and was in receipt of weekly payments and medical expenses, the insurer would not fund proposed surgery. Her local doctor referred her to Adviceline so she could obtain advice about her entitlements. We lodged her serious injury application and successfully obtained compensation on her behalf.
- A woman who suffered a psychiatric injury due to overwork had her weekly payments terminated in 2017. After issuing proceedings in the Magistrates Court, negotiations commenced with the Defendant to try resolve the case prior to the case being listed for Hearing. We took a strong view that the worker was entitled to payments beyond 130 weeks, and were subsequently successful in having the notice withdrawn. The client's payments were reinstated from the date of termination almost two years prior.

Outstanding road accident results:

- A country GP was struck by a speeding car whilst cycling one morning and suffered severe injuries. Interestingly, during his treatment, the GP made a number of observations about the rehabilitative treatment he received. He found there was often a lack of co-ordination in his medical treatment. He also recognised the health professionals who cared and those who didn't. He found he could forgive mistakes that might be made by caring doctors, but was less forgiving for those who didn't seem to care. He saw the need to give injured people time to understand what treatment was being received. TAC expert, Michael Lombard was able to expedite his compensation for pain and suffering and after a meeting with the TAC, and obtained maximum compensation for the GP.
- A prominent GP went jogging after work one evening and was tragically hit by a drunk driver, sustaining massive injuries. The GP was unable to return to work and his life and his family's changed forever. We contacted the TAC and submitted that the maximum compensation for pain and suffering should be made immediately. They agreed and this sum was paid to the Supreme Court for investment. We then set about analysing the loss of income in the past and future. Again we submitted the maximum sum under the TAC Scheme and within 8 months this was finalised. No court proceedings were required to achieve maximum compensation for our client.

Continued inside.

Incredible asbestos disease results:

- A 75 year old Greek migrant, who worked in the 1970s and 1980s as a cabinet maker renovating homes in Melbourne, was negligently exposed to asbestos by his former employer. After many years of hard physical labour, the worker returned to Greece to enjoy his retirement. Subsequently, the worker was diagnosed with mesothelioma, a terminal asbestos-related cancer, due to his work in Melbourne 40 years earlier.

  Given his condition, the worker was unable to return to Melbourne to pursue a claim for compensation.

  Nonetheless, Adviceline Injury Lawyers successfully obtained significant compensation for the worker, all the while he remained in Greece to receive vital medical treatment.

Big result for a slip and trip injury:

- A young mother of five fell and slipped on wet floor in a major supermarket, injuring her right knee. She required multiple surgeries and was unfortunately unable to work due to ongoing problems with her knee.

  Despite an initially difficult battle with the supermarket, we were able to secure a brilliant settlement for our client at mediation. For our client, this compensation meant she could buy a home for her family!

In addition to these great outcomes, Adviceline also achieved outstanding results for our clients affected by sexual assault and hearing loss.

Bree Knoester, Partner

What is Comcare?

Comcare is a national system of compensation laws, originally established to provide compensation for work related injuries to Commonwealth employees and was subsequently expanded to cover prescribed large businesses.

If your patient is employed by the Commonwealth or by one of these prescribed business they are required to lodge a Comcare claim when seeking compensation for their injuries, not a WorkCover claim.

What is the difference between WorkCover and Comcare?

There are many differences between the WorkCover system and the Comcare system, particularly:

- Unlike WorkCover, weekly payments are paid at 100% of your patients pre-injury average weekly earnings for the first 45 weeks of incapacity. After 45 weeks, payments will drop to 75%.
- If your patient is incapacitated for pre-injury employment, weekly payments are payable to retirement age. Under WorkCover weekly payments are often terminated after 130 weeks.
- In a Comcare claim your patient is entitled to make more than one lump sum impairment claim if they are considered to be suffering from a 10% whole person impairment. This is assessed in accordance with the Comcare Guide to the Assessment of Permanent Impairment.
- If your patient intends to sue their employer they must not accept a lump sum permanent impairment payment. This is because, under ComCare, your patient must elect whether to proceed with a lump sum impairment claim or a common law claim. They cannot proceed with both. The common law claim is restricted to a maximum payment of $110,000 and is payable for 'damages' of pain and suffering only. An employer cannot be sued for lost wages.
- A dispute between an injured worker and Comcare will not be determined by a court, instead, if the parties are unable to resolve the matter, it will be heard by the Administrative Appeals Tribunal.

For more information about injuries sustained by Government or prescribed business employees, contact our Comcare team on (03) 9321 9906.

Workers Compensation Law

Change is in the air!

The law governing WorkCover compensation in Victoria was amended in 2018, with changes including:

Lump sum entitlements paid to deceased estates
The *Workplace Injury Rehabilitation and Compensation Act 2013* (**WIRC Act**) was amended to allow the estate of a deceased worker to access their lump sum entitlement if they pass away before it is paid. In order for the benefit to be paid to the estate, the worker must have lodged their claim and attended the necessary independent medical examinations prior to their death.

Annual leave and sick leave whilst on WorkCover
Following two cases heard by the Fair Work Commission in 2017, the Ombudsman reviewed its position on annual leave entitlements while on WorkCover. From May 2018, if an injured person is employed and receives weekly payments they will accrue annual leave as if they were working normally. Sick leave, however, does not accumulate. When the injured person returns to work they will accumulate annual leave and sick leave for the hours that they work.

Uniform treatment for apprentice jockeys
The WIRC Act was amended to provide equal treatment for apprentice jockeys and jockeys. An apprentice jockey is deemed to be employed by Racing Victoria if they are engaged in riding work at an approved facility and/or riding to and from an approved facility. In addition, the definition of 'remuneration' was also expanded to include prize money.

Case study - Golf swings SI certificate

Mr Garnaut sustained an injury to his left ankle whilst at work. When his injury did not heal, Adviceline Injury Lawyers assisted him to apply for a Serious Injury Certificate. Mr Garnaut's application was rejected by the Victorian Workcover Authority, and we referred the matter to the County Court for a final decision.

Prior to his injury Mr Garnaut was five times club champion and played regularly. After his injury Mr Garnaut's handicap increased and there was a "marked decrease" in how often he played.

In May 2018 Justice Dyer found that our client did suffer from a serious injury, and accepted that playing "high quality" social golf was important in the Mr Garnaut's life and that this has been grossly disrupted by the injury.

Looking forward to 2019

Victorian Ombudsman Deborah Glass has commenced a follow up investigation into the management of complex workers compensation claims and WorkSafe oversight. Her investigation will examine whether the situation has improved for workers with complex injuries and conditions since her last report in 2016. We expect the report to be released in the course of the coming year.

Gemma Hannah, *Lawyer &* ***Grace Bowran-Burge****, Lawyer*

Asbestos Law

Something old, something new

Although the devastating consequences of the asbestos era continued to rear its head, relatively new condition 'silicosis' - touted as the new asbestos - also threatens the health and safety of Australians.

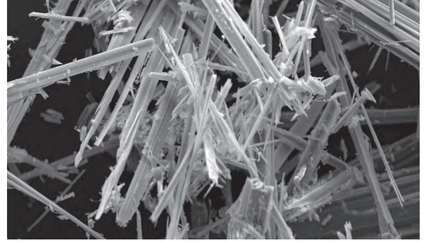
In 2018 the Federal Government released statistics which reported that cases of the deadly asbestos cancer, mesothelioma, continue to rise with two new cases diagnosed each day. Most commonly diagnosed with the illness are men who have worked in the building trade, however concerns grow for the 'third wave' victims, home renovators.

KPMG released data earlier in the year demonstrating that cases of mesothelioma caused by home renovation exposure have surpassed instances of the disease caused by workplace and other exposure. There were 182 cases of mesothelioma caused by non-renovator exposure in 2017 and 'DIY' renovations were the cause of 210 cases. These staggering statistics are expected only to increase.

Meanwhile, the consequences of forgotten industrial lung disease, 'silicosis' re-emerged in 2018.

Silicosis is caused by the inhalation of silica dust, a mineral present in rock products such as granite, which is breathed in when the stone is cut. It most commonly affects workers in the stone mason industry, and the inhalation of significant quantities causes irreparable damage to the lungs and can ultimately lead to death. Advanced sufferers of the disease often require total lung transplants in order to survive.

An increase to cases throughout 2017 and 2018 caused Federal Health Minister, Greg Hunt, to call on each State to investigate health and safety practices in the industry. In an attempt to supress the number of future cases, Safe Work Australia also issued a number of stop work notices requiring businesses to improve their safety procedures.



Case study - Johnson & Johnson talc

In July 2018, a jury awarded USD$4.69 billion to female plaintiffs who alleged their ovarian cancer was caused by Johnson & Johnson's baby powder which was proven to contain asbestos. Johnson & Johnson appealed the award for damages, however, in December 2018, the decision was upheld.

Confidential documents and internal reports sourced from Johnson & Johnson in the United States revealed that the company knew its baby powder contained asbestos, and had done as early as 1971.

Despite the damning documents, representatives for the company maintain that Johnston & Johnston had no knowledge the product was unsafe or did not comply with appropriate regulations.

A further appeal of the award may yet be pursued.

The latest Johnson & Johnson talc trial commenced in January, the first of more than a dozen cases scheduled for trial in 2019.

Giorgina McCormack, *Lawyer*

Public Liability

Slips and trips on Council property

Local Councils are responsible for the management of roads and footpaths within their catchments to ensure the safety of road users and pedestrians.

In order to make a successful public liability claim against a Council, an patient must establish that:

1. They suffered an injury;
2. Their injury is considered a "significant injury" at law; and
3. The "significant injury" occured as a result of the negligence of the Council and/or the relevant Council breached its statutory duty.

The relevant legislation that governs this area of law is known as the *Road Management Act 2004* (Vic).

This legislation imposes a statutory duty on Councils to inspect, maintain and repair public roads and footpaths, however the Council can determine the standard to which this is completed. This standard must be stipulated in a Road Management Plan (RMP).

As a result, the standard of care that is expected of Councils is very low. In particular, the responsible Council is only required to do what a reasonable Council would do in those circumstances.

This means a person injured on Council property would find it difficult to demonstrate that the Council was negligent and/or breached its statutory duty in not constructing, inspecting, maintaining and/or repairing a public road or footpath appropriately.

Case study

In February 2011, Mr Nightingale injured his right foot and ankle in a fall. According to Mr Nightingale, he lost his footing and twisted his ankle after he stepped into a sunken area of a footpath on Balmoral Street in Blacktown, Sydney.

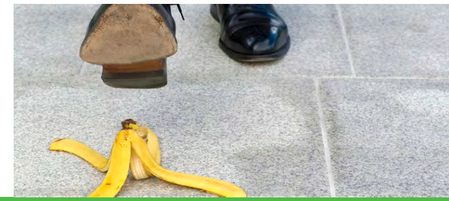
Mr Nightingale alleged that Blacktown City Council was negligent in failing to repair the footpath, provide adequate light to the footpath and/or warn him of the danger posed by the footpath. Mr Nightingale also alleged that Blacktown City Council failed to have an adequate system of repair and maintenance of the footpath.

Mr Nightingale unsuccessfully sued Blacktown City Council. The trial judge dismissed Mr Nightingale's claim against Blacktown City Council on the basis that he failed to show how the Council had actual knowledge of the particular risk which resulted in his injury.

Mr Nightingale appealed this decision to the Court of Appeal in New South Wales. Mr Nightingale was unsuccessful and he was ordered to pay costs.

Mr Nightingale's case is one of many cases which demonstrate the difficulty with proving that a Council is negligent in not constructing, inspecting, maintaining and/or repairing a public road or footpath appropriately.

Linda Hanley, *Associate*



Comcare

New statistics released

Comcare released their annual workers' compensation statistics report for the 2016-2017 year, which revealed the following:

- The most significant causes of mental stress claims were work related harassment/ bullying (35 per cent of all mental stress claims) and work pressure (29 per cent of all mental stress claims);
- Mental stress claims, while accounting for only 6% of all accepted claims, accounted for 17% of claim costs;
- The median length of time a worker was incapacitated after suffering an injury was 4.9 weeks. By contrast the median duration of time lost for a disease claim (including mental stress) was 6.9 weeks; and
- The leading type of injury for accepted workers' compensation claims was body stressing, in particular muscular stress while lifting, carrying or putting down objects (43% of all accepted claims).

Case study - Unreasonably managed

While working with the Department of Defence an employee suffered a psychological injury and lodged a Comcare claim.

Comcare rejected the claim on the basis of reasonable administrative action. The employee appealed this decision to the Administrative Appeals Tribunal (AAT), arguing that her injury was not a result of reasonable administrative action. Her appeal was unsuccessful.

Adviceline Injury Lawyers then took over conduct of the matter and appealed the AAT decision to the Federal Court.

In September 2018 Justice Davies found the decision of the AAT was not made according to law.

Her Honour found that while the AAT had determined administrative action contributed to the injury, they had not properly determined whether the injury would still have occurred absent the administrative action, and this was an error of law.

The matter has returned to the AAT for redetermination.

Grace Bowran-Burge, *Lawyer*

Traffic Accident Law

Fixing a loophole for cyclists

A sensible, long awaited change to TAC benefits for cyclists occurred in late 2018.

Prior to the change in law, cyclists were only covered by the TAC where there was a:

- Collision with a motor vehicle;
- Collision with an open or opening car door; or
- Collision with a stationary vehicle whilst on the way to or from work.

This meant that cyclists who collided with a stationary vehicle when they were not travelling to work did not receive any assistance from the TAC for their injuries.

Case study - Rory's Law

This restrictive definition of a "transport accident" was clearly highlighted on 9 July 2014 when a farmer, Rory Wilson, collided with a parked truck whilst cycling with his friends on a wet and windy day.

He suffered from a severed spinal cord and subsequently suffered two massive strokes. He was left paralysed and had to learn to read and speak again.

As he was not riding to work, he discovered that he was not eligible for any assistance from the TAC.

The new law has closed this loophole by amending the definition of "transport accident" to include collisions between a pedal cycle and a stationary vehicle, regardless of whether the cyclist was riding to work. It has been dubbed, "Rory's Law".

The application of "Rory's Law" will operate retrospectively for any collisions that occurred from the date Rory was injured on 9 July 2014.

Cyclists who have been injured from collisions with parked vehicles since that date are now able to lodge TAC claims even though they may not be within the prescribed time limits for lodging TAC claims.

Assistance may now be available to injured cyclists who have been struggling in recent years to recover from their injuries.

Shyla Sivanas, *Lawyer*

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We are dedicated to helping get your patients' life back on track.

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