The Wrongs (Amendment) Act 2015 (Vic) (Amendment Act) contains changes that will impact the way that Victorian common law personal injury claims are approached and reserved (it will not affect claims under the Transport Accident Act (Vic) or the Workplace Injury Rehabilitation and Compensation Act (Vic)). From 19 November 2015, the amendments apply to all proceedings, including proceedings already on foot. This alert briefly sets out some of the relevant changes. It will be of interest to claims handlers, underwriters and brokers who have a Victorian personal injury portfolio.

The key changes are:

- Lowering the threshold impairment level for psychiatric injuries to 10% or more and spinal injuries to 5% or more
- An increased non-economic loss damages cap from $518,300 to $577,050
- Change to the method of calculating the cap for economic loss – amendment to s28F
- Introduction of a limited statutory entitlement to damages for the loss of capacity to care for dependants
- Provide the court with the power to stay proceedings until a certificate of assessment and prescribed information has been served

1. Amendment to threshold impairment levels

Spinal injury: the threshold has decreased to “impairment of 5 per cent or more” rather than “impairment of more than 5 per cent”.

Psychiatric injury: the threshold has decreased to “impairment of 10 per cent or more” rather than “impairment of more than 10 per cent”.

It is expected that the number of claims for non-economic loss will increase as a result of the threshold changes. In its report which instigated the introduction of the Act, the Victorian Competition and Efficiency Commission (VCEC) estimated that the changes relating to impairment thresholds would cause an impact on the insurance market, including additional claim costs between $0.6 - $4.0 million per year and increased insurance premiums between 0.1% - 1.0%.\[1\] It estimated that the collective changes in the legislation may increase liability and medical negligence premiums by up to 5%.

A question arises as to what will happen to claims that are on foot, where Medical Panel determinations have already been issued and the claimant did not meet the relevant threshold – will the claimant have the right to a further assessment? The legislation does not provide a clear answer. We consider the better view is that claimants will not have grounds to seek review of the Panel’s determination despite the threshold change. However, differences of opinion exists. No doubt, this will be the subject of early litigation.

2. Increased non-economic damages cap from $518,300 (as at 1 July 2015) to $577,050 (which will continue to be indexed annually)
This change will bring the Wrongs Act cap on non-economic loss damages into line with the Victorian workers compensation scheme. It is anticipated that it will lead to an increase in the cost of claims for non-economic loss by at least 10% in the claims that fall at the high end of the range of non-economic loss damages.

3. Change to the method of calculating the cap for economic loss

At common law, economic loss is generally calculated by assessing the difference between a plaintiff’s pre-injury and post-injury earnings, whereby the Wrongs Act provides a statutory cap for this head of damages.

Before the introduction of the Amendment Act, section 28F(2) of the Wrongs Act required a court “to disregard the amount (if any) by which the claimant’s gross weekly earnings would (but for the death or injury) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award.” The interpretation of this provision taken by the Court of Appeal in the decision of Tuohey v Freemasons Hospital [2012] VSCA 80 highlights the difficulties that the wording of the cap caused for high income earners. In this case, Tuohey had pre-injury gross weekly earning capacity of $10,548. His post-injury earning capacity was reduced to $6,442, amounting to a $4,106 loss. At the time, the cap of three times gross averages weekly earnings was agreed to be $2,836. Here, the Court held that the relevant “amount” referred to in section 28F is the plaintiff’s pre-injury earnings, rather than the difference between pre and post-injury earnings. Ultimately, Tuohey was not entitled to any award for economic loss as both his pre and post-injury earnings were above the cap, despite the significant decrease in his earning capacity as a result of his injury.

As a result of the amendments, section 28F(2) now simply provides that “the maximum amount of damages that may be awarded for each week of the period of loss of earnings is an amount that is 3 times the amount of average weekly earnings at the date of the award.” It does not require the court to “disregard” any amount. Looking back to the example of Tuohey, if this case was brought before the Court today, he would be eligible for the full amount of the cap available (which is currently $3,170.40).

This change seeks to make the economic loss provisions operate more fairly with respect to people with high earning capacity. Individuals who were previously unable to claim this head of damages may now have scope to do so.

4. Introduction of a limited statutory entitlement to damages for the loss of capacity to care for dependants

In 2005, the High Court in CSR v Eddy (2005) 226 CLR 1 held that damages for the loss of capacity to care for others should not be recoverable as a specific head of damages, therefore removing the common law entitlement to such damages. In response to this, the Act creates a new statutory head of damages for a claimant’s loss of capacity to provide gratuitous care for his or her dependents and is intended to apply despite anything contrary at common law.

For such an award to be made, the court must be satisfied that:

- The claimant provided care to those dependants before the accident occurred;
- The dependents were incapable of having provided, and are incapable of providing in future, the care because of their age or physical or mental incapacity; and
- If not for the injury, the care would have been provided to the dependants for at least 6 hours per week for at least 6 consecutive months, and that there will be a need for the care to be provided for those periods in future, which need is reasonable in all the circumstances.
5. Power of the court to stay proceedings

If a certificate of assessment has not been served by the plaintiff on the respondent, the Act now empowers the court to order that proceedings be stayed until this occurs. This change seeks to improve the efficiency of the claims process.

What Action Should People Responsible for Claims Management Take?

1. Re Amendments to Thresholds

Review your files to see if any of your claims have the following aspects:

- Spinal injuries
- Claims for psychiatric injury

If they do, if the claimant already has a Medical Panel determination that they have satisfied the injury threshold, then move on to recommendation 2 below. If the claimant either hasn’t yet obtained a Medical Panel determination (or has obtained a determination that they did not satisfy the threshold), consider increasing your reserves to make an allowance for non-economic loss damages if the claimant is likely to satisfy the new, lower, threshold.

2. Re Increases in Non-Economic Loss Damages

Review the quantum of all claims which have a non-economic loss (general damages) component. Those claims at the high end of the scale may require an upward review of around 10%.

3. Re Calculating Economic Loss

Review your files to assess if any claimants were earning over 3 time average weekly earnings prior to the incident. If they were, an allowance may need to be made for future economic loss that was not previously made, or a higher allowance may need to be made.

4. Re Loss of Capacity to Care

Review your files to see if any of your claims involve a claimant who previously provided care to others, and whose ability to do so post-injury has been reduced.

If they do, consider increasing your reserves if the claimant is likely to provide such care for more than 6 hours per week, or a period of more than 6 months.

5. Re Certificates of Assessment

If a claim is litigated and the plaintiff hasn’t served a Certificate of Assessment, consider instructing your lawyer to apply for a stay of proceedings until the Certificate is served.