National policy changes to affect outcomes for plaintiffs

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Centrelink Policy Causing Problems

APLA members will be aware that the *Social Security Act* requires Centrelink to take compensation payments into account when determining eligibility for most Social Security payments. The word "compensation" is defined in Section 17 (2) of the Act as a payment that is made wholly or partly in respect of lost earnings or lost capacity to earn resulting from personal injury and includes a payment of damages.

A lump sum payment of compensation may result in a person being precluded from receiving Social Security payments with the period of preclusion to commence on the date of the accident or on the day when workers' compensation payments cease. The Act has a specific formula which is used where a lump sum settlement is achieved, which contains a component for lost earnings or earning capacity. In such situations the formula adopted by the department uses 50% of the gross lump sum which is deemed to be the "compensation part". The number of weeks in the lump sum preclusion period is calculated by dividing the compensation part by the single pension income cut off amount, which at the present time is $565.75. As is well known, any Social Security payments previously paid during the preclusion period will be repayable to Centrelink. An injured person will then be prevented from receiving Centrelink payments for the remainder of the preclusion period.

In the past Centrelink has provided an excellent service in making an estimate of any likely charge and preclusion period upon the request of the plaintiff's legal representative. This has left most of us in a position where we can give a fairly clear indication of those matters to a plaintiff who is considering a settlement sum. For obvious reasons if a settlement sum was expressed as being inclusive of legal costs the 50% rule would be applied to the whole sum, as it was not possible to determine the component of costs. It was clear, until recently, however, that if the settlement sum was expressed as being in addition to legal costs the 50% rule only applied to the lump sum and not the costs. This was specifically set out in the Centrelink Policy Guide.

Without warning, and for no apparent reason, Centrelink has adopted a completely different policy where it is refusing to provide charge and preclusion periods estimates until the party and party costs are known and included in the application of the 50% rule. In almost all cases the defendant is required to hold the settlement sum until the Centrelink payback is known. In circumstances where party and party costs are yet to be determined, the change of policy by Centrelink can lead to delay whilst costs are either agreed or assessed.

Centrelink appears to be suggesting that it could issue one charge or preclusion period for the settlement sum and then an amendment or revision once the costs are resolved. This could lead to great confusion as to what amount should be retained in a solicitor's trust account and leave a client still uncertain as to the net result of the settlement.

The general experience of lawyers in my firm has been that there has been great difficulty in obtaining any sort of estimates prior to settlement. This has led to the difficulties expressed above in advising clients.

In my view there is no proper basis for applying the 50% rule to party and party costs. They cannot in any way be considered to be part of the damages payable to an injured plaintiff. The effect of applying the 50% rule to such costs is delay and uncertainty. APLA suggests that all plaintiff solicitors be weary of this change of policy. I advise that APLA, in conjunction with the Law Council of Australia, is making representations to the relevant Minister to try and reverse this current policy and reinstate the previous position. It would be helpful if any members who have experienced difficulties with these issues could forward details, perhaps by e-mail, to Eva Scheerlinck, APLA Public Affairs Manager.

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Health Insurance Commission Legislation Expected to Facilitate Claims

All APLA members will be aware that there are imminent changes to the Health and Other Services (Compensation) Act 1995. It appears that most amendments to the Act took effect on 1 January 2002 but there will be a period of grace where the Health Insurance Commission will assist claimants and their representatives adapt to the new system. Most of the changes should benefit those of us helping the injured. These include:

- A Notice of Past Benefits will now be valid for six months rather than three months.
- There will be no obligation to give notice of the claim by either the claimant or the notifiable person until after the settlement is achieved.
- Any judgment or settlement for $5,000.00 or less is not caught by the system and there is no obligation to either give notice or remit any funds.
- It will also be easier for services that have been "deemed" as being accident related to be "undeemed" with a right of review of decisions under the deeming provision.

It is my understanding that the Health Insurance Commission will be holding briefing sessions around Australia to assist members of the profession in relation to these changes. If necessary, APLA will arrange for further information to be provided.

There is one worrying aspect of the changes that should be noted and which is similar to the current problems in the Centrelink legislation. For reasons that are not clear, the new provisions provide that an amount that is sent as an advance payment must be for 10% of the total amount of compensation awarded including legal costs. It appears an absolute nonsense for legal costs to be included in any Health Insurance Commission calculation. One major problem is that it is arguable that an advance payment cannot be made until the legal costs are determined where a settlement sum is expressed as being in addition to party and party costs.

This is an issue that will be pursued by APLA with the Health Insurance Commission and the relevant Minister. PL