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2. injured person made a claim within the time limits: s 68 ........ error! bookmark not defined.
3. transport accident ‘connected’ to Victoria: s 35(1) ......................... error! bookmark not defined.
4. person suffered an ‘injury’ ............................................................... error! bookmark not defined.
5. meaning of ‘transport accident’? ..................................................... error! bookmark not defined.
   5a. that there was an ‘incident’ ....................................................... error! bookmark not defined.
   5b. incident ‘directly caused’ by the ‘driving’ of a vehicle ............... error! bookmark not defined.
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Approach to determining ‘SI’ under s 93(4)(c) & (d)—leave of court...

Step 1: identify the injury: s 93(1)

Step 2: identify the impairment: s 93(17)

Step 3: identify the consequences of impairment

Step 4: narrative test satisfied? s 93(17) + CL

Division b/n physical & mental consequences of injury: Richards v Wylie....

Section 94 TA Act – Indemnity

S 93(17A) new SI provision re ‘nervous shock’

Elements of s 93(17A)

INTERACTION BETWEEN THE ACCIDENT COMPENSATION ACT 1985, TRANSPORT ACCIDENT ACT 1986, AND OTHER SCHEMES

Introduction

Overlap between AC Act and TA Act

‘Journey claims’

TA/AC Act and Wrongs Act 1958 (Vic)

Section 138 AC Act

Safety, Rehabilitation and Compensation Act 1988 (Cth) (‘SRC Act’)....

Other Acts

National Disability Insurance Scheme Act 2013 (Cth)

ALTERNATIVE OR APPROPRIATE DISPUTE RESOLUTION (“ADR”) IN RELATION TO THE ACA AND THE TAA

Definitions

Claim procedures in AC Act

Claim management procedures

Medical Panels: s 67

s 134AB proceedings

Claim procedures in TA Act

Claims management procedures

s 93 proceedings

ADR v Litigation
INTRODUCTION TO THE ACCIDENT COMPENSATION ACT 1985 (VIC)

Introduction

- Use the Act that was in force when the accident occurred
- AC Act a uniquely complex piece of legislation that governs workplace injuries in the State of Victoria
- Combines:
  - No-fault
  - Common law

Historical background

Kevin Purse 2005 identifies 4 ‘nodal points of policy development’ (p. 9)

1. White settlement to end of 19th c (pp. 9-): Laissez-faire, CL, & Unholy Trinity
2. 1900-1925 (pp. 11-12): profound and rapid change
3. Mid-1920s—1979 (pp. 12-): ‘incrementalist interregnum’
4. 1970—mid-1990s (pp 13-): ‘reform and counter-reform’

Background to WC Act

- Industrial revolution 18th-19th cc
- British legislation from late 19th c: Workmen’s Compensation Act 1897 (UK)
- No-fault system introduced for the first time
- Problems in common law at this time—Unholy Trinity of:
  1. Common employment
  2. Voluntary assumption of risk
  3. Contributory negligence

First Australian legislation

- Australian jurisdictions adopted UK legislation between 1897 and 1914:
  - Workmen’s Compensation Act 1900 (SA)
  - Workers Compensation Act 1914 (Vic)
- change from ‘out of AND in the course of employment’ (ie, causal AND temporal nexus to employment) to ‘out of OR in the course of employment’—ie, conjunctive to disjunctive

Background to the AC Act

- Mark Considine on factors leading to pressures to reform
• 1985: AC Act passed

• Post-1985: amendments

Outline of the AC Act – 1

• Eligibility for no-fault compensation
  o Injury: physical or mental
  o Employment nexus
    ▪ Worker
    ▪ Arising out of or during the course of employment

• Types of compensation
  o Lump sum (one off payment)
  o Periodic payments of PIAWE
  o MLE

Outline of the AC Act – 2

• Eligibility for common law damages
  o Employment nexus as above
  o Limited common law damages (no pecuniary only)
  o Common law requirements of negligence: DOC (NDD of employer), breach, causation
  o Threshold of ‘SI’: 3 gateways

• Restrictions on quantum and type of common law damages
  o No Pecuniary damages
  o Non-pecuniary or ‘pain and suffering’ damages only
  o No Special damages
  o Statutory caps

Aims of the AC Act

• Cook et al 2012, 8th ed.: 13-step checklist guide to statutory interpretation

13 step process!

1. Establish whether the legislation was in force at the relevant time. If it only commenced operation at a later time, check whether it nevertheless applies retrospectively to the problem.

2. Use the table of contents and headings to check through the whole piece of legislation seeking relevant provisions.

3. When you find a relevant provision, read it carefully and note any words or phrases that appear significant.
4. Check whether any of those words or phrases are defined in the legislation.

5. If necessary, check the meaning of any words in a dictionary.

6. Consider whether any provisions of the relevant legislation are in point.

7. Consider whether any of the adjacent provisions in the legislation throw light on a relevant provision, remembering that words are normally used consistently.

8. If appropriate, check whether any relevant provision has been given judicial interpretation.

9. Attempt to interpret the words according to their ordinary meaning or, where appropriate, their technical or legal meaning, and try to apply them to the problem.

10. Attempt to identify the purpose of the legislation, or of a particular provision, by looking at the whole of the legislation, and try to interpret the words consistently with that purpose.

11. If the provision is ambiguous or obscure or, taking account of its context and underlying purpose or object, its ordinary meaning leads to an absurd or unreasonable result, reference may be made to parliamentary, executive, and related materials to determine the meaning of the provision.

12. If the preconditions referred to in 12 are not present, reference may be made to relevant extrinsic materials to discover the mischief or defect addressed.

13. Interpret a provision against a background of any relevant common law presumptions.

Beneficial or Responsible?


- Cf: Byrne v TAC [2008] VSC 92 per Cavanough J *obiter* [46]
ENTITLEMENT TO RECEIVE COMPENSATION UNDER THE ACCIDENT COMPENSATION ACT 1985 (VIC)

Criteria for entitlement to compensation:
1. **Who is a worker?**
2. **What is an injury?**
3. **Arising ‘out of’ or ‘in the course of’ employment?**
4. **Connection to Victoria?**

CRITERION 1: WHO IS A WORKER?

**Section 5(1) of AC Act provides that:**

worker means an individual—
(a) who—
(i) performs work for an employer; or
(ii) agrees with an employer to perform work—
at the employer’s direction, instruction or request, whether under a contract or employment (whether express, implied, oral or in writing) or otherwise; or
(b) who is deemed to be a worker under this Act;

**AC Act definition of ‘worker’:**
- So-called ‘common law’ definition of worker: s 5(1)(a)
  - ie, contract of employment *(changed in 2011)*
  - Cf definition of worker under previous s 5(1) (effective pre-22 June 2011): reference to ‘contract of service’ not contract of employment
- ‘deemed’ worker: s 5(1)(b)

**Key distinction**
- *Contract in services – between employer and employee*
- *Contract for services – between employer and contractor*

**NB: employer not liable if the injured worker is a contractor**

‘*Contract of service*’ v ‘*contract of employment*’
- Difference between the two terms?
- No substantial difference: Explanatory Memo to Bill refers to simplifying and streamlining wordings of definitions, consistent with Hanks Report
Contract of service—relationship between employer and employee. This term traditionally used to refer to this relationship.

More significant distinction.

Distinguish employer-employee relationship (contract of service) from principal-independent contractor relationship (contract for services)

Reference to ‘service’ from 19th c law of ‘master and servant’

Test to distinguish worker from Independent Contractor

Traditional ‘control’ test

Modified in Stevens v Brodribb HCA 1986 per Mason J

1. at 24, degree of control that employer/principal can exercise over employee/contractor is a ‘significant factor’
   - This ‘degree of control test’ is not so much the ‘actual control’ that a person exercises over another ‘as in the right of the employer to exercise it’, citing Dixon J in Humberston v Northern Timber Mills
   - This is common law adapting to contemporary society
   - Other indicia relevant to issue, including but not limited to: mode of remuneration, provision and maintenance of equipment, obligation to work, hours of work and provision for holidays, deduction of income tax, and the delegation of work (at 24).
   - Application to facts at 24-25.

2. Control test is not the only relevant factor: ‘Rather it is the totality of the relationship between the parties which must be considered.’ (at 29)

Hollis v Vabu, HCA 2001

Facts:
- Bicycle courier ran into the plaintiff causing him injury

Issue:
- Was the bike courier an employee or an independent contractor?

Held: Gleeson CJ, Gaudron, Gummow, Kirby, and Hayne JJ (maj joint judgment):
- Held that the bike courier was an employee
- Discussed and approved Mason J’s modified ‘control test’ in Stevens v Brodribb at 40
- Also noted with approval Mason J’s reference to ‘totality of the relationship’ at 33
- 7 factors swayed the Court, at 42-44
- NB: McHugh J’s ‘agency’ thesis at 50
- Callinan J’s dissent on basis of estoppel argument at 66-67