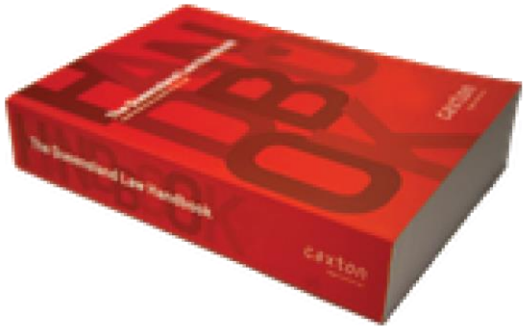

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Accidents and Injury

CHAPTER CONTENTS

ACCIDENTS DUE TO DEFECTIVE PREMISES AND PRODUCTS

INTRODUCTION

Where a person is injured as a result of the actions of another person or persons, an entitlement to compensation for the injury can arise.

There are general principles that apply to claims for compensation for injuries, and particular rules that apply to the most common types of personal injuries claims including those arising out of motor vehicle accidents, accidents at work and defective premises or defective products.

The plaintiff is the person who starts the proceedings in a court to obtain damages for personal injury, and the defendant is the person who is sued for the damages.

The legislation relating to claims for personal injuries is updated regularly, and it is recommended that plaintiffs or defendants consult a lawyer with specialist qualifications or experience in personal injury law.

GENERAL PRICIPLES

ACCIDENTS CAUSED BY NEGLIGENCE

Negligence in a legal context means a specific legal wrong—a failure in law to do what a reasonable person would have done in the circumstances to avoid loss or injury to another person.

Negligence is the most common cause of action pursued by people who suffer personal injury.

The elements of a negligence action

Before a plaintiff can recover compensation from a defendant in a negligence action, the plaintiff must establish that the:

- defendant owed the plaintiff a duty of care
- defendant breached that duty of care
- defendant's breach of duty caused the plaintiff's personal injury.

The *Civil Liability Act 2003* (Civil Liability Act) applies to claims for personal injuries and states the requirements for an action in negligence and the available defences. However, the following personal injuries are not included under s 5 of the Civil Liability Act:

- work related injuries

- dust-related injuries (asbestos, coal, silica)
- tobacco-related or smoking-related injuries.

Other than for employers, who are insured with the Commonwealth workers' compensation scheme, the *Workers' Compensation and Rehabilitation Act 2003* (Qld) applies to all work-related injuries that occurred after 1 July 2003. It includes similar provisions to the Civil Liability Act regarding the requirements for an action in negligence and possible defences.

DUTY OF CARE

At common law, a duty of care will generally arise when the defendant should have foreseen that their conduct could result in injury to the plaintiff.

There are recognised relationships that give rise to a duty of care from one party to another:

- landlord to tenant
- doctor to patient
- solicitor to client
- public authority to a member of the public such as a road user or entrant to a public area
- occupier to entrant of private premises
- road user to road user
- manufacturer of goods to consumer
- supplier of services to consumer
- prison authority to prisoner and detainee
- victim to their rescuer.

In some cases where the defendant has a high degree of control over the risk and there is either a special dependence or special vulnerability on the part of the plaintiff, the defendant will be said to owe a 'non-delegable duty'. This means the defendant cannot escape liability by passing on the duty to take care for the plaintiff's safety to a third party.

The following relationships are recognised as giving rise to a non-delegable duty of care:

- employer to employee
- hospital to patient
- school and teacher to student.

Some relationships are recognised as giving rise to immunity from a duty of care:

- a barrister acting in circumstances intimately connected to a case in court
- a rescuer who goes to the aid of another person in an emergency situation including a doctor rendering emergency first aid.

Sometimes, injuries can occur in circumstances outside of any recognised category of relationship giving rise to a duty of care. In these novel cases, the court will apply the following principles in determining whether a duty of care is owed:

- The kind of harm suffered by the plaintiff must be recognised as being compensable and an infringement of a legally recognised right.
- The harm must have been a reasonably foreseeable result of the defendant's negligence.
- The court will then draw analogies with any established category or categories of duty and apply them to the case at hand.

Breach of duty of care

Courts will apply the following questions to determine whether a defendant has breached the duty of care owed to a plaintiff:

- Would a reasonable person in a position of the defendant have foreseen a risk of injury to the plaintiff or the class of persons to which the plaintiff belonged arising from their conduct?
- What would a reasonable person have done in response to that foreseeable risk?

The court must always judge the defendant's conduct in light of what was known to the defendant at the time of the alleged breach and without the benefit of hindsight.

The common law test has now been adopted into s 9 of the Civil Liability Act and s 305B of the WCR Act, which provide that a person does not breach a duty to take precautions against the risk of harm unless:

- the risk was foreseeable
- the risk was not insignificant
- a reasonable person in the defendant's position would have taken some precaution.

In deciding whether a reasonable person would have taken precautions, the court must consider the:

- probability of harm occurring
- likely seriousness of harm
- burden of taking precautions to avoid the risk of harm
- social utility of the activity that creates the risk of harm.

Section 10 of te Civil Liability Act and s 305C of the WCR Act also give further guidance to a court in determining the standard of care.

Factors that may serve to lower the standard of care owed by a defendant are if the:

- conduct took place in circumstances of emergency
- defendant is a child or a person under a disability.

Similarly, a higher standard may be owed in certain circumstances if the:

- defendant holds themselves out as having special skills, knowledge or expertise
- plaintiff is a child and the defendant is an adult.

Intoxication on the part of the defendant does not lower the standard of care owed by the defendant to others. Intoxication on the part of the plaintiff does not mean the defendant owes a lower standard of care.

NEGLIGENCE, CAUSATION AND DAMAGE

A plaintiff must establish that the defendant's breach of duty has caused the injury for which they are claiming damages. If a plaintiff suffers no injury or damage as a result of the defendant's conduct, no liability arises, irrespective of the negligence of the defendant.

Section 11 of the Civil Liability Act and s 305D of the WCR Act set out the current test to establish 'causation'. In essence, the plaintiff must show that the defendant's breach of duty caused or materially contributed to the plaintiff's injury and the damage suffered.

Once the plaintiff has established causation, the court will then consider whether the injury and any consequent damage suffered by the plaintiff are 'too remote'.

Damage will not be too remote provided there was a real risk that damage of the same kind might occur to the plaintiff or a person in the same class as the plaintiff, and the risk would not have been considered farfetched by a reasonable person in the defendant's position.

In some circumstances where the plaintiff may have a particular vulnerability or pre-existing susceptibility, a defendant will still be liable for the damage caused

even though the damage was far more severe than would otherwise be the case but for the susceptibility.

For example, a person with eyesight only in one eye who suffers an injury to that eye is entitled to compensation for the fact that the defendant's negligence has blinded them, despite the fact that the damage would have been less severe had the plaintiff had eyesight in both eyes.

Assessing damages

In a negligence action, damage can arise from a personal injury and the financial consequences flowing from that injury or damage to property. In assessing the amount of damages payable for personal injury, a distinction is drawn between special damages and general damages.

Special damages are those losses capable of precise mathematical calculation suffered by the plaintiff. This includes out-of-pocket expenses such as medical expenses, travelling expenses, the costs of medications, the loss of wages both in the past and into the future, the loss of superannuation benefits on those wages and interest on such amount of those damages occurring in the past.

General damages are those losses that are incapable of precise calculation including compensation for the physical or psychological injuries sustained, the pain and suffering, and loss of enjoyment of life caused as a result of those injuries. Because general damages are incapable of precise calculation, it is necessary to provide as much evidence to the court as possible about the injuries and their resulting effects to enable the court to assess the amount of compensation that should be paid to the plaintiff.

The Civil Liability Act and the WCR Act provide rules regarding the entitlement to and assessment of different types of damages available to plaintiffs in a claim for damages for personal injuries.

Financial loss, other than that which flows from personal injury or property damage (pure economic loss) may also attract compensation or damages in certain circumstances (see the chapter on Consumers and Contracts).

Mitigation of loss

At common law, a plaintiff is under a duty to mitigate their loss. This means a plaintiff must take reasonable steps to reduce the extent of any loss arising from an injury. A defendant will not be liable for any loss that should have been mitigated.

For example, if a plaintiff is unable to return to their usual type of employment as a result of their injury, the plaintiff has a positive obligation to make reasonable

attempts to rehabilitate and re-enter the workforce to the extent of their residual capacity to do so.

This common law duty has been adopted in the Civil Liability Act, the WCR Act and the *Motor Accident Insurance Act 1994* (Qld).

DEFENCES TO A NEGLIGENCE ACTION

Once a plaintiff establishes the elements of negligence discussed above, the defendant then bears the onus of proving any defence to the action. The following defences may apply to a claim for damages for personal injury:

- obvious risk
- inherent risk
- voluntary assumption of risk
- dangerous recreational activity
- exclusion of liabilities
- illegality
- inevitable accident
- contributory negligence.

Obvious risk

Section 15 of the Civil Liability Act defines an obvious risk to be a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the plaintiff. It includes risks that are:

- patent and a matter of common knowledge and those that have low probability of occurring
- not prominent, conspicuous or physically observable
- of a low probability.

Section 15 provides that there is no duty to warn of an 'obvious risk' to the plaintiff unless the:

- plaintiff has requested advice or information about the risk
- defendant is required by written law to warn of the risks
- defendant is a professional, other than a doctor, and the risk of the death of or personal injury to the plaintiff arises out of the provision of a professional service by the defendant.

A risk that arises because of the failure of the defendant to properly operate, maintain, replace, prepare or care for a thing is not obvious unless the defendant's failure itself is obvious.

For example, where a plaintiff stepped over the foul line and onto the polished, slippery surface of a ten pin bowling lane whilst ten pin bowling, the risk of slipping on the bowling lane was not considered to be an obvious risk because the foul line was not clearly delineated (*Windley v Gazaland Pty Ltd T/A Galdstone Ten Pin Bowl* [2014] QDC 124).

In respect of work-related accidents, s 305H(f) of the WCR Act provides that a court may make a finding of contributory negligence if a plaintiff undertakes an activity involving an obvious risk.

Inherent risk

An inherent risk is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.

A defendant is not liable in negligence for harm suffered by a plaintiff as a result from the materialisation of an 'inherent risk' if the Civil Liability Act applies (s 16 Civil Liability Act).

For example, the risk of one golfer being struck by a golf ball hit by another golfer whilst walking on a golf course has been held to be an inherent risk that will not give rise to liability (*Pollard v Trude* [2008] QSC 335).

Voluntary assumption of risk

A defendant can avoid liability by establishing 'voluntary assumption of risk' by the plaintiff. The defendant must show that the plaintiff:

- was fully aware of the risk involved in the activity
- had a full appreciation and comprehension of the nature and extent to the risk
- voluntarily accepted the whole of that risk.

If the risk is an obvious risk, the plaintiff is presumed to have been aware of the risk unless the plaintiff proves otherwise (s 14 Civil Liability Act).

Dangerous recreational activity

A defendant is not liable for harm suffered by the plaintiff as a result of the materialisation of an obvious risk associated with a dangerous recreational activity engaged in by the plaintiff whether or not the plaintiff is aware of the risk (s 19 Civil Liability Act).

'Dangerous recreational activity' is defined in s 18 of the Civil Liability Act to mean an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person.

Exclusion of liability

A defendant might seek to modify their exposure to liability by stipulating a reduction or even an exclusion from liability. Exclusion of liability clauses are sought to be relied upon in circumstances where a defendant is prepared to establish a relationship with the plaintiff only on terms expressly defined by them (e.g. permitting entry to their premises, offering services to their client). These terms can become binding.

An exclusion clause will only be upheld to exclude liability for negligence if the clause is specifically and clearly worded to do so. However, if the clause is broadly worded such that its meaning is lost, reliance cannot be placed on it.

Clauses in contracts that are subject to the Australian Consumer Law 2011 (sch 2 *Competition and Consumer Act 2010* (Cth)) that try to exclude liability for breaches of consumer guarantees are void.

Illegality

'Joint illegal enterprise' may be raised as a defence to a claim when both the plaintiff and the defendant were voluntarily involved in an illegal or criminal act together at the time when the plaintiff is injured. At common law the defendant must prove that:

- the defendant and the plaintiff were jointly engaged in illegal activities
- there was a connection between the illegal activity and the negligent conduct.

Where the plaintiff is unaware of the illegality of the activity or was forced to participate in it, the defence will not succeed.

Further, if the plaintiff, although a willing participant in the illegal enterprise in the first place, subsequently withdraws from the illegal enterprise (e.g. by requesting to be let out of a stolen vehicle in which they are a passenger), then a duty of care may be owed after such time as the plaintiff withdrew (Miller v Miller [2011] HCA 9).

A plaintiff will be prevented from recovering damages if they suffered an injury whilst engaged in conduct that was an indictable offence, and that conduct materially contributed to the risk of the harm that eventuated (s 45 Civil Liability Act). The court does, however, have a discretion to award damages if it is satisfied that it will be harsh and unjust not to. In those circumstances, the court is obliged to reduce the damages by at least 25%.

Inevitable accident

At common law, a plaintiff cannot succeed in a claim for negligence if the injuries arise as a result of an inevitable accident. Inevitable accident is not a defence as such, it is essentially a case of the plaintiff failing to establish negligence.

The focus of the enquiry is whether there was anything the defendant could have done to prevent the accident by the exercise of ordinary care, caution and skill between the time of the inevitable event occurring and the injury being suffered. The issue of inevitable accident mainly arises in respect of motor vehicle accidents, for example:

- a diabetic driver suffering a hypoglycemic attack
- an object suddenly entering a driver's eye
- a driver suffering a coughing attack
- a driver being stung by a bee
- a tyre blow-out
- a driver suffering a black out.

Contributory negligence

Contributory negligence is a failure by a plaintiff to take reasonable care for their own safety in the circumstances where that failure contributed to the accident.

In other words, the plaintiff contributed to their own injuries because of their own actions or omissions. Section 10 of the *Law Reform Act 1995* (Qld) allows a court to reduce damages by an amount it considers fair and equitable having granted the extent of the plaintiff's share of responsibility for the harm. Section 24 of the Civil Liability Act and s 305G of the WCR Act both provide that a court may reduce the plaintiff's damage by 100% on account of contributory negligence if it considers it just and equitable to do so.

Common examples of contributory negligence include:

- failing to wear a seat belt
- intoxication
- a pedestrian running out onto the road
- an employee failing to wear proper safety equipment provided by the employer.

When considering the question of apportionment of responsibility, the court will consider the entire conduct of both parties in relation to the circumstances of the

accident and make a comparison between their respective departures from their obligations.

Under the Civil Liability Act, a mandatory reduction of a plaintiff's damages is prescribed in certain circumstances. In particular where a plaintiff is injured, in circumstances where either the plaintiff or the defendant, or both, are intoxicated and the intoxication has contributed to the defendant's breach of duty (ss 47-49 Civil Liability Act).

CLAIMS BY DEPENDANTS OF A PERSON KILLED

There is a statutory right to sue any person responsible for the death of a person who would have provided for a family (pt 10 *Civil Proceedings Act 2011* (Qld) (Civil Proceedings Act)). In certain circumstances, s 59A of the Civil Liability Act also provides for an award of damages for the loss of services provided by the deceased to their dependants.

Persons entitled to sue the defendant for the death of the deceased are members of the deceased person's family as defined by s 62 of the Civil Proceedings Act. 'Spouse', as defined in s 63 of the Civil Proceedings Act, includes:

- a de facto partner of the deceased only if the deceased and de facto partner lived together as a couple on a genuine domestic basis for a continuous period of at least two years ending on the deceased's death
- a de facto partner who lived with the deceased partner for a shorter period, if the circumstances of the relationship evidenced a clear intention that the relationship would be a long-term committed relationship
- a de facto partner if the deceased left a dependant who is a child of the relationship, who lived with the deceased as a couple immediately before the deceased's death

A 'parent' includes stepparents and grandparents (s 63 Civil Proceedings Act).

A 'child' includes any child of the deceased (within or outside of marriage), as well as an adopted child, stepchild, grandchild and any other child for whom the deceased had assumed responsibility (s 62 Civil Proceedings Act, *Hunt v National & General Insurance Co Ltd* [1974] Qd R 157). The term 'child of the relationship' includes a child of the deceased born after the death of the deceased (s 63(2) Civil Proceedings Act).

If the person responsible for the death of the deceased was that person's employer, then it is possible that the WCR Act will apply to the claim (*Greenall v Amaca Pty Ltd* [2023] QSC 137; *Greenall v Amaca Pty Ltd* [2024] QCA 132). This means that, further to the requirements of s 62 of the Civil Proceedings Act, the

family members must also be dependants under the WCR Act to bring a dependency claim. If that is the case, then it may be difficult to establish a claim for the lost services provided by the deceased to their dependants.

Only one action can be brought on behalf of all dependants (s 65(1) Civil Proceedings Act). This action can be brought by a personal representative of the deceased, or by one or more members of the deceased's family who suffered damage due to the deceased's death (s 65(2) Civil Proceedings Act). Where there are multiple dependants, any settlement monies must then be apportioned between each dependant. If one of the dependants is a minor, it is necessary to have any settlement sanctioned by either the Supreme Court or the Public Trustee of Queensland.

Where one member of a group of dependants may have caused the death of the deceased, it does not preclude the recovery on behalf of the other dependants. However, a dependant who caused the death will not be able to claim damages for loss of dependency, and the amount attributed to the remaining dependants is reduced by the share attributed to the person who caused the death.

Time limit for starting a dependency claim

In Queensland, the action must be commenced within three years of the date that the cause of action arose (s 11 *Limitation of Actions Act 1974* (Qld)). It is also necessary for the dependant(s) to comply with the pre-court procedures contained in the *Personal Injuries Proceedings Act 2002* (Qld), the *Motor Accident Insurance Act 1994* (Qld) and/or the WCR Act.

What must be established

Any spouse, parent or child who claims (or is a party to a claim) must show that:

- they were economically dependent on the deceased as a family provider or the deceased provided household services to the dependant. This is generally able to be proved in the case of a spouse and school-aged children. It is more difficult when, for example, the claimants are the deceased's parents
- the defendant would have been liable to compensate the deceased for the damage caused by the accident if the deceased had survived the accident. In other words, it must be shown that the deceased's death was caused by a wrongful act or omission, and that act or omission would have entitled the deceased (had they survived) to maintain an action and recover damages against the defendant (e.g. negligence) (s 64 Civil Proceedings Act).

Any defences that could have been raised by the defendant against the deceased may be raised against a claim by the dependants. For example, contributory

negligence on the part of the deceased will reduce the amount awarded to the dependants by a proportionate amount (s 10(5) Law Reform Act 1995 (Qld)).

What damages are recoverable

The only damages recoverable are for the loss of the deceased's economic support and some limited medical, funeral and like expenses if applicable. Damages are not recoverable for grief, sorrow and other distress resulting from the loss of a close family member. The loss to be compensated is that suffered by the dependants. This is the loss of the financial benefit they expected to receive from the deceased during the deceased's life.

In some circumstances, damages can also be awarded for the loss of services provided by the deceased. 'Services' include ordinary housekeeping, house maintenance and garden services, and any additional material services such as hairdressing, dressmaking or teaching, which one spouse may render to the other spouse or to their children (ch 3 pt 3 Civil Liability Act, *Nguyen v Nguyen* (1990) CLR 245).

If the death occurs in the presence of family members (or to someone who has a close relationship to them), they may have separate individual common law claims related to their own injuries (known as nervous shock claims) under the general law of negligence.

Damages for loss of consortium and servitium

In Queensland, subject to certain thresholds, damages may be recovered for loss of consortium or servitium (services) suffered by a spouse/de facto partner, where the other party to the relationship has been injured or has died as a result of injuries.

'Consortium' means the relationship that exists between spouses (including de facto partners) and takes into account the affection, sexual relationship, companionship, assistance, society and comfort provided by each party to the relationship to the other. However, in the case of fatalities, it must be remembered that the period during which the loss is to be measured is that between the injury and the date of death. Unless a relatively significant period has passed between the injury and the date of death or the loss during that period is extremely severe, it may not be worthwhile to maintain such an action.

'Servitium' refers to the loss of having the injured person undertake things, such as cooking, cleaning and the like, for the spouse/de facto partner. Sections 58 of the Civil Liability Act and 306M of the WCR Act restrict damages for loss of consortium to fatal injuries, or where general damages have been assessed at greater than an amount prescribed under the Civil Liability Indexation Notice,

which is updated from time to time, and has different amounts for different years. For the 2024-2025 financial year, that sum is $54 850 (under the Civil Liability Act), and under the WCR Act, where the amount for the 2024-2025 financial year is $53 090.47 and is to be calculated by multiplying the figures published for Queensland Ordinary Times Earnings by 28.78 times.

TIME LIMITS FOR BRINGING ACTIONS

The Limitation Act imposes strict time limits (limitation periods) within which actions must be commenced by court proceedings in Queensland. If legal proceedings are not commenced within these limits, they are deemed to be statute barred, which forms a complete defence to the claim. In very limited circumstances, a court has the discretion to allow an extension of time within which the proceedings can be commenced (pt 3 Limitation Act).

The claim does not need to be heard in court within the prescribed time limits. The proceedings only need to be commenced. This means that the relevant legal documents initiating the claim must be filed in the court registry. Because of these time limits, it is essential that legal advice be obtained as soon as a person has suffered injury or property damage in circumstances that might support a claim.

It is important to be aware that in almost all types of injury claims, there are a number of pre-court steps that must be completed prior to filing proceedings in court (see Pre-court steps below).

Limitation periods

The Limitation Act sets out the primary limitation periods:

- Claims for damages for personal injuries (including dependency claims) must be commenced within three years of the cause of action arising (s 11 Limitation Act).
- Claims for property damage must be commenced within six years of the cause of action arising (s 10 Limitation Act).

A cause of action (the right to sue) arises when all the elements that make up the legal wrong are in existence. In a negligence action, the limitation period will commence once the plaintiff has suffered some injury or property damage as a result of the defendant's conduct. In most cases, it is obvious when injury or damage has been suffered, usually at the date of the accident, and so it is obvious when the limitation period starts.

Sometimes, it will not be obvious that a cause of action has arisen. For example, in one case medical practitioners wrongly specified a female patient's blood group. This meant that medical precautions were not taken to prevent the development

of antibodies in her blood that would be likely to cause complications during any future pregnancies. More than three years after the antibodies developed in her blood, the woman suffered through a difficult pregnancy and her child died 48 hours after birth. In an action against the doctors for negligence, it was argued that there was no liability as the limitation period had expired. The Supreme Court of Queensland held that the plaintiff did not suffer injury simply from the presence of the antibodies in her blood stream. Rather, her personal injury was caused during the subsequent pregnancy when she was obliged to undergo medical procedures resulting from her blood condition. Therefore, the cause of action accrued during her pregnancy, which was less than three years before the action was commenced (*Wright v Borzi* [1979] Qd R 179).

Extension of limitation period

Difficulties also arise when a person suffers an injury but is unaware of it until the limitation period has expired. For example, a worker may develop a disease from exposure to a substance and may only become aware of it more than three years after the disease was contracted.

The Limitation Act contains a number of provisions designed to modify the operation of the limitation periods in this type of situation and other deserving situations, such as when a plaintiff does not have knowledge (or reasonable means of knowledge) of some critical aspect of their case (referred to as a material fact of decisive character) until after the expiry of the limitation period. In these circumstances, the period can be extended by the court for a further year from when the plaintiff had knowledge (or reasonable means of knowledge) of that material fact. These provisions can only be relied on if a material fact relating to either the accident or damage suffered is beyond the claimant's means of knowledge. If a plaintiff's solicitor fails to commence proceedings within the prescribed time limits or fails to advise the plaintiff that there is a time period, then it is likely that the solicitor will have been negligent and can be sued for the loss (see the chapter on Accessing Legal Assistance and Resolving Disputes).

Limitation periods for legal proceedings on behalf of children run for three years from the date the child turns 18 or dies, whichever happens first (ss 5(2), 29 Limitation Act). However, there are specific pre-court time limitations that can apply to certain motor accident claims when the vehicle at fault is not identifiable. These types of claims are complex and legal advice should be obtained at the earliest opportunity.

Limitation periods in respect of legal wrongs occurring whilst the victim was suffering from a disability, that means a person does not have capacity to understand litigation or provide instructions, run for three years from the date the disability ends or the victim dies, whichever happens first (s 29 Limitation Act).

The disability is taken to have ended if the victim regains capacity sufficient to allow them to pursue the cause of action, even if only for a relatively short period before again losing capacity. Further, if the victim does not suffer from the mental disability immediately after the accident, for instance a victim who only began to suffer from a disabling post-traumatic stress disorder a number of months after an accident, the limitation period is still likely to run from the date of the accident.

When a person is sued for fraud or some other legal wrongdoing that has been concealed by the wrongdoer's fraud, limitation periods run from when the fraud was discovered or might have been discovered by reasonable diligence (s 38 Limitation Act).

Dust-related conditions and injuries from child abuse

The usual limitation periods for commencing legal proceedings have been removed with respect to certain types of injuries or circumstances in which an injury occurs.

If somebody has suffered from a dust-related condition, there is no limitation period within which they may bring their claim, unless their claim results from smoking, exposure to tobacco smoke or the use of tobacco products. A dust-related condition is defined in sch 2 of the Civil Liability Act as including pathological conditions of the lung, pleura or peritoneum that are attributable to dust or a collection of diseases being:

- aluminosis
- asbestos-induced carcinoma
- asbestosis
- asbestos-related pleural diseases
- bagassosis
- berylliosis
- byssinosis
- coal dust pneumoconiosis
- farmer's lung
- hard metal pneumoconiosis
- mesothelioma
- silicosis
- siliotuberculosis

- talcosis.

Similarly, under s 11A of the Limitation Act, there is no limitation period for brining a claim in relation to an injury that results from certain types of abuse suffered by a person as a child. The certain types of abuse are sexual abuse or serious physical abuse, or psychological abuse in connection with sexual abuse or serious physical abuse of the child.

Whilst there may be no limitation period, there can be issues about whether a fair trial can proceed in all of the circumstances. Legal advice should be sought with respect to these types of claims.

Pre-court steps

The *Personal Injuries Proceedings Act 2002* (Qld) (PIP Act) and the *Motor Accident Insurance Act 1994* (Qld) (MAI Act) set out the practical steps that need to be taken following personal injuries occurring other than during the course of work.

The PIP Act and the MAI Act require an injured person contemplating court action for their personal injuries to give a notice of claim to the person they think caused the injury and to follow prescribed steps (e.g. a compulsory conference) before starting an action in court. For non-work-related injuries, there are important time limits that should be complied with when lodging the first formal notice of claim form.

Whichever is the earlier of these time limits applies:

- within nine months from the date of injury (after the motor vehicle accident) or if symptoms of the injury are not immediately apparent, the first appearance of symptoms of the injury (ss 9(3)(a) PIP Act, 37(2)(b)(i) MAI Act)
- one month after the injured person instructs a lawyer to act on that person's behalf and the person against whom the proceeding is proposed to be started is identified (s 9(3)(b) PIP Act) or one month after first consulting a lawyer about the possibility of making a claim (s 37(2)(b)(ii) MAI Act).

If an injured person fails to comply with these time limits, then they need to provide a reasonable excuse for the delay. It is possible for an action to be struck out if the excuse given is held not to be reasonable. In order to avoid this possibility, a notice of claim form should be delivered as soon as possible.

If the reasonable excuse for the delay is accepted, then the normal three-year limitation period applies. The WCR Act also prescribes steps that need to be taken prior to lodging court proceedings.

Pre-court steps can be complex, so legal advice should be obtained from an accredited personal injuries specialist.

Additional information about some of the common pre-court procedures can be accessed in other chapters of the *Queensland Law Handbook*.

Other time limits

The time limits applicable for certain claims can vary depending on whether the law of the Commonwealth or a state other than Queensland applies to the cause of action. Many other rules within Queensland also impose further time limits within which particular legal proceedings must be commenced, claims notified or various steps in legal proceedings completed. The variance of time limits between jurisdictions and the existence of specific limits within Queensland is a good reason for those contemplating action to engage a solicitor who has specialist qualifications in personal injuries as soon as possible.

MOTOR VEHICLE ACCIDENTS

LEGAL OBLIGATIONS

Drivers involved in an accident are legally obliged to:

- stop at the scene and help anyone who may be injured
- call 000 if there is an emergency or if there is a:
    - death or injury (requiring medical attention from a qualified ambulance officer, nurse or doctor)
    - hazardous environment or threat to public safety including traffic congestion (e.g. fuel spill, power lines down)
- call Policelink on 13 14 44 if any of the following occur:
    - suspected involvement of drugs and/or alcohol
    - a driver fails or has failed or is refusing to provide required details
    - a driver with an impairment or disability requires police assistance
- exchange information with other persons involved in the traffic crash by giving their name and address, the name and address of the car's owner (if different from their own), the registration number of the car and any other information necessary to identify the car to:
    - any other driver involved in the accident

    - any person injured
    - the owner of any property damaged
- move the vehicles involved in the crash (if safe to do so) including any dangerous debris that has fallen from their vehicle after an accident, including oil spills
- where required, report the crash to police within 24 hours.

The police website also contains further information for what to do in a traffic crash and the relevant details you will need to obtain, as well as the QR code if you want to submit the details via the Policelink.

Practical steps

When a person is involved in an accident, the following steps should be taken at the scene of the accident:

- obtain the names and addresses of any witnesses
- make handwritten notes of any conversation with the other person involved in the accident and make a sketch showing how the accident happened (e. g. position of vehicles)
- make a drawing of the accident scene (including distances, width of street and lane markings). Take photos of the scene and any damage to vehicles
- obtain full particulars of the driver of the other vehicle, including their licence number and the name of their insurance company (both CTP and comprehensive insurance)
- do not make admissions about liability for the accident. Admissions at the scene of the accident may invalidate an insurance policy
- report the accident to any insurer as soon as possible. This is a standard term of insurance policies and failure to do so may result in denial of cover. The accident should be reported even if you have no present intention to claim against the policy
- seek immediate medical attention if injuries are sustained.

MOTOR VEHICLE INSURANCE

There are different types of insurance policies for motor vehicles:

- compulsory third-party insurance
- comprehensive insurance
- third-party property damage insurance.

Compulsory third party insurance

Compulsory third party (CTP) insurance is paid when a motor vehicle is registered. It covers the owner and driver of a vehicle 'from being held financially responsible for damages if they injure someone in a motor vehicle accident. It also enables a person who is injured wholly or partly due to the actions of another driver to access medical treatment and rehabilitation support as well as receiving fair and timely compensation' (Motor Accident Insurance Commission). If the car responsible for an accident is unregistered and uninsured (no CTP insurance) or cannot be identified, the Nominal Defendant of Queensland stands in the place of the CTP insurer.

It is necessary to establish that another person's negligence caused a motor vehicle accident in order to succeed in a claim against the CTP insurer. Whilst some CTP policies include modest benefits for an injured driver if they are found to have caused the accident (driver-at-fault insurance), the last of those policies was discontinued in 2023.

There may, however, be circumstances where someone who cannot prove negligence for an accident can claim compensation for their treatment, care and support needs if they suffer a serious personal injury. A 'serious personal injury' has a special meaning under the *National Injury Insurance Scheme (Queensland) Act 2016* (Qld) and the *National Injury Insurance Scheme (Queensland) Regulation 2016* (Qld). Further information about what injuries are covered under the National Injury Insurance Scheme (Queensland) and the support provided can be found om the scheme's website.

Comprehensive insurance

Comprehensive insurance covers the owner and/or driver of a motor vehicle for property damage claims by other persons. It also usually covers the owner for theft and damage to their own vehicle, regardless of who caused the accident. Some policies also provide cover for hospital and medical expenses, and pay a benefit if the owner is killed or seriously injured while driving the insured car (driver protection insurance).

Third-party property insurance

Third-party property insurance provides cover to the owner or driver of a vehicle for damage to other persons' property but not their own. Every owner of a motor vehicle should take out at least this level of cover.

Losing the right to claim

It is important to read the terms of the policy carefully. Most comprehensive and third-party property policies contain special conditions which, if not complied with, could result in rejection of the claim by the insurance company.

Failure to report the accident

Most policies require the insured person to report any accident or damage as soon as possible after the accident occurred or the damage was sustained. Even if the owner/driver does not intend to make a claim on the insurance, it is still advisable to notify the insurer of the accident in order to protect their rights. Strict notice requirements apply for personal injury claims.

With respect to property damage claims, failure to report the accident to the insurer may not invalidate the policy. However, the insured may be required to pay the insurer any legal costs incurred unnecessarily as a result of the failure to notify the insurer.

Alcohol

Most comprehensive or third-party property insurance policies stipulate that no cover will be provided if, at the time of the accident, the driver was under the influence of alcohol or drugs. The terms of the exclusion will vary between policies but could provide that the insurance cover will be invalidated if the driver fails a breathalyser test or is convicted of failure to supply a specimen of saliva or blood for testing.

Unlicensed driver

Most comprehensive or third-party property policies exclude cover if an unlicensed driver was driving the vehicle at the time of the accident.

History of insurance claims

When taking out insurance, it is essential that all questions asked by the insurance company in the proposal form be answered carefully and truthfully. Questions about the owner's past driving record must be answered fully and honestly, otherwise the insurer may have grounds to reject a subsequent claim.

Alteration of the vehicle

The modification of a car or the attachment of accessories can invalidate the insurance cover under some policies. Any modifications or accessories of a mechanical nature must be disclosed to the insurer and specifically covered by the insurance.

CLAIMING FOR PROPERTY DAMAGE AFTER A MOTOR VEHICLE ACCIDENT

To successfully claim against another person for personal injury or property damage caused by a motor vehicle accident in Queensland, you must be able to show another person was at fault. It is not sufficient to show the other person was insured.

Different laws apply in the other states. If an accident occurs in another state, the law applying in that state will govern your claim.

If a person is convicted of a criminal offence as a result of a motor vehicle accident (e.g. driving under the influence of alcohol, driving without due care and attention), this can be used as evidence in a civil claim but is not necessarily proof of negligence.

Can property damage and personal injuries be claimed separately?

The nature and extent of any property damage caused by a motor vehicle accident is usually readily apparent and can be easily assessed and quantified. On the other hand, the extent and consequences of a person's injuries may not be obvious for some time after the accident.

It is possible to pursue separate claims for property damage and personal injuries. In all likelihood, the property damage insurer will not be the same entity as the CTP insurer. In any event, care needs to be taken to ensure a decision in the first case does not bind the parties in any subsequent case. For example, a badly injured claimant would not necessarily want a 50/50 apportionment of liability in a related property damage claim to automatically apply to their personal injuries claim.

Consideration of these issues can be very complicated and should be referred to lawyers specialising in these types of claims.

Property damage claims

When a motor vehicle is damaged in an accident, the owner of the vehicle has three choices:

- claim from their own comprehensive insurer
- pay for the cost of any repairs
- claim the cost of the repairs from the party at fault.

Unless the amount of damage is below the policy excess, it is usually advisable to simply refer the claim to your own insurer to handle.

Comprehensive insurance

If a vehicle is covered by a comprehensive insurance policy, the following factors will be relevant:

- who (if anybody) was negligent
- the excess applicable on the policy
- the amount of any no-claim bonus
- if the other party is at fault, whether they are insured or have assets sufficient to meet the cost of repairs
- if legal proceedings are to be commenced, the legal costs involved
- the cost of repairs to the vehicle
- the cost of repairs to the other party's vehicle.

Deciding who was at fault

Deciding whether a driver was at fault (i.e. negligent) can be difficult.

Clearly, a driver who is drunk while in charge of a vehicle is driving negligently if, due to drunkenness, they collide with another vehicle. A vehicle driven at a speed above the speed limit is probably being driven negligently. Failing to stop at a red light or at a stop sign is also, in most circumstances, negligent unless the situation is one of emergency.

In many cases, it is difficult to say that only one party in an accident was at fault. In such a case, the court has power to apportion the damages between the parties according to the degree of each party's responsibility for the accident. Where one party shares responsibility for an accident, that party is said to have been contributorily negligent.

Contributory negligence often occurs in intersection accidents. For example, a driver who fails to give way may be found 90% responsible for an accident, while the driver of the vehicle on the right (who has right of way) may be held 10% responsible. This is because any driver is expected to keep a proper lookout, even when they have right of way.

The possibility of apportionment of responsibility for an accident must always be carefully considered when deciding what action to take.

Excess on the policy

The excess payable under a policy is the amount that must be paid by the insured when they make a claim.

The excess amount will vary between insurance companies. It depends on factors such as the age of the driver and their driving history. If an insured person has made a previous claim, the excess may be increased.

It is possible with most policies to pay an extra premium to remove all or part of the excess.

If a claim is made on an insurance policy and the other party is at fault, your insurer is likely to take steps to recover the cost of the claim from that other party or their insurer. In those circumstances, you may not be required to pay the excess at all or the excess may be reimbursed to you when the claim has been resolved. You should not attempt to take steps to recover the excess yourself from the other party without notifying your insurer and obtaining their specific approval. Otherwise, you run the risk of prejudicing the insurer's rights and voiding the policy.

No-claim bonus

In calculating the annual premium, insurers reward owners of motor vehicles who have not made claims on their insurance policies. If no claim is made for a specified time, the insurer will normally lower the premium when the insurance is renewed. Conversely, if a claim has been made during the previous insurance year, the insurer will increase the premium. Therefore, before making a claim, it is advisable to find out the effect the claim will have on your policy's no-claim bonus.

Some insurers will permit an insured to keep the no-claim bonus when a claim is made, as long as the accident was not the driver's fault, and the insurer was able to recover damages from the responsible party.

Financial position of the other party

If the driver of the other vehicle involved in the accident was at fault but is not insured, you will need to find out whether they can pay for repairs. There is nothing to be gained by incurring legal costs to obtain a judgment in court against a defendant who is simply unable to pay. If the other driver was at fault but cannot pay, you should claim against your own insurance policy and let your insurer pursue the other party if it chooses.

Legal costs

If legal proceedings are contemplated, legal costs must be considered.

Although it is possible for a non-lawyer to handle all or part of a claim, it is generally not advisable. If a solicitor is engaged to handle a claim, the legal costs recoverable from the defendant, if the plaintiff is successful, depend on the amount of the claim. Even if the plaintiff is successful in court and obtains an order for damages and costs, it is likely the solicitor's fees will be significantly more than any recoverable costs.

Costs to repair the other vehicle

As outlined above, it may be that a claimant will have to pay a share of the other party's damages even if the other party is mostly to blame for the accident.

If the other party's damages (i.e. cost of repairs) are much greater than the claimant's, this can cancel out any benefit derived from court action.

Costs to repair own vehicle

When deciding whether it is worth making an insurance claim, you will need to compare the costs of repairs with the excess payable and the value of the loss of the no-claim bonus on the insurance policy. The legal costs of suing might also be an issue. If the cost of repairs to the car is low, it may not be worth claiming on the insurance, and it will usually not be worth engaging a solicitor to act.

Efficient repair of a vehicle

A major benefit to be gained by immediately making a claim on an insurance policy is that the vehicle will normally be repaired with minimum delay. However, the insured will have to pay any excess not covered by the policy before the vehicle will be returned by the repairer.

When a decision is made to sue for the cost of repairs, the insured will normally have to pay for the repairs to the vehicle pending determination by the court. Although the court may award interest on the cost of repairs, if the case is contested by the other party the delay can be considerable (possibly years).

No comprehensive insurance

When a vehicle is damaged in an accident and it is not comprehensively insured, the owner can either pursue a claim against the owner of the other vehicle or simply pay for the repairs.

In deciding which of those two alternatives to pursue, many of the factors discussed above will be relevant. If a vehicle is insured for third-party property

damage, this will protect the owner or driver against any liability to pay for damage sustained by other parties.

Where to sue

Where proceedings are instituted will depend on the amount of damages sought:

- For damages up to $25 000, proceedings can be commenced in the Queensland Civil and Administrative Tribunal (QCAT) or the Magistrates Court.
- For damages between $25 001 and $150 000, proceedings can be commenced in the Magistrates Court.
- For damages between $150 001 and $750 000, proceedings can be commenced in the District Court.
- For damages over $750 000, proceedings can be commenced in the Supreme Court.

One advantage of proceeding in QCAT is that costs cannot be ordered against the unsuccessful party, and neither party is allowed to be represented by a lawyer unless QCAT gives leave (permission) and/or both parties agree.

Preliminary steps

If a claimant did not obtain the other party's name and address at the scene of the accident, they can conduct a search of the vehicle's registration number at the Department of Transport and Main Roads. Alternatively, an extract of the police report can be requested if police attended the accident or it was later reported to police.

If the driver of the vehicle at the time of the accident was not the owner, the owner of the vehicle will not potentially be responsible for any property damage caused unless the driver was acting as their agent at the time of the accident. This will only be the case if, at the time of the accident, the driver was doing something for and on behalf of the owner (e.g. the driver was an employee of the owner, and the driver was acting in the course of employment). If the driver was not the agent of the owner, only the driver can be pursued for any damage arising from the accident.

Having formed a view as to who is responsible, the cost of repairs to the vehicle should be assessed by a reputable repairer. A written quote covering parts and labour costs must be obtained. It is not necessary to have two quotes, but it is advisable. If two quotes are obtained, the claim will usually be for the lower amount.

Letter of demand

Once quotes have been obtained for repair of the vehicle, a letter of demand should be sent to the other driver. The letter of demand should include details of the accident (e.g. the date, place and vehicles involved) and that the writer holds the other driver responsible for the accident. A demand should be made in the letter for payment of the repairs in accordance with the lowest quote obtained.

Where it is known that the other driver is insured, a letter can also be sent to the relevant insurer enclosing a copy of the quote and indicating that the vehicle can be made available to the insurer for inspection for a specified period of time. The insurer will generally reply, either accepting or denying liability. The insurer will likely want its loss assessor to examine the vehicle if liability is accepted.

If no reply is received from the driver of the other vehicle, or if the insurer denies liability, a decision will have to be made whether to commence legal proceedings. If no reply is received, a formal letter can be sent to the other party advising that, unless the claim is finalised within a set period of time (e.g. 14 days), legal action will be commenced. Copies of any letters sent should be kept as they may need to be produced in future legal proceedings.

Recovering insurance excess

If a claim is made on a comprehensive insurance policy and an excess is payable, this might be recovered from the other party (if they are at fault). Alternatively, the insurer may recover the excess on behalf of the insured. This should be checked in advance.

To seek recovery of the excess, a letter of demand should be sent to the other driver outlining the circumstances of the accident (place, time and vehicles involved). The letter should detail that the owner/driver holds the other driver liable and, therefore, seeks payment of the amount of excess payable under the insurance policy. This letter should only be sent with the knowledge and approval of the insurer as any admissions or representations made in the letter might serve to void the policy.

If payment of the excess is not received, a decision must be made whether to commence proceedings in QCAT. In most circumstances, the amount of the excess will not justify legal proceedings.

COMMENCING COURT PROCEEDINGS AFTER A MOTOR VEHICLE ACCIDENT

If a decision is made to commence legal proceedings, the claimant will need to decide which court to proceed in and whether to engage a solicitor.

The information provided below is focused towards claims for property damage, rather than personal injury.

Initiating a claim

To start proceedings in QCAT, the claimant must complete an Application for minor civil dispute. The claimant must set out the details of the accident and the nature of the claim (including the amount of damages claimed). The application is then filed with QCAT.

Alternatively, legal proceedings can be commenced in a Queensland court, usually the Magistrates Court.

A filing fee is payable, which varies according to the amount claimed.

Once the application has been filed, a copy must be served on the defendant. Service on the defendant can be arranged through the Magistrates Court for a further fee, or the claimant can serve the application personally.

Defence

Once an application or legal proceedings have been served, the defendant must file a response to QCAT or a notice of intention to defend and the defence to the court, and serve a copy to the claimant (plaintiff) within 28 days of service. The response or defence must answer all assertions made in the application.

The procedure

The Queensland Civil and Administrative Tribunal aims to resolve disputes without proceeding to a hearing. The application will first be listed for a directions hearing to determine how the case will proceed. The directions hearing may require attendance in person or by telephone, and QCAT will then make orders detailing the next steps.

Before being set down for hearing, the claim will usually be referred to mediation or a compulsory conference in an endeavour to resolve it without a hearing.

All evidence relied on must be brought to the mediation or compulsory conference and provided to QCAT. The discussions at mediation and conference cannot be referred to at the hearing. If an agreement is not reached at this stage, the case will be listed for hearing.

Proving the case at a hearing

If the claim cannot be resolved, it will proceed to a court or QCAT hearing.

Evidence is given orally at the hearing by those people directly involved in the accident and witnesses to the accident. The drivers of each vehicle and their

passengers can give evidence of what they saw and heard. Courts tend to give more weight to the evidence of independent witnesses to an accident (e.g. drivers of other vehicles or pedestrians in the immediate vicinity).

A very useful witness can be the police officer who attended the accident. The identity of the police officer can be ascertained from the traffic incident report. An Application for Traffic Accident Report form, available from CITEC, has to be filled out and a fee paid. This report can also be a useful source of information relating to the circumstances of the accident.

A police prosecution is frequently commenced against one or more of the drivers involved in a collision. Criminal proceedings begun by police are quite separate from civil proceedings for damages. The outcome of any criminal proceedings will usually be detailed in the traffic incident report.

After judgment or agreement

Once a plaintiff has obtained judgment or has come to an agreement at mediation or compulsory conference, the defendant should pay the amount ordered or agreed. If the defendant fails to pay, advice should be sought from a solicitor, legal aid agency or from QCAT about how to enforce the judgment.

Generally, money orders can be enforced with warrants for the seizure and sale of property or redirection of debts or earnings.

Receiving a letter of demand

A letter of demand should never be ignored. If the recipient is insured, the letter should be immediately forwarded to their insurer.

If no insurance is available, the recipient needs to decide if they wish to contest the claim, try to negotiate a settlement or simply agree to it and pay the claim.

If the person who receives a letter of demand believes they were not completely responsible (i.e. the other party may have contributed to the accident), or is uncertain about who is responsible, they should seek legal advice as soon as possible.

Payment of a claim will avoid further expense such as court costs, interest and legal fees.

If the recipient of a letter of demand disputes liability for some or all of the damages, they should respond in writing indicating this. If they accept responsibility but question the amount claimed, a letter should be sent to the claimant seeking further information about how the amount is calculated.

Offers to settle

An offer of settlement can be made at any stage after the accident, preferably after a letter of demand has been received, as long as all material facts about the damage have been gathered. Material that may be relevant to an offer to settle may include:

- any correspondence with the other party (e.g. letters of demand)
- statements of independent witnesses, if any
- the traffic accident report
- at least two smash repairers' quotes
- the Transport and Main Roads Motor Vehicle Register search (provides information about the registered owner of the vehicle).

It is important when making an offer of settlement that it be carefully worded so as not to admit liability for the accident. It might include a statement that the offer is made without admission of liability and is designed to avoid costly legal proceedings.

The letter should be marked 'Without Prejudice' and should avoid disclosing details about the accident that might indicate liability.

When a letter making an offer is not carefully worded, any admission of liability may be used in later court proceedings (e.g. in a later claim for personal injuries). Legal advice about the contents of this type of letter should be obtained. If you hold insurance that might potentially cover the claim, you must obtain permission from the insurer before making an offer to settle (regardless of whether you intend to make a claim under the policy). Failure to do so may void the policy.

If there is no dispute about responsibility for the accident, and the person who is liable is uninsured or does not wish to make a claim on any insurance policy, the claimant may be prepared to accept payment by instalments. However, the claimant is under no obligation to do so.

Insurers who have paid a claim are entitled to take legal action in the name of the insured person to recover the repair costs from the party responsible for the accident. This is known as a right of subrogation (see chapter on Insurance).

Obtaining a release after settlement

When a claim is settled between the parties without a decision of the court, it is advisable for the person or insurer paying the money to obtain a signed release from the claimant. This document is intended to release the payer from any further responsibility.

A claimant should ensure that any release they sign does not prevent subsequent action for damages for personal injury.

If the settled claim only relates to payment of an insurance excess on the claimant's comprehensive policy, the claimant must not give the other party any release from liability. This will place them in breach of the terms of the policy and could result in them having to repay their insurer for amounts already paid or received. Any release or receipt intended to be given in these circumstances must first be approved by the comprehensive insurer. If there is any doubt, legal advice should be obtained.

PERSONAL INJURY CLAIMS AFTER A MOTOR VEHICLE ACCIDENT

Fault-based scheme

Owners of all motor vehicles used or intended to be used on public roads in Australia are required to take out a compulsory third-party insurance against liability for the death or personal injury of others arising out of motor vehicle accidents. The relevant Queensland legislation is the *Motor Accident Insurance Act 1994* (Qld) (MAI Act).

This Act does not provide for the payment of statutory or no-fault benefits. The legislation governs an entirely fault-based scheme. No compensation is paid to injured road users unless they can prove the injury was caused by the negligence of another person.

When a person has suffered personal injury or lost a family member in a motor vehicle accident, it is critical that legal advice be obtained as soon as possible. If a victim has been hospitalised, advice should be obtained on their behalf. Delay, especially when an unidentified motor vehicle is involved in an accident, can seriously prejudice or forfeit the chances of recovering compensation.

Compulsory third-party insurance

A compulsory third-party (CTP) insurance policy provides cover for legal liability for personal injuries or death arising out of the use of a motor vehicle. The insurance covers the relevant motor vehicle for accidents causing personal injury anywhere in Australia. Cover is not limited to accidents arising out of the actual driving of the vehicle but can extend to a wide range of accidents involving motor vehicles.

Compulsory third-party insurance covers the legal liability of anyone who is driving the vehicle or is in charge of it, as well as the liability of the registered owner of the vehicle. The definition of 'insured person' in s 4 of the MAI

Act ensures that anyone in charge of an insured vehicle is, for the purpose of a personal injury claim, deemed to be insured (including the owner).

This means that the registered owner and the third-party insurer will always be liable for any wrongdoing involving the vehicle that results in personal injury. For example, if a thief steals a car and, while driving away, negligently injures a pedestrian, the registered owner of the vehicle and their insurer are liable for the victim's injuries. The same principle would apply where the owner had lent the vehicle to another driver. Making the registered owner liable for others is simply a way to allow the victim access to the CTP insurance scheme. Unlike other insurance policies, the amount of the premium is not affected by the lodging of a claim.

Vehicles that must be insured

A motor vehicle is any mechanically propelled vehicle. Any vehicle with an engine will, therefore, be considered a vehicle for the purposes of the MAI Act and must be registered, unless it is specifically exempted. The following vehicles will be exempted unless the accident happens on a road:

- a tractor, backhoe, bulldozer, end-loader, forklift, industrial crane or hoist, or other piece of mobile machinery
- an agricultural implement
- a motor vehicle adapted to run on rail tracks or tram tracks
- an amphibious vehicle.

A vehicle will only be registered by the Department of Transport and Main Roads if the owner has taken out CTP insurance. The insurance is renewed annually, with the premium being paid as part of the registration costs of the vehicle. When lodging the application, the applicant selects and nominates an insurer (s 21(1) MAI Act). The insurer cannot refuse to issue or renew an insurance policy (s 22(1) MAI Act).

Subject to certain limited exceptions, if a vehicle is to be used on a road, it must be registered under the Road Rules and insured under the MAI Act. Failure to do so is an offence under the MAI Act (s 20).

The owner of a vehicle cannot contract out of their liability for damages for personal injury. For example, an owner cannot agree to carry passengers on the condition that they will not have any claim against the driver if there is an accident. If there is any such agreement, it will be void, at least as far as damages for personal injuries are concerned. Liability will be determined on the usual principles of negligence (see Accidents Caused by Negligence).

Uninsured or unidentified vehicles

If a person suffers personal injury because of the negligence of the driver of an unidentified or uninsured vehicle, a claim can be made against the Nominal Defendant. If the vehicle is uninsured, the accident must have occurred on a road or in a public place for the Nominal Defendant to be liable (s 5(2) MAI Act).

The Nominal Defendant is a statutory body constituted under the MAI Act and is funded by annual contributions paid on the registration of each vehicle in Queensland.

The Nominal Defendant is liable to a claimant for any damages for personal injury that the owner of the vehicle would have been legally liable to pay had the vehicle been identified and insured (s 33 MAI Act).

When a possible claim exists against the Nominal Defendant in respect of an unidentified vehicle, notification of the claim must be given to the Nominal Defendant within three months of the motor vehicle accident (s 37(2)(a) MAI Act). If notice is not given within nine months of the accident, the claim will be statute-barred, which will prevent a claimant from being entitled to bring a claim. It is therefore vital that notice be given as soon as possible after an accident.

In order to maintain a claim against the Nominal Defendant in respect of an unidentified vehicle, it must be shown the vehicle could not be identified after proper enquiry and search (s 31(2) MAI Act).

If the vehicle can be identified, a Department of Transport and Main Roads search should be done on the vehicle as soon as possible after the accident. This search will reveal whether the insurance on the vehicle is current. In conducting the search, care should be taken to ensure the search is conducted as at the date of the accident, not the date of the search. If the vehicle is uninsured, the Nominal Defendant should immediately be notified of the claim.

The legislation provides for a thirty-day period of grace after expiry of the CTP insurance (s 23(2)(b) MAI Act). This means that if the owner of a motor vehicle allows the registration to lapse, the CTP insurance will continue for thirty days after the expiry of the registration. A claim arising from an accident during that period of grace will be against the CTP insurer while the registration was in force and not against the Nominal Defendant.

If there is any doubt whether a vehicle is insured or if there is any chance an unidentified vehicle was involved in an accident, notice should immediately be given to the Nominal Defendant as a matter of precaution.

When the Nominal Defendant has paid out damages to an accident victim, it can seek to recover those damages from the owner and/or driver of the uninsured vehicle (s 58 MAI Act).

Pre-court claim process

The following compulsory pre-court process applies to claims for damages governed by the MAI Act:

- A person intending to make a claim (the claimant) for personal injuries must notify police of the accident (s 34).
- A person who receives a claim or demand, or notice of a claim or demand concerning personal injury must give the claim to an insurer within one month of receipt of claim (s 36).
- The claimant must give an insurer a notice of accident claim form within nine months of the accident or the first appearance of symptoms of the injury (if not immediately apparent), or within one month of consulting a lawyer about the claim (whichever time period is the earlier). This claim form can be obtained from the Motor Accident Insurance Commission (shorter time frames apply to Nominal Defendant claims) (s 37).
- The insurer must, within 14 days of receipt of notice of a claim, advise the claimant if the notice is compliant with the legislative requirements and, if not, advise how the non-compliance can be remedied, allowing at least one month to do so (s 39).
- The insurer may ask the claimant to provide additional information about the claim (s 37A).
- The insurer must, after receipt of the claim, respond in writing within six months to advise whether:
    - liability is admitted in total, in part or is denied
    - the claimant's offer of settlement is accepted or rejected, or invite the claimant to make a written offer of settlement (s 41).
- The insurer must as soon as practicable, after receipt of the claim, make a written offer (or counter offer) of settlement to the claimant explaining the basis on which the offer is made, or alternatively accept the claimant's offer (s 41).
- The insurer, upon admitting liability, then has a duty to pay the claimant's reasonable medical and rehabilitation expenses (s 42).

- The parties must, before commencing court proceedings, participate in a compulsory settlement conference (s 51A). The conference should be held at the latter of six months after the claimant gave a complying notice of the claim to the insurer or one month after the additional information was provided to the insurer as requested. The parties can otherwise agree to hold a compulsory conference or, if there is a good reason, dispense with the conference (ss 51A(2), 51A(4)). The procedure to be followed prior to and at the compulsory settlement conference is complex, and it is essential that legal advice be obtained at this stage.

Court proceedings should, if the matter remains unresolved after the compulsory settlement conference, be commenced within 60 days after the compulsory conference (s 51D).

If a compliant notice of accident claim form is given before the three-year statutory limitation period expires, proceedings may, in very limited circumstances, be brought outside the limitation period. It is essential that legal advice be obtained about this. Notice may be given to the Motor Accident Insurance Commission if the claimant is unsure about the identity of the CTP insurer (s 57(3)).

Where the Nominal Defendant is involved, the strict requirements discussed above must be observed. If there is any chance the Nominal Defendant might be involved, notice should be given as a matter of urgency so that the claimant's rights are protected.

Court proceedings

Restrictions have been placed on the rights of spouses to claim damages for loss of consortium and loss of services arising out of motor vehicle accidents (see Claims by Dependants of a Person Killed for an explanation of damages of loss of consortium and servitium). The court cannot award these types of damages unless the injured person died as a result of their injuries or is entitled to general damages above a specified threshold (s 58 Civil Liability Act). The Civil Liability Regulations prescribe the amounts of damages that may be awarded for a loss of consortium or loss of servitium claim depending on when the injury occurred (reg 6).

The court may award exemplary, punitive or aggravated damages only if the conduct of the insured person is so reprehensible that such an award is justifiable (s 55 MAI Act). Those damages can only be claimed against and recovered from the insured person and not the CTP insurer.

Finally, recovery of legal costs is restricted by the MAI Act, depending on the amount of the settlement or judgment amount (s 55F MAI Act). Mandatory final

offers made by both parties at the conclusion of an unsuccessful compulsory conference can carry important costs consequences. Legal advice needs to be obtained about the nature and effect of those offers.

Irrespective-of-fault scheme

The *National Injury Insurance Scheme (Queensland) Act 2016* (Qld) (NIIS Act) establishes the Queensland branch of the National Injury Insurance Scheme (Scheme). This Scheme aims to provide lifetime treatment, care and support to people who have sustained serious personal injuries, irrespective of fault. At present, it does, however, only apply to particular injuries sustained in motor vehicle accidents.

The Scheme is administered by the National Injury Insurance Sceme Queensland Agency (NIISQ).

What does the Scheme cover?

In an effort to avoid a one-size-fits-all approach, the Scheme evaluates individual needs when determining the treatment, care and support required by an applicant. The following may be available (s 8 NIIS Act):

- medical and pharmaceutical treatment
- dental treatment
- rehabilitation (e.g. physiotherapy, occupational therapy, speech therapy)
- ambulance transportation
- respite care
- attendant care and support services
- aids and appliances (e.g. wheelchairs)
- prostheses
- educational or vocational training
- home and transport modifications.

In determining whether treatment, care and support are necessary and reasonable, NIISQ must consider the following (regs 17–20 *National Injury Insurance Scheme (Queensland) Regulation 2016* (Qld) (NIIS Regulation)):

- benefits to the participant—is the treatment maximising the participant's independence by improving their ability to conduct daily activities? Is it assisting injury management? Do the benefits of the treatment outweigh any risk they may pose to the participant?

- appropriateness of services—is the service provided consistent with industry best practice and is it effective for the individual participant?
- appropriateness of the provider—is the provider qualified, experienced and registered if necessary? Is the provider sensitive to the participant's location, age, culture and ethnicity?
- cost effectiveness—do the benefits of the treatment outweigh costs? Is the cost of the treatment reasonable and comparable to other providers?

Who is eligible?

To be eligible, an applicant must have sustained a 'serious' personal injury as a result of an eligible motor vehicle accident in Queensland after 1 July 2016. This includes anyone from another Australian state or territory. A 'serious' personal injury is defined in the NIIS Regulation as (pt 2 div 1):

- permanent spinal cord injuries
- traumatic brain injuries
- multiple or high-level limb amputations
- permanent injury to the brachial plexus
- severe burns
- an inhalation burn resulting in permanent respiratory impairment
- permanent legal blindness.

In addition, an 'eligible' motor vehicle accident is defined as being the result of (s 4(1)(i–iv) NIIS Act):

- the driving of a registered or registrable motor vehicle
- a collision, or an action taken to avoid a collision, of a registered or registrable motor vehicle
- a registered or registrable vehicle running out of control
- a defect in the registered or registrable vehicle causing loss of control while the vehicle is being driven.

A person is not eligible if they have already been awarded damages (by court judgment or binding settlement) in the matter relating to their injury, or if the person was suffering from a pre-existing injury or condition, and the accident did not permanently increase the extent of that disability. However, s 13 of the NIIS Act provides that a person, who is not strictly considered eligible, may apply to NIISQ and, if approved, can buy into the Scheme by paying a contribution.

Anyone wishing to obtain information about the potential benefits of buying into the Scheme should seek legal advice or contact NIISQ directly.

Application process

In addition to the injured person themselves, a family member, friend or hospital may, provided they have obtained consent, also apply for an injured person's acceptance to the Scheme (s 18 NIIS Act).

Also, if a common law claim for damages has been commenced by serving a compulsory third party (CTP) insurer with a Notice of Accident Claim form, a CTP insurer may make an application on behalf of the injured. Section 16 of the NIIS Act imposes a one-year time limit, from the date of an accident, for the making an application. There is, however, a discretion to accept an application out of time where it is fair and reasonable to do so. Although there is this discretion, an application ought to be made as soon as possible after an accident that resulted in a serious personal injury.

If an applicant's claim is refused by NIISQ, the NIIS Act sets out a process for review. This is first by way of applying to NIISQ for an internal review (s 106 NIIS Act). Such an application must be made within 28 days of receiving the decision information notice from NIISQ (s 107(1)(b)(ii) NIIS Act). Upon review, NIISQ may confirm, amend or alter the original decision.

If the review decision affirms NIISQ's original decision to reject an application, an applicant can lodge an application for review with the Medical Assessment Tribunal (s 112 NIIS Act). If an applicant wishes to appeal any decision of the tribunal, a further application for review must be lodged with the Queensland Civil and Administrative Tribunal (QCAT) (s 127 NIIS Act) within 28 days of the tribunal's decision (s 127(3) NIIS Act).

If NIISQ fails to make an internal review decision with 28 days of such an application being lodged, an applicant can lodge an application for review direct with QCAT.

Exclusions and common law damages

The Scheme does not cover the cost of damage caused to vehicles or property as a result of an accident. It also does not cover non-serious personal injuries or provide for any other damages such as economic loss and pain, suffering and loss of amenities. In these matters, an injured person retains whatever common law rights they may have.

An eligible person also retains the right to opt out of the Scheme and, if available, receive common law damages. For example, if a person can establish that an accident was the result of another's negligence, they may wish to use their own

finances to source treatment, care and support rather than relying on NIISQ. Legal advice should be sought about the benefits of an eligible person regardless if they wish to participate in the Scheme or opt out.

THE QUEENSLAND WORKERS' COMPENSATION SYSTEM

The law relating to work accidents is quite complex and different laws apply depending on the date of injury. It is, therefore, advisable to seek the assistance of a lawyer who is a Queensland Law Society accredited specialist in personal injuries.

WorkCover Queensland (WorkCover) is the government authority that administers the workers compensation system under the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (WCR Act) in this state. Some larger employers have special licences to handle their own compensation claims. These employers are known as self-insurers.

If an employer fails to insure against injury, an injured worker can still receive compensation, but WorkCover may later recover benefits paid to the worker directly from the employer and also impose penalties.

An employee injured during the course of their employment may be entitled to pursue the following avenues, which are governed by the WCR Act. An injured employee may:

- apply for statutory compensation from WorkCover
- commence a common law claim for damages against their employer indemnified by WorkCover.

There are some instances where, although an injury occurred in connection with Queensland, a different legislative scheme may apply (which may be based in another state, Commonwealth or international jurisdiction). Advice should be sought as soon as reasonably possible following a work accident to make sure that entitlements are not lost.

WORKCOVER STATUTORY COMPENSATION

WorkCover provides a 'no fault' scheme whereby an employee will be entitled to receive statutory compensation if the employee is considered a 'worker' and

sustains an injury that arises out of, or in the course of, employment and the employment is a significant contributing factor to the injury.

Compensation will not, however, be paid if the injury is intentionally self-inflicted (s 129 WCR Act) or, subject to some exceptions, was caused by the employee's serious and wilful misconduct (s 130 WCR Act).

To be covered, the injury or disease must happen in Queensland or, if it happens elsewhere, the worker's employment must be connected to Queensland as detailed in s 113 of the WCR Act. This can be a complicated question. If there is any doubt that the worker's employment is connected to Queensland then legal advice should be sought.

Definition of a worker

A worker is an individual who works under a contract for service and is an employee for the purpose of assessment of pay-as-you-go tax (PAYG tax) withholding under the *Taxation Administration Act 1953* (Cth) (s 11 WCR Act). This can include sub-contractors, but it is usually the standard employer/employee relationship where wages are paid in return for labour.

There are some groups of people who are specifically excluded by the WCR Act from receiving compensation (e.g. professional sportspeople or a member of a crew of a fishing ship in certain circumstances). The WCR Act does, however, allow for WorkCover to enter into contracts of insurance to cover some volunteers working in emergency services, local government, statutory bodies, unions and charitable or other non-profit organisations.

The law can be complex in this area and, if in doubt, obtaining advice from an accredited personal injuries specialist is recommended.

What injuries are covered?

All personal injuries are covered by the WCR Act including physical, psychiatric and psychological disorders or an aggravation of such conditions. Other injuries covered include diseases, aggravations of an injury, disease or medical condition, and loss of hearing where employment is a significant contributing factor (s 32(1) WCR Act). Injury can also include death.

Psychiatric and psychological injuries

The WCR Act has specific exclusions for psychiatric or psychological injuries (s 32(5) WCR Act). It provides that an injury does not include a psychiatric or psychological disorder arising out of, or in the course of, the following:

- reasonable management action taken in a reasonable way by the employer in connection with the worker's employment

- the worker's expectation or perception of reasonable management action being taken against the worker
- action by the Workers' Compensation Regulator (regulator) or an insurer in connection with the worker's application for compensation.

The WCR Act provides examples of actions that may be considered reasonable management action taken in a reasonable way, including:

- action taken to transfer, demote, discipline, redeploy, retrench or dismiss an employee
- a decision not to award or provide promotion, to reclassify or transfer a worker's employment or to give leave of absence or other benefit.

These broad exceptions can impose significant hurdles, and it is wise to seek legal advice before lodging the application for compensation with WorkCover.

Hearing loss

In order to claim compensation for loss of hearing, a worker must have been employed in an industry in Queensland for a period totalling at least five years and, again, employment must be a significant contributing factor causing the loss of hearing. Workers are not entitled to a lump sum compensation for the first 5% of hearing loss (s 125(4) WCR Act).

Injury during employment

Usually accidents occur in the workplace, but a number of other circumstances are covered. For example, while the worker is:

- away from the place of employment in the course of the worker's employment
- temporarily absent from the place of employment during an ordinary recess
- attending a trade, technical or other training school that the worker is expected to attend
- on a journey between the worker's home or place of employment and a place to obtain medical advice, treatment or rehabilitation for an existing injury (ss 34, 35 WCR Act).

The journey to or from the worker's home starts or ends at the boundary of the land on which the home is situated (i.e. the fence line) (s 35(3) WCR Act). As such, if a worker falls down the stairs of their home on their way out the door to work, they will not be covered. A worker's home is defined as the worker's usual place of residence and may include a temporary residence (s 35(4) WCR Act). Compensation may not be payable if there was a substantial delay, interruption or deviation in the journey (s 36 WCR Act).

Section 36 of the WCR Act deems injuries not to have arisen out of or in the course of employment if they occur during a journey when the worker drives:

- under the influence of alcohol while in control of a vehicle (in contravention of s 79 *Transport Operations (Road Use Management) Act 1995* (Qld)), and this is the major significant factor causing the event
- dangerously (in contravention of sch 1 s 28A *Criminal Code Act 1899* (Qld)), and this is the major significant factor causing the event.

Fatal injuries

If a worker sustains a fatal injury during the course of their employment, then compensation may be payable to the dependant/s of the worker. The amount of compensation payable will depend on whether the dependant was totally or partially dependent on the worker. The amount of compensation payable is made with reference to QOTE, which is the original series of Queensland full-time adult's ordinary time earnings as declared by the Australian Statistician.

The compensation may include:

- a lump sum of a maximum of $404.87 times QOTE (s 200 WCR Act) and a minimum of 15% of that maximum amount depending on the level of dependency
- additional lump sum of 10.83 times QOTE for a totally dependent spouse (s 200(2)(aa) WCR Act) or 21.64 times QOTE for dependants who are under 16 or students (s 200(2)(b) WCR Act)
- a lump sum of 10% of 404.87 times QOTE for a non-dependent spouse, issue or next of kin (s 201A WCR Act)
- reasonable medical and funeral expenses for the deceased worker (s 199 WCR Act)
- weekly benefits for dependent children who are under 16 or a student (ss 200, 201 WCR ACT).

A dependent spouse includes a de facto partner where there has been a continuous domestic relationship for at least two years or a shorter period where the circumstances evidenced a clear intention of a long-term and committed relationship (s 29 WCR Act).

Self-inflicted injuries

Compensation is not payable if the injury is intentionally self-inflicted (s 129 WCR Act). However, a work-related suicide may still be covered if the psychiatric condition was so severe as to deprive the worker of the ability to form a

deliberate intention to cause self-harm, or if the psychiatric injury is found to have arisen out of the course of employment in compensable circumstances (see Psychiatric and Psychological Injuries on this page).

Serious and wilful misconduct

If the injury is caused as a result of serious and wilful misconduct by the worker, compensation will only be payable if the injury results in death or a total bodily impairment of 50% or more (s 130 WCR Act). However, compensation is not payable if the injury could result in a degree of permanent injury of 50% or more arising from a psychiatric or psychological injury or combining a psychiatric or psychological injury and another injury (s 130(2)(a) WCR Act). The WCR Act does not define serious and wilful misconduct.

Time limit on application

All injuries should be formally reported to the employer as soon as practicable. A claim for statutory compensation is generally only valid if lodged within six months after the entitlement to compensation arises (s 131 WCR Act). This is usually when the injury occurs, but is defined by the WCR Act as the day on which the worker is assessed by a (s 141 WCR Act):

- doctor
- nurse practitioner for a minor injury
- dentist for an oral injury.

WorkCover must waive the requirement if it is satisfied that special circumstances of a medical nature exist as determined by the Medical Assessment Tribunal (s 131(4) WCR Act).

This time limit may be waived if WorkCover is satisfied that any delay in lodging the application is due to mistake, absence from Queensland or a reasonable cause (s 131(6) WCR Act).

If the application is lodged more than 20 business days after the injury occurs, WorkCover's liability to pay compensation is limited to no more than 20 business days before the day on which the application was lodged (s 131(2) WCR Act).

Employers are under a legal obligation to maintain proper records of injury and to report injuries to WorkCover within eight business days (s 133 WCR Act). Claims for compensation can be made even if the employer has left the address where the worker worked or the employer has gone into liquidation.

How to claim

A claim for compensation requires two documents, a WorkCover claim form and a WorkCover medical certificate.

The medical certificate must be obtained from a medical practitioner or, for a minor injury, a nurse practitioner (s 132 WCR Act). The certificate must be lodged with the claim form. The claim can be lodged in a variety of ways including by post, in person, by telephone, fax or over the internet. The claim form must be truthfully completed. Substantial penalties can apply for not truthfully completing the form.

A copy of the claim form should be served on the employer. The worker should also keep a copy of the documents and note the date the claim was lodged.

WorkCover has 20 business days after receipt of the claim form in which to decide whether to accept the application for compensation (s 134 WCR Act). WorkCover has the right to ask the worker to provide a statement and any other proof of the injury and its cause. The worker may also be asked to attend a medical appointment with a WorkCover doctor and must cooperate with such a request (s 135 WCR Act).

Weekly payments

Once a worker's application for compensation is accepted, and where an incapacity to work results from an injury, WorkCover is obliged to pay weekly compensation to the worker in lieu of the worker's usual wage.

The provisions in respect of weekly payments and how they are paid are complex, and the WCR Act should be referred to for more specific information.

Workers receiving compensation have a legal obligation to notify the employer and WorkCover in writing of a return to work within ten business days even if the work is voluntary (s 136 WCR Act).

Medical, hospital and rehabilitation expenses

WorkCover must pay the cost of any reasonable medical, hospital and rehabilitation expenses that a worker will incur (ch 4 pt 2 WCR Act). To have WorkCover pay for any treatment, such as surgery, physiotherapy, psychological counselling and chiropractic treatment, prior approval should be obtained.

At the very least, a referral for the treatment should be obtained but it is often better for the worker's treating doctor to make this request on the worker's behalf.

WorkCover also imposes limits on the amount of treatment. However, WorkCover has an overriding responsibility to provide for the worker's rehabilitation and return to work (s 220 WCR Act).

If the worker has to travel a distance of more than 20 kilometres one way for the purpose of medical treatment, they may be entitled to claim travelling expenses (s 219 WCR Act). In any case, it is wise to keep records of all travelling for medical treatment. The cost of taxi or ambulance travel is not claimable until a doctor certifies that it is necessary.

A worker receiving weekly compensation payments may be eligible to receive a caring allowance, if the:

- worker depends on day-to-day care for the fundamental activities of daily living
- care is to be provided at the worker's home on a voluntary basis.

Assessment of a worker's care needs must be undertaken by an occupational therapist (s 224 WCR Act).

Cessation of payments

A worker's entitlement to receive weekly compensation ceases when the first of the following happens:

- The incapacity due to the work-related injury stops.
- The worker has received weekly payment for the incapacity for five years.
- WorkCover has paid the maximum amount of compensation prescribed by the WCR Act (s 144 WCR Act).
- A worker's entitlement to payment of medical treatment, hospitalisation and expenses ceases when:
- the entitlement to weekly compensation ceases
- medical treatment is no longer required because the work-related injury is unlikely to improve with such further treatment (s 144B WCR Act).

Lump sum compensation

A worker may be entitled to receive lump sum compensation from WorkCover if the worker has sustained a degree of permanent impairment as a result of the accepted injury.

There is no time limit on applying for lump sum compensation as long as WorkCover originally accepted liability for the claim for weekly payments and/or medical expenses.

WorkCover may automatically arrange, or a worker can request it arrange, for the worker to be assessed to determine whether the worker has sustained a permanent impairment (s 178 WCR Act). This assessment should not, however, occur until the worker's injury has stabilised and is unlikely to improve with further medical or rehabilitative treatment.

Following the assessment of the injury, the worker will receive a document known as 'Notice of Assessment' detailing whether the worker has sustained a degree of permanent impairment. If there are psychiatric and physical injuries arising from the same incident, Notices of Assessment will be issued separately for the physical and psychiatric injuries.

Importantly, within 20 business days of receiving the Notice of Assessment, WorkCover will cease paying any weekly compensation and medical treatment. For this reason, it is usually better to wait until WorkCover decides to assess the impairment.

WorkCover must have the impairment assessed by:

- an audiologist if it is for industrial deafness
- a doctor for a physical injury
- the Medical Assessment Tribunal if it is a psychiatric or psychological injury (s 179 WCR Act).

For a physical injury, if the worker does not agree with the assessed degree of permanent impairment, the worker has 20 business days after the Notice of Assessment is given to request the impairment be assessed by another doctor or the Medical Assessment Tribunal. Save for an error of law, a worker cannot request a review of a decision of the tribunal.

If the degree of permanent impairment detailed in the Notice of Assessment is less than 20%, the worker must make an irrevocable choice between accepting the lump sum offer of compensation or claiming common law damages (s 189 WCR Act). The worker cannot do both. The worker's choice is also final and, as such, it is essential that legal advice be sought at this stage.

If the degree of permanent impairment detailed in the Notice of Assessment is 20% or more, the worker can accept the lump sum offer and pursue a common law claim for damages (s 188 WCR Act).

A worker is not required to make a decision in respect to the offer of lump sum compensation within 20 business days of it being given. If the worker does not respond to the offer, the offer is taken to be automatically deferred and can be accepted at any time in the future provided, where the degree of permanent

impairment is less than 20%, and the worker has not commenced a common law claim (s 189 WCR Act).

Rejected claims or terminated benefits

If a worker is unhappy with a decision by WorkCover in respect to payment of weekly compensation, the funding of medical, rehabilitative or hospital treatment and/or paying a caring allowance, they may have review and/or appeal rights. In these circumstances, the worker should immediately seek legal advice as strict time limits apply within which to exercise such rights (ch 13 WCR Act).

If the decision is in respect to the acceptance or rejection of an application for compensation, termination or suspension of the payment of compensation or a failure to make a decision in respect to an application for compensation, a worker has the right to ask for review of the decision or failure to make a decision.

A worker must lodge an Application for Review with the regulator, who is separate from WorkCover, within three months from the date of receipt of notice of the decision or from the date of lodgement of the application (s 542 WCR Act).

It is recommended that legal advice be sought to assist in lodging a review. A worker may be legally represented during the review process.

Sometimes WorkCover will refer the decision on a claim directly to the tribunal. The applicant is entitled to representation before the tribunal but, essentially, it is a medical review process, not a legal one.

The regulator must, within 25 business days after receiving the application for review, decide to:

- confirm the decision
- vary the decision
- set aside the decision and substitute another decision
- set aside the decision and return the matter to the decision maker with the directions the authority considers appropriate (s 545 WCR Act).

The regulator may, with the worker's (applicant's) consent, extend the time in which to make a decision. If the regulator fails to make a decision within the 25 business-day time period, the worker (applicant) can appeal directly to the Queensland Industrial Relations Commission against the regulator's failure to make a decision (s 546(4) WCR Act).

The worker may request to meet with a representative of the regulator to make oral submissions.

It is preferable to try to avoid reference to the tribunal, as the tribunal's decision is final and cannot be reviewed or appealed in ordinary circumstances (s 515 WCR Act). The tribunal can re-open a matter if fresh medical evidence is provided within 12 months from the date of the original tribunal decision (s 512 WCR Act).

If the regulator affirms the original decision, the worker has 20 business days from receiving the decision to lodge an appeal with the Industrial Relations Commission (s 550 WCR Act). It is advisable to seek legal advice before deciding whether to appeal to the commission.

Some decisions cannot be reviewed by the regulator and must be appealed directly to the commission or an Industrial Magistrate (ch 13 pt 3 div 1 WCR Act). As these decisions must be appealed within 20 business days of receiving the decision, it is important that legal advice is immediately sought (s 550 WCR Act).

A party who is aggrieved by a decision of the commission may appeal to the Industrial Court, and the decision of the Industrial Court is final (s 561 WCR Act).

WORKERS' COMPENSATION UNDER THE NATIONAL INSURANCE SCHEME

The workers' compensation rights are outlined in the WCR Act with additional rights to compensation added under ch 4A of the WCR Act.

Eligibility

To be eligible, a worker must establish that they:

- meet the same criteria specified in the WCR Act to be eligible to receive compensation under that Act (see WorkCover Statutory Compensation above) and
- have sustained a serious personal injury as defined in the WCR Act and Regulations. These are substantially similar to those under the NIIS Act.

A worker may not be entitled to receive compensation for serious personal injury (ch 4A WCR Act), although they have suffered serious personal injury, if the only reason the worker's application for compensation was accepted was because of ss 34(1)(c) or 35 of the WCR Act. Those sections, generally, deal with temporary absences from work or instances where a worker is on a journey before, after or between work. If ch 4A compensation has been denied by an insurer because a worker was only entitled to compensation because of ss 34(1)(c) or 35, advice from a lawyer should be sought urgently to ensure that the worker does not lose any entitlements.

In addition, an injured worker will be ineligible if their injury was caused by the worker's serious and wilful misconduct.

This does not mean, however, that a worker who sustains an injury in circumstances that prevents them from being eligible under the WCR Act to ch 4A compensation cannot apply for compensation under the NIIS Act, even if they are on a journey or a temporary absence from work. If a worker has suffered a serious personal injury, they should seek advice from a lawyer about their entitlements to compensation as compensation may still be available.

Application

On acceptance of an injured worker's application for statutory compensation, the worker can request to be assessed, or the workplace insurer can decide to have the worker assessed, to determine whether the worker is entitled to treatment, care and support payments for the injury. If assessed with such an injury, the worker will be an eligible participant under ch 4A of the WCR Act and be entitled to receive benefits on account of treatment, care and support needs.

The workplace insurer must ensure this assessment is carried out within 20 business days of the request being made (s 232M(3) WCR Act), unless otherwise agreed by the parties. After the assessment, the injured worker will be advised of their eligibility in writing within 10 days of a decision being made (s 232M(6) WCR Act).

An injured worker may be assessed as either a lifetime or an interim participant (s 232M(4)(a) WCR Act).

If accepted as a lifetime participant, the worker is entitled to have their necessary and reasonable treatment, care and support needs paid for, for as long as the worker is a participant.

If the worker is deemed to be an interim participant, the insurer will pay these costs for a period of two years. At the end of the two-year interim period, the worker will be reassessed to determine whether they are eligible to be a lifetime participant (s 232S WCR Act).

If an injured worker disagrees with the outcome of their assessment, they are able to have the decision reviewed. In the first instance, the aggrieved worker will have three months from the date they received written notice of the original decision from the relevant insurer to lodge an application for review with the Workers' Compensation Regulator.

In the event the Regulator affirms the insurer's decision, the aggrieved worker will then have the right to lodge a notice of appeal with the Queensland Industrial

Relations Commission. The notice of appeal must be lodged within 20 business days of the worker receiving the Regulator's decision.

Common law damages

A participant under ch 4A of the WCR Act reserves the right to bring a common law claim for damages.

However, any participant under ch 4A, who is considering pursuing a common law claim for damages should seek legal advice in respect to whether they should seek and accept damages on account of any treatment, care and support needs. This is because, in accepting damages on account of such needs, the participant will be precluded from receiving benefits under ch 4A of the WCR Act in the future (though they may be entitled to additional payments after five years under s 232ZD of the WCR Act).

COMMON LAW CLAIM FOR DAMAGES AGAINST AN EMPLOYER

A common law claim for damages is a legal claim against a worker's employer seeking damages (money) for an injury sustained by the worker in circumstances where the worker can establish that the employer was negligent or in breach of an express or implied term of the worker's contract of employment, and such negligence or breach caused the injury (see The Elements of a Negligence Action).

Damages are usually paid pursuant to a contract of insurance by WorkCover Queensland, and not the employer, although the employer is named in the proceedings, and any allegations of negligence or breach of contract are made against the employer. If the employer is a self-insured entity under the WCR Act then the damages will be paid by the self-insured employer.

Common law damages

Common law damages may include monetary compensation for:

- pain, suffering and loss of enjoyment of life
- past and future loss of income and superannuation contributions
- past and future special expenses (including medical, allied health/rehabilitation and pharmaceutical expenses, travel expenses, care, assistance, aids and equipment).

In very limited circumstances, damages can be awarded for gratuitous services provided to the worker.

There is also some entitlement to interest on past special expenses and actual past economic loss.

Damages must be reduced by the amount of compensation already paid by WorkCover and prescribed by the WCR Act as refundable. These amounts should be included in the claim so the worker is not out of pocket for these amounts (s 270 WCR Act). When negotiating with WorkCover in common law claims, offers of settlement are invariably made on the basis that WorkCover will not require compensation to be repaid. If the matter proceeds to judgment, the court will order the compensation to be repaid to WorkCover out of the award.

WorkCover is entitled to have the claimant independently medically examined, provided their request is not unreasonable or unnecessarily repetitious (s 282 WCR Act).

When damages are payable

An employer is under a duty to ensure that reasonable care is taken for the safety of employees.

The circumstances of each employee must be considered when assessing the extent of the care that ought to have been taken by an employer towards the employee.

Generally, an employer has an obligation to reasonably:

- provide and maintain safe plant and equipment
- select competent and skilled employees
- provide a safe system of work.

As a duty of care is owed personally to each employee, the extent will depend on the nature of the work being performed by the employee and the employee's own skill, expertise and qualification for the job. In each case it is a question of fact whether the employer has taken reasonable care to protect the employee from work accidents. Employers will not be liable for any accidents where they have done everything reasonably necessary to maximise the safety of their employees. Legal advice should be obtained in respect to whether a worker has any prospects of success in a common law claim.

Negligence of a fellow employee

A worker may also make a claim for damages when injured as a result of the negligence of a fellow employee, rather than the negligence of the employer.

Whilst the fellow employee may be found personally liable, they may be covered for their negligent conduct by their employer's contract of insurance if it can be

established that the employer is vicariously liable for the fellow employee's negligence.

Vicarious liability will be established if it can be shown that the fellow employee was acting within the scope of their employment at the time. An employer may not be held vicariously liable for acts of negligence by employees where their actions constitute serious and wilful misconduct or are outside the scope of employment.

Contributory negligence

If a court decides that a worker contributed to the injury by their own negligence, the court can reduce the damages awarded to the worker or find that the worker's contribution was so great that it defeats the claim entirely (s 305G WCR Act).

Examples of contributory negligence are detailed in s 305H of the WCR Act and may exist where a worker has:

- failed to comply with instructions
- failed to wear protective clothing and equipment provided by the employer
- failed to attend safety courses
- been adversely affected by drugs or alcohol taken intentionally.

It is a matter for a court to decide the amount by which damages are to be reduced on account of contributory negligence.

Time limits

Generally, a worker cannot commence a common law claim unless and until the worker has received a Notice of Assessment for the injury in respect to at least one of the injuries sustained (s 237 WCR Act).

Save for an exception depending on the date of injury, a worker can still pursue a claim for common law damages even if the impairment detailed in the Notice of Assessment is 0%.

There is, however, a strict three-year time limit to claim damages (s 11 *Limitation of Actions Act 1974* (Qld)). That is, the worker must commence legal proceedings, or otherwise take one of the very limited steps available to protect the worker's right to commence legal proceedings, within three years from the date of the injury or when the worker first knew of the injury. Should this not be done within three years, then the worker's right to claim damages will likely be statute barred.

It is strongly recommended that legal advice be sought as soon as possible as several procedural steps must be completed before commencing legal proceedings and to ensure the worker's claim is not statute barred.

Although extremely limited, there are some circumstances where an extension of this time limit may be obtained.

Procedure

Prior to commencing legal proceedings, a number of procedural steps must be undertaken. These include the lodgement of a Notice of Claim for Damages form with WorkCover (s 275 WCR Act) and participating in a compulsory settlement conference (s 289 WCR Act).

If a resolution is not reached, written final offers must be exchanged at the conclusion of the compulsory settlement conference. Various costs consequences flow from the offers made at the conclusion of the compulsory conference.

This area of law is complex and legal advice should be obtained to ensure the worker does not risk losing their right to pursue a common law claim.

If WorkCover admits liability for the worker's damages, it must, if asked by a worker, ensure that reasonable and appropriate rehabilitation is made available (s 268 WCR Act). Although it is not obliged to agree, a worker can ask WorkCover to make rehabilitation available prior to an admission of liability or if there is a denial of liability.

A worker is also under an obligation to mitigate their loss, which can include participating in rehabilitation and/or participating in a return to work program (s 267 WCR Act).

The employer does not have the right to terminate a worker's employment on the grounds that they have applied for compensation or pursued a common law claim. Employers may, however, be entitled to terminate a worker's employment for other reasons. As strict time limits apply, urgent legal advice should be sought if an employer terminates a worker's employment.

ACCIDENTS DUE TO DEFECTIVE PREMISES OR PRODUCTS

INJURY OR DAMAGE DUE TO DEFECTIVE PREMISES

If a person is injured or their property is damaged as a result of some defect in the premises (which includes land), the occupier of the premises might be liable to

pay damages to the injured person. The law governing this type of liability is known as the law of occupiers' liability.

The occupier

An occupier is the person in possession of the premises. The person in possession of the premises has the power to admit or exclude people wanting to enter the premises.

Often, an occupier will also be the owner of the premises, but owning the premises is not the same thing as being in possession of that premises. A landlord owns a rented house, but it is the tenant who has possession of it. Therefore, if someone comes onto the rented premises and suffers an injury, it may be the tenant and not the landlord who will be liable as the occupier. Generally, however, the landlord has the primary responsibility to ensure the premises are safe.

Two or more people can be occupiers. For example, if a couple purchase a home together and live there, they are both occupiers. Similarly, if two or more people sign a tenancy agreement, they are both occupiers.

The person whose business is being carried on in a shop or other commercial premises is the occupier.

Public places, such as playgrounds and parks, are occupied by the local government or other body that exercises control over them.

Occupier's duty of care

At common law, an occupier owes a duty to take reasonable care to avoid foreseeable risks of injury to entrants.

Breach of duty

In assessing whether an occupier will be liable for injuries sustained by an entrant, a court will next assess whether the occupier has breached their duty of care.

Specifically in respect to occupiers' liability, reasonable care is the amount of care that an ordinary person acting reasonably would have taken in the circumstances. There is no hard and fast rule about what amounts to a lack of reasonable care. It depends very much on the nature of the premises, the type of danger and the reason for the entry. A highly polished floor might not be an unusual danger in a ballroom, but it would be in a supermarket. A defective front step would be a danger to most people coming to a private residence, but it would not be so to a tradesman who had been requested to come and repair the step.

Causation

The mere occurrence of an accident is not enough to succeed in establishing that an occupier is liable for any injury that results from that accident. The injured person must also prove causation by establishing that, if the occupier had taken reasonable care, the person would not have been injured.

Specifically in respect to occupiers' liability, if a danger or risk is obvious, then the occupier may not be liable for any injury. At common law, it has been held that an occupier is in most cases entitled to assume that an entrant will take reasonable care for their own safety and, where a risk is obvious to an entrant, exercise reasonable care for their own safety. In this case, it may not be necessary for the occupier to warn the entrant about that risk.

Landlords

In general terms, a duty of care is owed by landlords to tenants at common law on the basis that there is proximity (or a relationship) between a landlord and tenants, family and entrants onto the property.

However, the duty of landlords (in residential premises) is only to take reasonable care to avoid foreseeable risks of injury from defects of which they are advised or of which they would reasonably become aware by appropriate inspection.

People entering business premises

An occupier of a business premises is liable to a person who suffers injury on the premises if the occupier failed to take reasonable care to protect the entrant from dangers of which the occupier knew or should have been aware of. The duty of care and standard of care is usually higher where a person enters upon premises for the purpose of a commercial transaction. This stems from the fact that the occupier of the commercial premises is likely to make a profit from the entrant.

This usually includes supermarkets. The occupier of a supermarket must, for example, be taken to be aware that spillages will occur from time to time and should have a system in place to detect and remove spillages as frequently as is reasonably practicable.

Entrants into public parks and other public places

All people who lawfully use facilities open to members of the public are entrants. Entrants use playgrounds and other recreational reserves.

INJURY OR DAMAGE CAUSED BY DEFECTIVE ROADWAYS AND PATHWAYS

The Civil Liability Act gives local governments and other public authorities broad protection against claims made for defective footpaths or roadways. In deciding whether a council is liable, a court must apply principles such as the:

- limitation imposed on the council by its financial resources
- general allocation of financial resources by councils, which is not open to challenge (s 35 Civil Liability Act).

The law previously was that highway authorities were immune from prosecution if they failed to act (or in legal terms for nonfeasance). In effect, this meant that highway authorities could not be held responsible in negligence for failing to repair a road or footpath. Such authorities were only responsible where they had attempted to repair or remove an existing danger and were negligent in doing so.

The decisions of *Brodie v Singleton Shire Council and Ghantous v Hawkesbury City Council* [2001] 206 CLR 512 (heard together) overturned this principle, holding that the ordinary principles of negligence were to apply to highway authorities. The High Court stated that a highway authority must '... take reasonable care that their exercise of or a failure to exercise those powers does not create a foreseeable risk of harm to a class of person'.

The Civil Liability Act has effectively reinstated the immunity of a public authority for failing to repair a road (s 37 Civil Liability Act). The one concession is that if the authority is actually aware of a risk but does nothing to remedy it, and this results in the harm or damage, then the authority may be liable.

It also needs to be considered whether or not there was an obvious risk of injury (see Defences to a Negligence Action).

LIABILITY, EXCLUSION AND WARNING SIGNS ON PREMISES

Exclusion signs

Signs that say 'No Trespassers' are legally meaningless. They do not turn an entrant into a trespasser and cannot exclude the duty of care owed by an occupier to a trespasser. However, such signs may have the desirable effect of discouraging unwanted visitors.

Signs that say 'No Hawkers, Peddlers or Salesmen' will render such people trespassers if they enter the premises. Trespassers, as discussed above, are

generally owed the general duty of care as owed by an occupier to other entrants. Normally, the law implies consent by the occupier to the entrance of such individuals, at least as far as the front door.

Warning signs

A sign warning of a danger (e.g. slippery stairs) may protect an occupier from liability if the warning is considered adequate to protect the entrant from injury.

No liability signs

A sign that says 'No liability accepted for any type of injury' may be sufficient to exclude an occupier's liability to an entrant if reasonable steps were taken to ensure that the sign could be seen and read by the entrant (see *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 QB 409).

However, the law is far from certain, and it would be unwise for an occupier to seek to avoid responsibility for some danger in the premises by simply stipulating that no liability is accepted. An attempt should be made to eliminate dangers as far as practicable, and an entrant should be at least warned of any known dangers.

Insurance

Occupiers should insure against risk of liability, although coverage for residential premises is often included in standard householder's insurance and contents insurance policies. An insurance company should be notified of any injury or potential claim as soon as possible.

INJURY OR DAMAGE DUE TO DEFECTIVE PRODUCTS

A person might suffer personal injury or property damage as a result of a product being defective in the manufacture, design or formulation of a product or a defect in product information. For example, a bottle might explode and injure a person's hand, or a replacement part in an engine might fail and damage the whole engine.

If the person who suffers the injury or damage has purchased the defective item, they will probably be able to sue the supplier of the goods in contract. Furthermore, if the item was acquired for private or domestic use and was either manufactured by a corporation in Australia or was imported into Australia by a corporation, there will probably be a statutory right to sue the manufacturer for breach of warranty under the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act) (see chapter on Consumers and Contracts).

In cases where there is a safety defect in goods, and the safety defect causes personal injury or damage to certain types of other goods, there may be further

claims that can be made under the Australian Consumer Law (sch 2 ch 3 Competition and Consumer Act). In addition to these contractual and statutory duties, the common law of negligence also imposes a liability on manufacturers of defective products to those who suffer injury or damage as a result of coming into contact with defective products.

This area is complex and legal advice should be sought.

Liability of manufacturers for negligence

A manufacturer of a defective product may be liable for negligence, breach of contract and/or for breach of the Competition and Consumer Act.

The normal elements of negligence must be established in order to establish liability.

Under common law, however, before a manufacturer can be sued it must be shown that the manufacturer was negligent in the design, manufacture or presentation of the product. Negligence is not a prerequisite for a claim relating to breach of contract and/or breach of the manufacturer's liability under the Competition and Consumer Act.

The duty of care in negligence is not an absolute duty to prevent loss or damage. It is only a duty to take reasonable care. Accordingly, a defendant will not be liable in respect of obvious and unavoidable risk or in respect of unforeseeable risk.

To whom is the manufacturer's liability owed

A manufacturer's common law liability is owed to anyone the manufacturer should reasonably foresee as likely to suffer injury or damage if the product is defective in either its design, manufacture, presentation of the product, safety and/or distribution. If a motor vehicle contains a manufacturing defect and as a result is involved in an accident, the manufacturer will be potentially liable to the owner of the vehicle for damage caused to the vehicle in the impact and to anyone who else who suffered personal injury, whether they were travelling in the vehicle or were standing on a footpath. All could be foreseen as likely to sustain injury or damage.

Proof of negligence

Proof will vary depending on the particular incidence of negligence being alleged. The main allegations of negligence in manufacturing liability cases include defect in the product itself, defect in the product design or failure to give appropriate instructions/warnings as to its proper use.

Establishing a defect in a product may require detailed expert examination of the product such as by an engineer. It must also be shown that any defect has, on the balance of probabilities, resulted from matters within the control of the person being sued and has not resulted from any subsequent handling or use of the product. For example, a bottle might explode due to a defect in the bottle itself (responsibility of the bottle manufacturer), excessive carbonation in the bottle (responsibility of the drink manufacturer), mishandling in transit (responsibility of the transporter, wholesaler or retailer) or mishandling by the consumer.

When a product is involved in an accident and injury or damage results, and there is any suspicion that the product might have been defective, then that product (or what is left of it, including all pieces) should be kept until legal advice is obtained. It may be near impossible to prove that a product was defective if its remains are disposed.

What products are covered

Products are generally defined in the broadest sense of the term. The definition extends to construction of houses, production of cars, household consumables, industrial equipment and the like. The fact that a product is second hand does not bar a claim. However, the definition of 'goods' and 'consumer goods' under the Australian Consumer Law can limit the application of some of the statutory causes of action.

Who is liable

Anyone who causes a product to be defective is potentially liable for any injuries or property damage resulting from the defect. Such persons or entities may include:

- producers or suppliers of raw material
- manufacturers of component parts
- manufacturers and designers of finished products
- assemblers and installers
- importers and distributors
- repairers and other service providers
- architects and engineers
- certifiers
- licensors
- bailors

- bailees
- retailers and other suppliers.

What damages are recoverable in negligence

Generally speaking, if a product is defective there may be remedies for breach of contract or under the Australian Consumer Law for the cost of replacement, repair or refund for a product.

If personal injury or property damage results from the product being defective, compensation for such loss may be recoverable. These damages include general damages for pain and suffering, loss of income (past and future), care and special damages (including medical treatment expenses). There are often caps to the amount of damages that can be recovered. When the product itself is physically damaged, damages for the reasonable cost of repair or replacement are recoverable.

Does a defence exist

In addition to some of the defences detailed above (see Defences to a Negligence Action), a defendant may be able to avoid liability for a defective product if:

- developmental risks defence exists. This defence may be available where the defect that was present in a product at the time of its supply was neither known nor discoverable by the defendant given the state of scientific and technical knowledge at the time. The defence would not be available where the defendant would have known of the risk created by the defect if it had carried out appropriate research, testing or investigation prior to the time of supply
- learned intermediary defence exists. This defence may be available where products, such as vaccines, prescription-only pharmaceuticals or professional hair-care products, are supplied through learned intermediaries such as medical practitioners or professional hairdressers. The defendant must establish that the information, if provided to learned intermediaries, was adequate in the circumstances to alert them to the potential risks associated with the product. This defence may be available where products, such as chemicals, are supplied in bulk and where there is a reasonable expectation that the person acquiring the product in bulk will package and label the product, and will provide appropriate warnings and instructions to persons who it can reasonably be foreseen may suffer loss or damage in using the product.

What is the limitation period?

A person who has suffered personal injury generally has three years from when the cause of action arose to bring a common law claim. In relation to a claim for breaches under the Competition and Consumer Act, an injured person generally has three years from the time when the person becomes aware or should have reasonably become aware of a cause of action. There are some extensions to this time period depending on the specific cause of action of up to 10 years from the supply of the goods and also up to 12 years following the act that is alleged to have caused the injury.

LEGAL NOTICES

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