An overview of the Queensland Workers’ Compensation common law claim process

29 January 2015
Meet your moderator

Laurent Cazier
Industry Manager
WorkCover Queensland
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Session summary

- The common law process
- Negligence or liability
- Non delegable duties owed to employees
- Quantum or Heads of Damages
- Documentation
Meet your presenters

Ross McConaghy
Partner
Jensen McConaghy

John Hunter
Senior Associate
Jensen McConaghy
Introduction

An employer’s WorkCover policy covers both statutory no-fault benefits AND common law damages claims providing the policy was valid at the time of the accident.
What is ‘common law’?

- The common law is essentially law developed by judges as distinct from laws created by Parliament.
- The established principles from these previous decisions govern how current cases are treated, subject to statutory modification.
- A worker’s right to sue is a common law right and the relevant legal principles have evolved over time.
- Claims for statutory benefits are “no fault”.
- In Common law claims however the injured worker must prove fault.
- Benefits payable on statutory and common law claims are quite different.
Why pursue common law and what’s the catch?

• Damages claimed successfully from a common law claim are generally much higher than compensation available through no-fault statutory benefits

• The catch: the injured worker must prove the employer was at fault
How does common law work?

A common law claim for damages as it relates to a workplace injury consists of two elements:

• establishing **liability** (e.g. a breach of the duty of care owed by an employer to an injured worker)
• determining **quantum** (i.e. amount) of damages created by the breach of duty
Statutory restrictions

• Whether the claimant brings a common law claim after a statutory claim, or as a ‘common law only’ claim, the claimant must meet the key definitions of ‘worker’ and ‘injury’

• Additionally, for injuries suffered after 14 October 2013, a worker must be assessed with a degree of permanent impairment (DPI) of more than 5% (which really means 6% or more) to bring a common law claim
Common law claim stages

Pre-Litigation
• Notice of claim
• Compliance
• Liability investigations
• Medical investigations
• Disclosure (ongoing obligation)
• Liability response (6 months of compliance)
• Conference (3 months from liability response)
• Exchange written final offers (open for 14 days)
• Court proceedings (within 60 days of conference)

Litigation
• Pleadings (Statement of Claim and Defence)
• Disclosure
• Mediation
• Trial
Accessing common law—elements

In any common law claim, a claimant must prove three elements:

1. There was a duty of care
2. That duty was breached
3. That breach caused the claimant to suffer personal injury

- It is firmly established that an employer owes a duty of care to its workers—that duty cannot be delegated to another party (eg. a host employer)
- Therefore, the real focus in common law claims is on breach of duty and causation
Common law—liability

A successful claimant will need to establish:

• The risk of injury was *reasonably foreseeable*

• The injury was *preventable*

• The precautionary measure alleged was a *reasonable* response to the risk

• The claimant's injury was caused by the risk in question (ie. *causation*)
What ‘duties’ does an employer owe a worker?

A non-exhaustive list of duties an employer owes a worker:

• provide, maintain and enforce a safe system of work;
• provide safe and appropriate plant and equipment free from patent defects;
• provide safe premises, free from all dangers as far as protection from them is reasonably practicable;
• instruct workers in the safe performance of their work, where instructions might reasonably be thought to be required; and
• provide adequate supervision and assistance.
When does an employer breach its duty of care?

• An employer will have breached its duty of care where:
  – the risk of injury to its worker was reasonably foreseeable & not insignificant; and
  – there were measures available to the employer to protect its worker from the risk; and
  – the employer unreasonably failed to adopt those measures.

• It follows that not all risks present in a workplace require a response—only those that are reasonably foreseeable and not insignificant
Breach of duty—continued

An employer can still be liable even where:

• the worker was experienced
• the risk was obvious
• there have been no previous incidents
• the worker is performing an unauthorised task
• there is criminal conduct on the part of a co-worker or third party
• the worker is working at a third party’s premises (or even their own home)
• the worker is working under a labour hire arrangement, taking their instructions from someone other than the employer.
Causation

- The injured worker must show that the employer’s breach actually resulted in the injury.

- It is not sufficient for an injured worker to simply show that the system of work was defective in some way—there must be a link between the breach of duty and the injury.

- If the injury would have occurred regardless of the employer’s breach, then the claim will fail.
Some other concepts

Contributory negligence
• A worker’s damages can be reduced to reflect the extent to which the worker has negligently contributed to his or her injuries—this rarely exceeds 20%

Vicarious liability
• An employer can be liable for its own actions and those of its employees (known as ‘vicarious liability’)

Special Duty of Care
• An enhanced duty of care (known as a ‘special duty of care’) may arise if the employer has prior knowledge of the employee being at some particular risk
Quantum—total assessment of damages

Heads of Damage:

1. **General Damages**—pain, and suffering (now calculated by ISV)
2. **Past Economic Loss**—past wages and superannuation
3. **Future Economic Loss**—future loss of wages and superannuation
4. **Special Damages**—past expenses including medical and training costs
5. **Future special damages**—future expenses including treatment, medication, aids and retraining costs
Calculating damages

- Damages are intended to place an injured worker as near as possible in monetary terms in the same position as if they had never been injured
- Damages are assessed on a ‘once and for all basis’
- Damages are not subject to taxation

Damages may include:

- interest on past losses
- past and future gratuitous/paid care
Future economic loss (FEL)

- Typically the largest component in any claim
- FEL involves a comparison between what a claimant might have earned had they not been injured and what they can still earn
- If a claimant is not working, the employer must prove what employment the claimant can still undertake and what they can earn from such endeavours
- A claimant can be awarded ‘global’ FEL, even where the claimant is not currently losing income because of the injury, for disadvantage in the open labour market/loss of earning capacity/loss of future opportunity
Pre-existing conditions

• An employer will be exposed to damages where an incident results in the aggravation of a pre-existing condition. This includes where the incident brings to light a previously asymptomatic condition.

• It is up to the employer (WorkCover) to prove how the pre-existing condition would have affected the worker in the future, if the incident had not occurred. This is a difficult burden of proof to discharge and requires specific medical evidence.

• In other cases, an employer will remain liable where an underlying condition results in the injured worker suffering a far more serious injury than a person of reasonable fortitude. This is what lawyers refer to as the ‘egg-shell skull’ rule.
How do you prevent common law claims?

Identify: identify the risk of injury

Investigate: determine ways to reduce that risk of injury

Implement: implement a safe system of work

Enforce: supervise and enforce the safe system of work
We should never assume a new starter is trained in safe work practices due to their experience as this does not discharge the duty of care imposed on the employer.

**Documentation is key**

**Document:**
- Records of induction and training
- Refresher training courses
- Risk assessments on task(s) performed
- Evidence of the enforcement of the safe work practices
- Record keeping from the worker’s start date
- Competency based assessment
Identify, document, train and enforce

- Ensure proper safety procedures are in place
- Effective and timely record keeping and documentation
- Properly train and induct staff
- Undertake risk assessments and implement systems to address identified risk
- Ensure that non-complying staff activity is addressed i.e. enforce your system of work
- Promote safety through educating and involving the staff e.g. staff undertake their own risk assessments, participate in toolbox talks etc.
Types of documentation

Record keeping in areas such as:

• Training records
• Disciplinary records
• Diary notes
• Incident reports
• Application for Compensation and other claim related documents
• Contemporaneous statements from witnesses
• Competency Based Assessment
• CCTV footage

These are just some examples of key evidence, which can greatly improve your chances of defending negligence in a common law claim. Contemporaneous evidence overrides any later inconsistent versions of events.
Key messages—Legal liability

**Basic Principles:** Common law and the right to sue your employer for negligence is a long established right for injured workers and is the final stage of entitlement to compensation for injured workers. Statutory claims are no fault and common law claims are at fault.

**Prevention:** Common law claims can be prevented by preventing injuries and with effective communication between all parties to ensure successful rehabilitation and RTW outcomes.

**Risk management:** Common law claims can be better defended by identifying risk; implementing a safe place and safe system of work; ensuring adequate training and induction; providing adequate supervision, assistance and enforcement and good record keeping and documentation.
Tips for employers

Communicate—work and communicate with them post injury
• one of the main reasons people bring a common law claim is because they feel their employer has not helped them as much as they can or their employer has not contacted them or has had minimal contact with them since the injury

Return to work—look for ways to help them return to work
• one of the most reliable predictors of a claim proceeding to common law is when an injured worker has not returned to work
• support and actively help the worker get back to work ASAP
• offer suitable duties

Review incident—take all necessary action to reduce the risk of further injury
• show the worker and their colleagues that you are serious about safety and that you care for your staff
Questions submitted during the session
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