Personal Injuries: A Practical Introduction

Common law or not?

1. In some areas of human activity the legislature has excluded the operation of the common law tort of negligence and different, usually "no fault", schemes apply.

1.1 Workers Compensation and Rehabilitation Act

worker means a natural person:

(a) who, under a contract or agreement of any kind (whether expressed or implied, oral or in writing or under a law of the Territory or not), performs work or a service of any kind for another person unless:

(i) the natural person:

(A) is paid to achieve a specified result or outcome; and

(B) has to supply plant, and equipment or tools of trade, needed to perform the work or service; and

(C) is, or would be, liable for the cost of rectifying any defect arising out of the work or service performed; or

(ii) a personal services business determination relating to the natural person performing the work or service is in effect under section 87-60 of the *Income Tax Assessment Act 1997* (Cth); or

(b) who is a person, or a member of a class of persons, prescribed for this definition as a worker;

[then follow various exceptions].

1.2 Motor Accidents (Compensation) Act:

(1) A motor accident is an occurrence:

(a) caused by or arising out of the use of a motor vehicle; and

(b) resulting in the death of, or injury to, a person.

(2) A motor accident is caused by or arises out of the use of a motor vehicle if, and only if, it results directly from:

(a) the driving of the motor vehicle; or

(b) the motor vehicle moving out of control; or

(c) a collision, or action to avoid a collision, with the motor vehicle (whether the motor vehicle is stationary or moving).

(3) If a person renders assistance, or attempts to render assistance, at the scene of a motor accident and, as a result of doing so, dies or is injured, the accident is taken to have resulted in the death or injury.

2. There are often difficulties identifying the "borders" of the different jurisdictions. Sometimes, there will be argument over whether an injured person is covered by a statutory scheme or not e.g. whether or not a person is a "worker" for the purposes of the *Workers Compensation and Rehabilitation Act* or whether an injury *"arises out of the use of a motor vehicle"* (cf. *Snoxell v Dorcon Constructions* (1986) 40 NTR 1). In cases of uncertainty you might decide to make an application or claim under both systems, especially if there is a time limit, and seek to adjourn one of them.

3. It is important to remember that the abolition of common law actions for damages by section 52 of the *Workers Compensation and Rehabilitation Act* applies only to an action against the employer. An action against a negligent third party will still lie and may be more advantageous e.g. if there is significant permanent impairment (*PI(LD)A* maximum is $511,500 and WCRA maximum is $278,869) or future loss of earning capacity is expected to increase beyond present NWE. But note section 20 of *PI(LD)A* limiting future loss claims to 3 times average weekly earnings.

4. If there is a potential action against a third party it will be prudent to commence and complete the workers compensation proceedings first because of the effect of section 54 *Workers Compensation and Rehabilitation Act:*

(2) A person is not entitled to compensation under this Part if, in respect of the injury:

(a) compensation or damages have been paid or recovered under the applicable law; or

(b) an award of compensation or judgment for damages has been made, given or entered under the applicable law.

(3) Where, in respect of the injury:

(a) a person receives compensation under this Part; and

(b) the person:

(i) is paid or recovers compensation or damages under the applicable law;

(ii) obtains an award of compensation or judgment for damages under the applicable law;

(iii) accepts a payment into court, or settles or compromises a claim, under the applicable law; or

(iv) is paid or is entitled to receive a benefit from a superannuation scheme established under the applicable law (other than a benefit financed by an

employer's contributions made under an industrial award or agreement or by the worker's contributions) because of incapacity resulting from the injury,

the worker's employer is entitled to recover from that person the amount determined in pursuance of subsection (4).

(4) The amount entitled to be recovered under subsection (3) is the amount determined by a Fellow of the Institute of Actuaries of Australia to be:

(a) the discounted present value of compensation paid or payable to the person under this Part; or

(b) equal to the amount of the compensation, damages, payment, settlement, compromise or benefit paid or payable to the person under the applicable law,

whichever is the lesser.

5. Many of the common law principles and the statutory provisions of the *Personal Injuries (Liability and Damages) Act* apply to claims under the *Compensation (Fatal Injuries) Act*.

Negligence is a single, overarching concept but is subject to specific formulations.

6. A classic expression of the duty of care is as follows:

> Negligence is the omission to do something which the reasonable man [or woman], guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man [or woman] would not do: Alderson B in *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781.

7. However, the content of the duty varies according to the situation. For example, the case law has recognized some important principles in particular areas:

- duty to co-ordinate activities of independent contractors where co-ordination required: *Stephens v Brodribb* (1986) 180 CLR 16.
- duty to have an appropriate monitoring and clean-up system to deal with risk of spills in supermarkets: *Harris v Woolworths* [2010] NSWSC 25, *Kelly v Lend Lease Retail Pty Ltd* (1993) 113 FLR 21, *Bevillesta Pty Ltd v Liberty International Insurance [*2009] NSWCA 16, *Strong v Woolworths* [2012] HCA 5 .
- duty of medical practitioners to diagnose, treat and give advice and information: *Rogers v Whitaker* (1992) 175 CLR 479.
- “non-delegable” duty of care owed by employers, hospitals and schools: *Kondis v State Transport Authority* (1984) 154 CLR 672, *Elliot v Bickerstaff* [1999] NSWCA 453, *New South Wales v Lepore* (2003) 212 CLR 511. Occupiers probably owe a similar

duty to contractual entrants: *Calin v Greater Union* (1991) 173 CLR 33.

Damages

8. Damages are divided into two distinct areas: non-pecuniary and pecuniary loss.

- **Non-pecuniary loss**

8.1 Section 24 of the *Personal Injuries (Liability and Damages) Act* abolished common law damages for “pain and suffering”, “loss of amenities of life”, “loss of expectation of life” and “disfigurement”. These have been replaced by the statutory category “non-pecuniary loss”. Section 26 of the *Personal Injuries (Liability and Damages) Act* requires “non-pecuniary loss” to be assessed by a medical practitioner according to the American Medical Association Guides to the Evaluation of Permanent Impairment. The court must award

- for an 85% evaluation - the maximum amount (indexed to AWE and currently $511,500);
- for not less than 15% and not more than 84% - the relevant percentage of the maximum amount;
- otherwise (but not less than 5%) – the amount specified in the table.

TABLE

Column 1 Degree of permanent impairment as percentage of whole person	Column 2 Amount of damages to be awarded
not less than 5% but less than 10%	2% of the maximum amount
10%	3% of the maximum amount
11%	4% of the maximum amount
12%	6% of the maximum amount
13%	8% of the maximum amount
14%	12% of the maximum amount

- **Pecuniary loss**

8.2 Pecuniary loss is invariably the most complex and contentious area of damages and requires careful, comprehensive instructions and

preparation. An invaluable text is Luntz, Harold, *Assessment of Damages for Personal Injury and Death,* 4th ed.

8.3 Pecuniary loss consists of loss of earning capacity (past and future loss of earnings), past and future gratuitous or non-gratuitous care and other categories of damages including past and future medical and hospital expenses and out-of-pocket expenses.

8.4 Loss of earning capacity is calculated on earnings net of taxation: see Luntz at [5.7.1] for a discussion of the reasons. However, where workers compensation or other periodic payments which are subject to tax must be reimbursed the damages should include an amount for the taxation element of the reimbursed amount: *Fox v Wood* (1981)148 CLR 438.

8.5 Pecuniary damages for future loss must be adjusted to take into account the percentage possibility "that the events might have occurred regardless of the personal injury": section 21 of *PI(LD)A*.

8.6 Interest on past loss of earnings determined by section 30 of *PI(LD)A*.

8.7 Future loss of earning capacity is almost invariably paid as a lump sum and discounted to reflect the advantage to the recipient of a present sum in respect of a future entitlement. The "discount rate" (assumed real rate of return) is specified at 5% in section 22 of *PI(LD)A.*

Statutory charges and social security consequences

9. Part 3 of the *Health and Other Services (Compensation) Act* creates a statutory charge over settlement or award amounts and requires reimbursement of past medicare payments, nursing home and certain care payments relating to an injury. The statutory responsibility for notifiying the Commonwealth of a judgment or settlement lies on the payer i.e. defendant or defendant's insurer, and makes it a criminal offence to fail to do so. Once notified the Commonwealth will provide a notice of charge specifying the amounts payable to the Commonwealth. A notice of charge is valid for 6 months.

10. Notwithstanding that the statutory responsibility is the defendant's it is prudent for the plaintiff to seek the notice of charge at an early point so that settlement negotiations take it into account.

11. There may be non-entitlement to future Medicare benefits. Section 18 of the *Health Insurance Act* provides that the Minister may determine that no Medicare payment is payable in respect of an injury where a person has received a settlement or award in respect of that injury.

12. The *Social Security Act* requires repayment of social security benefits received following an injury for which compensation is received (the "charge amount") and precludes payment of future social security benefits for a set period (the "preclusion period") depending on the amount of damages awarded or settlement achieved. There is a mechanism for applying for a notice of the charge amount and/or preclusion period before settlement but a plaintiff's solicitor must make her or his own calculation for the purposes of settlement negotiations if there is not a notice.

13. The preclusion period is determined by the actual amount awarded for lost earnings at trial or 50% of a settlement sum (including costs and expenses but less any periodic payments to be repaid) divided by "the pension income test cut–out point" (currently $831.50) to derive the preclusion period in weeks. The preclusion period will begin at the date the loss of earning capacity commences or the date that periodic payment of compensation e.g. workers compensation payments, cease. If social security payments have been received during that period they must be repaid.

14. There is an online estimator at:

    http://www.humanservices.gov.au/customer/enablers/centrelink/compensation-recovery/compensation-estimator

Pre-litigation conduct

15. Most civil actions for damages for personal injury are settled or compromised before trial. Litigation is often necessary to reach a settlement but there are important steps required before you commence litigation.

16. If you act for an impecunious client/plaintiff you will need to obtain litigation funding for disbursements for medical reports and so on. The Contingency Legal Aid Fund is a source of funding for "speculative" claims where solicitor and counsel are "specking" their fees.

17. If you have not already done so, you will need to comply with professional obligations under the *Legal Profession Act* about costs advice.

    - **Practice Direction 6 of 2009**

18. A very important consideration is Supreme Court Practice Direction 6/2009. This requires that a prospective plaintiff to outline his or her case in sufficient detail to allow a potential defendant to "understand and investigate the claim without extensive further information". Failure to do so runs the risk of adverse costs consequences. So, in practical terms you will need to be able to describe the plaintiff's case at this stage, including the basis of liability, the injuries,

provide medical reports and medical evaluation of the degree of permanent impairment, and give estimates of damages and the bases of calculation, along with any relevant documents. It will be prudent to indicate a willingness to mediate. A prospective defendant has corresponding obligations and must deny or admit the claim in part or whole. Offers of compromise are encouraged.

19. If a time bar is approaching then it will be necessary to issue proceedings or at a minimum obtain an assurance from the prospective defendant or defendants that they will not take the limitation point while the PD6/2009 process is completed.

20. Preparation for the PD6/2009 letter requires a prospective plaintiff's solicitor to:

    20.1 Obtain a detailed, comprehensive and signed witness statement from the prospective plaintiff. This will involve obtaining documents such as pay slips or invoices, tax records of earnings for past years and any other documents necessary to substantiate claims.

    20.2 In the not uncommon case of undeclared or under declared income you will need to discuss whether the prospective plaintiff "comes clean" with the tax authorities so that his or her assertions about loss of earnings have credibility.

    20.3 Obtain detailed, comprehensive and signed witness statements from potential witnesses.

    20.4 Obtain medical reports and copies of medical and hospital notes using authorities signed by the prospective plaintiff.

    20.5 Request a notice of charge from Medicare and seek details of any social security charge and preclusion periods from Centrelink.

21. It is advisable to consider whether counsel should be involved in drafting or settling the PD6/2009 letter.

22. PD6/2009 encourages the parties to make genuine efforts at settlement but if negotiation does not produce an acceptable compromise it will be necessary to issue proceedings.

23. One critical factor for a prospective plaintiff is the need to establish as soon as possible that the prospective defendant is not a person "of straw", that is, has significant assets or are insured. Sometimes, the prospective defendant is a company in liquidation. You cannot sue a company in liquidation without leave of the court. In such a case it may it may be appropriate to seek to identify the

insurer and sue it directly under Part VIII of the *Law Reform (Miscellaneous Provisions) Act*.

Commencing litigation

24. It is not uncommon for a prospective plaintiff to seek advice more than 3 years after the event or after another firm of solicitors has let the matter become time barred. You can still commence the proceeding but you will need to seek an extension of time under section 44 of the *Limitation Act.* The most common basis for an extension of time is a new material fact i.e. something that must be pleaded and which is discovered or brought to the notice of the plaintiff within 12 months of the expiration of the limitation period or after its expiry. The action must be instituted within 12 months of the ascertainment of the fact: *Sola Optical Case* (1987) 163 CLR 628 and, for a local case, *Patten v Lend Lease Funds Management* [2009] NTSC 51.

25. A statement of claim is required either at the time the writ is filed or soon after. Usually, a statement of claim requires careful thought about the basis of liability. It is not a one size fits all document. Counsel should be involved at this stage if not earlier.

26. In theory if the PD6/2009 process has been followed the case should be substantially ready with discovery complete and medical reports and permanent impairment evaluations exchanged, Medicare charge advice and Centrelink charge and preclusion periods advice all obtained.

27. By this stage you should be ready to file an offer of settlement pursuant to Order 26 SCR. This is an important factor that applies pressure to both plaintiffs and defendants. Most early offers are too low, if made by a defendant, or too high, if made by a plaintiff. No one is fooled by unrealistic offers. A well thought out offer places maximum pressure to settle on the other side.

28. You are then ready for a settlement conference.

- **Settlement conference**

29. A settlement conference is an important opportunity to frankly discuss the strengths and weaknesses of a case. Most personal injuries claims are settled at this stage. Preparation is crucial. Position papers will set out the respective cases on liability and damages.

30. At a settlement conference offers of settlement are exchanged. Usually the offers will be “all in” or “inclusive of costs”. If you are for the plaintiff you need to be able to tell your client what he or she will pay you in costs and what deductions will be made for Medicare and Centrelink charges, if any. You need to be able to provide an “in hand” figure if an offer is accepted. You need to

advise about preclusion periods. Failure to have accurate and comprehensive information makes settlement difficult or impossible and lets down the client (who may sue you if you have given wrong or inadequate advice).

- **Trial**

31. Very few personal injuries claims go to trial. This is because they are expensive and unpredictable. Try to settle your case if you can. However, if a trial is unavoidable timely preparation is important. You will need to comply with all rules for service of medical reports (note section 15 *Personal Injuries (Civil Claims) Act* abolishing legal professional privilege for medical reports) and if video evidence is to be given you will need to comply with the relevant rules.

Anthony Young
William Forster Chambers
30 July 2012