

Pitfalls in Personal Injury Litigation

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LEGAL PRACTITIONERS
LIABILITY COMMITTEE

Contents

Introduction	1
The Causes	2
The Best Risk Management - An Informed Client	2
The Most Common Mistakes	3
1. Missing VWA time limits	3
2. Failure to issue proceedings	4
3. Failure to consider or investigate causes of action	5
4. Failure to act resulting in delays and/or strike out applications	8
5. Revisited settlements	9
6. Inappropriate terms of settlement	11
7. Revisited results by dissatisfied litigants	12
8. Failure to appeal a TAC assessment	13
9. Sue for costs and receive a counterclaim for negligence	13
Emerging Risk: Tort Reform	15
LPLC Personal Injury Litigation Checklist	18
Appendix One	22

Common Law Rights and the *Accident Compensation Act* 1985

Introduction

Almost inevitably, clients only seek out litigation lawyers when something has gone wrong. In the personal injury arena, clients have the added difficulty of dealing with a physical or mental impairment and the consequences that flow from that.

This means that the relationship is going to be difficult from the start. It can be made even more difficult if litigants are faced with inconvenient delays, unexpected costs and a court system that may be unfamiliar and confusing to them.

It is not surprising, therefore, that litigation lawyers in general are faced with a significant number of claims each year. Litigation claims made up 26% of the total number of claims and 28% of the total cost for the period 1 July 2003 to 30 June 2004. About half of all litigation claims concern personal injury actions and most of these claims are made against Plaintiff personal injury lawyers.

There are steps you can take to minimise the risk of receiving a claim. *Pitfalls in Personal Injury Litigation* explains these steps and provides a practical checklist to help you avoid claims. Our companion publication *De-coding Commercial Litigation* examines the risks facing commercial litigators.

The mistakes catalogued in *Pitfalls in Personal Injury Litigation* are drawn from LPLC's claims experience over the last three years.

Personal injury lawyers will be aware of the recent High Court decision, *D'Orta-Ekenaike v Victorian Legal Aid* [2005] HCA 12, which has preserved advocates' immunity from suit for negligence in the conduct of a case in court and for out of court work intimately connected with the conduct of a case in court.

At the time of going to print, the scope of the immunity is under review and may be narrowed by legislative intervention.

Regardless of the status of the immunity and any defences that may be available as a consequence, personal injury lawyers should continue taking the steps necessary to minimise the risk of a claim.

The Causes

Litigation is an unfamiliar environment for many litigants. It can also be a very emotionally charged environment, particularly for personal injury plaintiffs.

For these reasons, solicitors need to manage not only the law but also the client and the retainer. They need to communicate with their clients at all stages of the process about what is happening and likely to happen while keeping a written record of their communications.

Unfortunately, we find that the underlying causes of most of the litigation claims arise from the failure by the solicitor to do these things.

Claims arise for a variety of reasons:

- poor engagement management (clarifying and managing the retainer);
- poor communication with the client throughout the life of the retainer;
- lack of a “useable trail” (file notes and correspondence); and
- failure to manage the legal issues (usually where a solicitor is acting outside his or her area of expertise).

The Best Risk Management – An Informed Client

There are many instances where the client’s actions or refusal to accept advice will put you at risk.

Where the client is taking a risk you must ensure that the risk is not transferred to you.

Advise the client of the risks and record that advice in a file note and a confirmatory letter to the client. Also make sure you include the client’s response to the advice you gave.

The Most Common Mistakes

1. Missing VWA time limits

This is the largest source of claims - nearly one in four claims relates to a failure to comply with the VWA timetable costing, on average, \$1 million each year for the past three years.

The complexity of the strict procedures and time limits set out in sections 135A and 134AB of the *Accident Compensation Act* 1985 are, in part, an explanation for the claims we are seeing. Solicitors who practice in this area must make sure they are aware of all of the time limits and have a well developed system for tracking them. Solicitors who do not practice in this area should not dabble in it!

There are three common errors we have seen so far:

- Missing the 30 day time limit for issuing an originating motion after a serious injury certificate has been denied by the VWA or private insurer.
- Issuing a writ either too early (within 21 days after a statutory counter offer) or too late (more than 51 days after a statutory counter offer or 30 days after the date of a deemed counter offer).
- Failing to understand how the deeming provisions work. That is, the timetable keeps 'ticking' even though a party fails to comply with a step (such as making an offer or responding to the initial application) because responses are "deemed" to have been given.



We recommend:

- You should not dabble in this area if it is not your usual area of practice.
- Be aware of all of the time limits and how they overlap and interact with each other.
- Understand how the deeming provisions work.
- Create a well developed system for tracking the timetable, including follow up reminders.

See our commentary in Appendix One.

2. Failure to issue proceedings

This continues to be the source of a large number of claims. These claims arise for a number of reasons:

- Solicitors dealing with personal injury cases traditionally carry a large file load and some cases do not reach, or are incorrectly recorded in, the system for tracking deadlines.
- The client's changing symptoms or the vagaries of the medical evidence leave the solicitor with an inaccurate or incomplete view of the real situation.
- The solicitor provides some preliminary advice on prospects but does not advise on the limitation period. The client goes away to "think about it" but "thinks" too long.
- The solicitor is waiting for funds but has not told the client of the limitation period.
- The solicitor experiences difficulty in getting the file from the client's previous solicitors.
- The solicitor fails to appreciate that as the incident occurred in a different State, different limitation periods apply.
- The solicitor is aware of an impending cut-off date but sends the application by DX too close to the deadline and it does not arrive in time.



Examples:

Failure to advise of limitation period in writing

When the solicitor first saw the client about a work related injury to the head and neck, it was agreed that the solicitor would seek approval from the relevant insurer to meet the costs for a medical assessment for permanent impairment. The client was impecunious and could not afford to pay for medical reports. The letter sent to the client after the first meeting merely confirmed the solicitor had written to the insurer. There was no advice about the client's common law rights or limitation periods. Three months later, the client terminated the retainer and collected his papers from the solicitor. A handwritten note signed by the client was all that confirmed this. It was likely the solicitor did not even speak to the client at this point, nor did the solicitor confirm the termination of the retainer or the limitation period in writing. The client maintained he was never told about the limitation period and the solicitor had no "useable trail" to refute this.

Missing impending cut-off dates

The solicitor acted for a client who was injured in a tripping incident. All enquiries and investigations were essentially complete a year before the limitation period expired. However, proceedings were still not issued within time. The firm had a system for recording critical dates. The time limits should have been calculated when the file was opened and placed in the diary system so that a reminder would be issued to the solicitor at a suitable time prior to the critical date. However, the system had fallen into disuse with the turnover of a significant number of support staff. The personal assistant to the partner handling the case had a personal crisis and resigned. The partner was gearing up for long service leave and delegated the task of briefing counsel to draft a statement of claim, without reference to the physical file, not realising the critical date was imminent.



We recommend:

- Make file notes of conferences with your client.
- Confirm your advice in writing.
- Tell your client of the limitation period (at the start of a retainer and when the retainer is terminated) and confirm it in writing.
- Set up systems for tracking deadlines and actively monitor their effectiveness.
- Be careful about the method of lodging applications and proceedings when deadlines are near.

3. Failure to consider or investigate causes of action

This category of claims makes up nearly a quarter of the cost of personal injury claims. The benefit of hindsight may make these claims hard to defend but the real issue is generally the lack of a “useable trail” (file notes and correspondence). These claims typically arise in the following scenarios:

- The client’s condition deteriorates and the possibility that the client may cross the serious injury threshold is not considered.
- The solicitor considers that the client does not have a good common law case but does not advise the client about the merits, or does advise but fails to confirm this advice in writing.

- The solicitor fails to investigate the possibility of a common law action and only pursues statutory compensation under the *Accident Compensation Act 1985*.
- The solicitor is consulted in relation to the client's family law or other type of claim. The client informs the solicitor that he or she has suffered an injury. The solicitor does not investigate this potential other claim (as it is not made clear the solicitor is retained to do so) and does not refer the client to a personal injury specialist.
- Proceedings are issued in one State when they should have been issued in the State where the incident took place.



Examples:

Subsequent deterioration

The client suffered back and elbow pain and severe headaches from working in a factory. The solicitor advised her in writing after the initial conference that it was unclear if she had a common law claim and further medical evidence would be required. He also told her the limitation period. Sixteen months later, the solicitor advised the client not to apply for a serious injury certificate because the medical evidence would not support the application. Eight months later, the client had an MRI and was told she may need surgery. At this time, the solicitor was focused on resolving the section 98 claim and failed to appreciate the deterioration in the client's condition. Due to changes in legislation, the client's limitation period expired four months earlier than previously noted.

Second cause of action

The solicitor was instructed by a policeman who was shot during a police raid as the result of the negligence of his fellow officers. The solicitor only pursued a crimes compensation claim as the client had said that he did not wish to pursue a claim against his colleagues as he wished to remain in the police force. The solicitor did not confirm the client's instructions in writing, nor did he advise the client of what to do if he changed his mind or of the limitation period that applied.

More than one injury

The client consulted the solicitor in relation to work related injuries when he fell from a platform having been struck by a crane. The client's work involved a lot of heavy lifting. An application for a serious injury determination was made but it did not include all the injuries that the client had suffered and did not refer to injuries suffered as a result of the general nature of the work. The application was unsuccessful.



We recommend:

- Be forensic in your approach to taking initial instructions. Take the time with your client to tease out a comprehensive background.
- Keep detailed file notes of conferences with your client, particularly the initial conference.
- If you decide that your client does not have a common law claim, give your client reasons why and record those reasons on the file.
- You should also suggest that if your client has any concerns about the advice or prospects, a second opinion should be obtained.
- If further investigations are possible, advise your client about the type of investigations that could be made and why you believe that they should or should not be undertaken.
- Advise your client of any limitation period.
- Send your client a retainer letter after the initial conference:
 - including your notes of the conference, and asking the client for any further instructions he or she may have forgotten during the conference (or convert your file note into a proof of evidence and send that instead);
 - setting out your arrangement for costs;
 - confirming any advice you gave the client (including the limitation period), even if it is preliminary advice and subject to obtaining further information; and
 - confirming what you will undertake for the client.

4. Failure to act resulting in delays and/or strike out applications

There are a number of reasons why these claims occur:

- the case or an issue in the case is “too hard” or the solicitor has a ‘mental block’;
- the client is non-responsive or difficult;
- the solicitor becomes side tracked; or
- counsel ‘sits’ on the brief.



Examples:

The “too hard” case

The client consulted the solicitor in relation to injuries suffered in a motor vehicle accident whilst serving in the armed forces 17 years earlier. The client had subsequently begun to suffer epilepsy and mental illness. The client was impecunious and the solicitor encountered difficulties in obtaining legal aid funding for medical reports. The solicitor also experienced difficulty in obtaining evidence to support a claim against the Department of Defence. The client then gave instructions in relation to injuries suffered in a fall at a supermarket. Again, there were difficulties in obtaining funding, in obtaining evidence in support of the claim and delay in the supply of reports by medical experts. The delays were compounded by the solicitor’s health problems.

The non responsive client

The client had a fall in a supermarket and injured her back and shoulder. She consulted the solicitor four years later. Proceedings were issued 12 months later when negotiations failed. The client did not speak English and did not respond to correspondence and then moved house without keeping the solicitor informed. The solicitor was unable to locate the client at the time the writ needed to be served. Given the client’s general disinterest in the matter, the solicitor allowed the writ to go stale. After the limitation period had expired, the client contacted the solicitor and complained.



We recommend:

- Do not allow the 'too hard basket' cases to drag on. Refer a file you have a 'mental block' about to a colleague or seek advice from specialist counsel.
- Communicate with your client about the delays in a case and, where your client is causing the delay, set out in writing the consequences of continued delay and any relevant time limits.
- Where your client fails to give you instructions to proceed over a significant period of time and written warnings have not been heeded, consider terminating the retainer. If you do terminate the retainer, advise your client in writing, giving details of any time limits.
- Do not let briefs languish with a barrister. Find out, and act on, what further information the barrister requires. Do not accept excuses for delay from counsel. Have an office policy about retrieving briefs from non-performing counsel. Set time limits in which counsel must perform.
- Review files on a regular basis.

5. Revisited settlements

Revisited settlement claims usually arise several years after the client's personal injury claim has settled. The client alleges that, in fact, the claim was worth far more than he or she was advised to settle for. These claims are sometimes difficult to defend because of lack of file notes, correspondence or information on the file.

These claims typically arise in the following scenarios:

- The solicitor fails to properly manage the client's expectations.
- The solicitor fails to explain to the client how a settlement conference will work and what to expect. The client becomes distrustful of the process and the result.
- The client feels pressured into settling just before trial because of a perception that the case has not been properly prepared.
- An earlier settlement offer is rejected but the client is advised to accept a later settlement offer of a lower amount.
- The effect of settlement on the client's entitlement to benefits is not properly explained.
- The solicitor deducts costs from the settlement amount without properly explaining the level of costs.



Examples:

Not managing the client's expectations

The solicitor acted for a client who was badly injured in an industrial accident. At their first meeting, the solicitor told the client that his claim was worth about \$400,000. The client was sent off to various medical appointments and the solicitor investigated the cause of the accident and who was responsible for it. The client was not kept informed of any of the results of these investigations. The mediation date was changed at the last minute. The solicitor handling the file and the barrister involved also changed just before the mediation. Only a short meeting with the barrister was arranged just before the mediation. Not surprisingly, the client was completely shaken at the mediation when told an offer of \$200,000 should be accepted. The solicitor had failed to properly prepare the client's expectations in relation to the value of the case.

No record of advice, particularly when the client does not follow advice

After granting a serious injury certificate, the VWA made a statutory offer. The client instructed the solicitor to make a statutory counter-offer at a much higher level than advised by the solicitor. The advice was given in conference and not confirmed in writing. Eventually the matter did settle at a much lower level, mainly because of the costs risks, but the client alleged that the amount was inadequate.



We recommend:

- You should manage the client's expectations in relation to the value of the claim throughout the life of the case:
 - give your client preliminary advice about the value of the case early on and inform your client that this may change as evidence is obtained; and
 - update your client on the value of the case as new evidence is obtained.
- Before a settlement conference or when advising in relation to settlement:
 - ensure that you have up to date medical evidence including copies of the other side's medical reports that you are entitled to;

- read and review medical reports carefully, comparing any inconsistencies and discussions of future treatment; and
- look out for latent diseases or other injuries not covered in your client’s claim and watch out for injuries that have not stabilised.
- Advise your client about how any settlement conference will be conducted and what to expect, well before the conference.
- Advise your client on the effect of settlement, and document advice on key issues:
 - entitlement to weekly payments;
 - common law rights;
 - entitlement to social security payments (particularly the existence of preclusion periods);
 - up to date information on costs.
- Where the client wants to settle for an amount you think is too low, make a contemporaneous file note of your advice to the client (including the reasons the client has given you for settling) and confirm this in writing.

6. Inappropriate terms of settlement

This category of claims involves a variety of mistakes but most commonly terms of settlement or releases which are too broad.



Example:

All injuries release for settlement of one incident

The client instructed the solicitor in relation to her workplace injuries which affected her left leg, neck, back and arms. The Medical Panel assessed impairment at 10% for both arms but no impairment in respect of the other injuries. Proceedings were issued seeking damages for injuries to leg, neck, back and arms. The solicitor advised the client to accept an offer made in respect of the arm injuries and to continue the proceedings in respect of the other injuries. The release, however, was for all injuries, preventing the client from recovering any damages for the other injuries.



We recommend:

- Stop to consider if the release covers only the matters raised by the proceeding and your client's instructions.
- If the release is wider than the matters raised by the proceeding, advise your client about this and the ramifications. Consider the consequences of an 'all forms all injuries' release.
- Advise your client of the effect of settlement, and document the advice on key issues:
 - entitlement to weekly payments;
 - common law rights;
 - entitlement to social security benefits (particularly the existence of preclusion periods);
 - up to date information on costs.

7. Revisited results by dissatisfied litigants

These claims arise when clients do not obtain the result that they wanted at trial and complain:

- the case was not properly prepared or the evidence not properly presented; or
- they should have been advised to accept an earlier settlement offer.

Of course, some of these claims may be subject to immunity defences available under *Giannarelli v Wraith* (1988) 165 CLR 543 or *D'Orta-Ekenaike v Victorian Legal Aid* [2005] HCA 12.



Example:

Failure to advise of cost consequences

The client was injured when she tripped over a speed hump which she alleged was defective in design. The defendants offered to settle the claim on a 'walk away, bear own costs' basis. This offer was repeated at the pre-trial conference. The client rejected both settlement offers, contrary to the solicitor's advice. Neither the client's instructions nor the solicitor's advice was confirmed in writing. The client was unsuccessful at trial and later claimed that she was not advised of the cost consequences of rejecting the defendant's offer. She further claimed that the case was not properly prepared as the solicitor failed to trace a material witness.



We recommend:

- Warn your client about the specific risks of litigation, particularly cost consequences, preferably well before the door of the court.
- Advise your client about the progress of the trial and make settlement recommendations, if necessary.
- Where an offer is made and rejected, either on or against your advice, confirm these instructions and the advice in writing.

8. Failure to appeal a TAC assessment

The *Transport Accident Act* 1986 provides that if a person wishes to appeal a decision of the Transport Accident Commission (TAC), then an application must be made within **12 months** of becoming aware of the decision.

There have been a number of claims where solicitors have missed this cut-off date or have failed to consider the possibility of appealing the TAC decision.



We recommend:

- Tell your client about his or her rights to appeal a TAC impairment assessment and the limitation period, setting out the cut-off date clearly in writing.
- Diarise the cut-off date.
- Obtain any further medical evidence necessary well before the cut-off date.
- Be careful about the method of lodging applications when deadlines are near.

9. Sue for costs and receive a counter claim for negligence

This unusual category of claims arises mainly in litigation and family law cases. The claims occur when the solicitor seeks to recover costs and is met with allegations of negligence in response.

The allegations of negligence are sometimes unfounded and come 'out of the blue'. In some cases, they are designed merely to slow down the cost recovery process but, in other cases, the client feels he or she has a legitimate complaint about treatment by the solicitor and objects to paying the bill.

Sometimes, the client has unrealistic expectations about the costs likely to be incurred and the likelihood of losing the case. In other cases, the solicitor has not kept the client promptly informed of the delays experienced in getting to court, the reasons for those delays and the effect on the costs incurred.



We recommend:

- Keep your client informed, on an ongoing basis, on key issues:
 - costs;
 - the likely success of the case; and
 - any delays that occur and how they will affect the costs.
- Consider the possibility of any allegations of negligence before issuing cost recovery proceedings and weigh up the cost involved.

Emerging Risk: Tort Reform

In response to the public liability insurance 'crisis', the following legislation was passed by the Victorian Government aimed at removing smaller personal injury claims from the system and setting limits on particular heads of damage for the larger claims:

- *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002*;
- *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003*; and
- *Wrongs and Other Acts (Law of Negligence) Act 2003*.

Note: the changes do not apply to work or transport accidents or accidents covered by other statutory regimes.

Many significant changes have been made by the legislation:

- Reduced time limits apply for injuries sustained on or after 21 May 2003 and for injuries before 21 May 2003 where proceedings were commenced on or after 1 October 2003:
 - **3 years** from the date of discoverability for adults;
 - at the latest, **12 years** from the date of the act or omission causing death or injury, even if the date of discoverability has not yet occurred;
 - **6 years** from the date of discoverability for persons under a disability (including minors) but with a limit of **12 years** from the date of the act or omission causing death or injury.
- The date of discoverability is the first day it is known (or should have been known) that the injury occurred and that it was caused by the fault of the defendant and was sufficiently serious to justify the bringing of an action.
- The introduction of a threshold for the recovery of general damages (other than injuries caused by an intentional act or sexual assault). General damages can only be recovered by those who have suffered a "significant injury" defined as -
 - more than 5% permanent impairment for a physical injury;
 - more than 10% impairment for a psychiatric injury;
 - loss of a foetus;
 - loss of a breast.
- The respondent may agree to waive a requirement for assessment of degree of impairment and accept that the claimant has a "significant injury". There are time limits set to do this.

- Where the respondent does not agree to provide such a waiver, the assessment of degree of impairment is determined by a medical practitioner in accordance with the AMA Guides. Multiple injuries are to be assessed together. The assessment can be accepted by the respondent or challenged by referring it to a Medical Panel within **60 days** after being served with the certificate of assessment. If the respondent fails to respond, then the respondent is deemed to have accepted the assessment.
- Where a Medical Panel is not satisfied that a claimant's injuries have stabilised, it may refuse to provide an opinion. If the Medical Panel is still unable to provide an assessment one year after first assessing the claimant, he or she is deemed to have sustained a "significant injury".
- The service of a certificate of assessment suspends the limitation period until the expiry of **3 months** after the assessment is accepted or deemed accepted.
- The claimant must file at court, before the determination of the claim, the certificate of assessment (or a waiver agreement) and any determination by the Medical Panel or a statement to the effect that the respondent has been deemed to have accepted the assessment.
- General damages are capped at \$371,380 indexed to CPI (equal to the maximum amount available under the TAC legislation).
- There are now limitations on recovery of special damages:
 - loss of earnings is capped at three times the average weekly gross earnings of all employees in Victoria at the date of the award;
 - the discount rate used to calculate lump sum payments for future economic loss has increased from 3% to 5%.
- Damages for gratuitous attendant care can only be recovered if the care was provided -
 - for more than 6 hours per week;
 - for more than 6 months;
 - where there is a reasonable need for care; and
 - the need for care arose solely because of the injury and would not have been provided otherwise.

- If gratuitous attendant care was provided for more than 40 hours a week, then the level of damages must not exceed an amount per week equivalent to the average weekly total earnings of all employees in Victoria.
- If gratuitous attendant care was provided for less than 40 hours a week, then the level of damages must not exceed an hourly rate based on 1/40th of the average weekly total earnings of all employees in Victoria.
- Limitations on liability for volunteers, food donors, providers of recreational services, public authorities and Good Samaritans (persons providing assistance, advice or care with no expectation of financial reward).
- Restrictions on liability toward people under the influence of drugs or alcohol, and people engaged in illegal activities.
- The reversal of the onus of proof where a person is injured by an “obvious risk” and the defence of voluntary assumption of risk is raised.

All solicitors should read the legislation and familiarise themselves with the changes.

The changes should see the volume of personal injury work fall and, to that extent, some risk diminish. However, as with any reform of the law, there is the potential for solicitors to be exposed to claims in various ways:

- Failing to properly consider or investigate whether the threshold for general damages has been satisfied.
- Not being aware of the shortened limitation periods or the new ways of calculating them.
- Not managing the client’s expectations in relation to the value of the case, given the limitations on recovery of various heads of damage.
- Failing to understand how the deeming provisions for “significant injury” work.
- Failing to file a certificate of assessment.

LPLC Personal Injury Litigation Checklist

This is not a comprehensive checklist but it will help you to avoid most of the mistakes made by solicitors in personal injury litigation matters. The checklist can be photocopied for ongoing use.

Client

Matter

Initially

- ❑ Make a detailed file note of your initial conference with your client, including -
 - the information the client gave you;
 - the advice you gave the client; and
 - what both of you agreed to do after the conference.
- ❑ Send your client a retainer letter after the initial conference which includes -
 - your notes of the conference, asking the client for any further instructions forgotten during the conference (or convert your file note into a proof of evidence and send that instead);
 - your arrangement for costs;
 - confirmation of any advice you gave the client;
 - confirmation of what you will undertake for the client; and
 - confirmation of any limitation periods.
- ❑ If you decide that your client does not have a common law claim:
 - give the client reasons why;
 - confirm those reasons in writing; and
 - suggest that if he or she has any concerns about the advice, a second opinion should be obtained.

Managing the proceeding and the client

- ❑ Manage the client's expectations in relation to the value of the case throughout the life of the case:
 - give your client preliminary advice about the value of the case early on;
 - inform your client that this advice may change as further evidence is obtained; and
 - regularly update your client on the value of the case.
- ❑ Regularly update your client about -
 - costs; and
 - any delays that occur and how these will affect the costs.
- ❑ Do not allow a 'too hard basket' case to drag on. Refer the matter to a colleague or seek advice from specialist counsel.
- ❑ Do not let briefs languish with a barrister:
 - find out, and act on, what further information the barrister requires;
 - do not accept excuses for delay from counsel;
 - have an office policy about retrieving briefs.
- ❑ Communicate with your client about the delays in a case:
 - where the client is causing the delay, set out in writing the consequences of continued delay and any relevant time limits;
 - where the client fails to give you instructions to proceed, consider terminating the retainer; and
 - if you do terminate the retainer, advise the client in writing and give the client details of any time limits.

Settlement

- ❑ Before a settlement conference or when advising in relation to settlement -
 - advise your client about how the settlement conference will be conducted and what to expect;
 - ensure you have up to date medical reports, including copies of the other side's medical reports you are entitled to;
 - read and review medical reports carefully, comparing any inconsistencies and discussions of future treatment; and
 - look out for latent diseases or other injuries not covered in your client's claim and watch out for injuries that have not stabilised.
- ❑ Where the client wants to settle against your advice or refuses to accept your advice to settle, make a contemporaneous file note of your advice to the client. Confirm this in writing.
- ❑ Does the release cover the matters raised by the proceeding and your client's instructions?
- ❑ If the release is wider than the matters raised by the proceeding, advise your client about this and the ramifications. Consider the consequences of an 'all forms all injuries' release.
- ❑ Document your client's instructions and your advice in relation to settlement negotiations. Advise your client about the effect of settlement on entitlement to benefits.

Deadlines

- ❑ Where the time limits are short, such as VWA applications, be aware of how the timetable works, especially the deeming provisions. See Appendix One.
- ❑ Maintain a well developed system for tracking the timetable, including follow up reminders. Actively monitor its effectiveness.
- ❑ Act quickly in obtaining evidence.
- ❑ Be careful about the method of lodging applications and proceedings when deadlines are near.
- ❑ Take note of, and diarise carefully, any self-executing orders.
- ❑ Review files on a regular basis.

Generally

- ❑ Keep detailed file notes of all conferences and all telephone conversations with your client and others.
- ❑ Your file notes should -
 - be dated;
 - identify the author;
 - record the duration of the attendance;
 - record who was present or on the telephone;
 - be legible to you and someone else;
 - record the substance of the advice given and the client's response / instructions; and
 - be a note to the file rather than a note to yourself.
- ❑ Confirm all of your advice in writing to the client.

Appendix One

Common Law Rights and the *Accident Compensation Act 1985*

Amendments to the *Accident Compensation Act* ("the Act") in 2000 preserved and restored common law rights for some workers subject to **strict procedural conditions**. Some of these procedures were changed by further amendments to the Act in late 2004.

For what injuries are rights available?

Injuries before 1 December 1992:

Actions can still be brought if incapacity was not known until after 1 December 1992.

Injuries between 1 December 1992 and 12 November 1997:

A right of action is effectively extinguished unless an application for a serious injury certificate was made before 1 September 2000

Unless: Incapacity was not known until after 12 November 1997.

Note: Limitation period is then 3 years from date of knowledge of incapacity.

Injuries on or after 12 November 1997 and before 20 October 1999:

No common law rights.

Injuries on or after 20 October 1999:

Common law rights resurrected.

Time limits

There are strict procedures and time limits prescribed by section 135A of the Act for injuries suffered on or after 1 December 1992 and prior to 12 November 1997 and by section 134AB for injuries suffered on or after 20 October 1999. These time limits are strictly enforced by the Victorian WorkCover Authority (VWA). You should only act for clients who may have a common law cause of action if you are fully aware of the requirements of the Act and any related Regulations and Ministerial Directions.

What follows is offered only as a guide to the key areas of risk in the Act's procedures for common law proceedings in relation to post 20 October 1999 injuries (and in accord with the 2004 amendments). Reference to the VWA includes self-insurers.

Which pathway?

The first step is to decide which is the appropriate pathway for your client to access the common law process.

A. Impairment assessment pathway (s.104B and s.134AB(3)(a) of the Act)



B. Serious injury pathway (s.134AB(3)(b) of the Act)

An alternative pathway was introduced by the 2004 amendments.

After at least 18 months from the date of injury, the client can elect to avoid the extensive tests and delays often involved in the impairment assessment pathway by making an application to the VWA on the ground that the injury is a “serious injury” as defined:

- permanent serious impairment or loss of a body function; or
- permanent serious disfigurement; or
- permanent severe mental or permanent severe behavioural disturbance or disorder; or
- loss of a foetus.

The consequences of the injury need to be “very considerable” in terms of pain and suffering and economic loss. If the serious injury pathway is taken, proceed to *Gateways* below.

Note: This pathway is subject to any Ministerial Directions specifying or limiting the classes of cases or circumstances in which an election can be made. At the time of publication no such directions have been made. In these circumstances, it is probable, but by no means certain that, in the absence of any Ministerial Directions, a client who considers that he/she has a serious injury can make an election.

Gateways

1. An application must be made to the VWA.

- The application can only be made if an Impairment Determination has been made and the client accepts the determination OR a Medical Panel Opinion has been provided (Pathway A) OR the client elects after at least 18 months from the date of injury (Pathway B).
- The application **must** be in the form approved by the VWA and must include material as required by Ministerial Directions including medical reports, affidavits of client and witnesses, expert reports, proposed statement of claim and tax returns for 3 years before and 3 years after injury (or, if less than 3 years, to the date of the application).

2. VWA must within **120 days** of receiving the application advise the client that -

- The client is deemed to have a serious injury (ie. 30% or more impairment). If so: proceed to Pre-Litigation Timetable ("PLT") (see below).

OR

- The client is not deemed to have a serious injury, but the VWA will issue a certificate consenting to bringing proceedings on the basis that it is satisfied the injury is a serious injury. If so: proceed to PLT (see below).

OR

- The client is not deemed to have a serious injury and the VWA will **not** issue a certificate. The client must then apply on the ground of serious injury to the Court for leave to bring proceedings within **30 days** of receiving the advice. If leave is granted: proceed to PLT (see below).

(**Note:** if the client fails in the application for leave and then later obtains a section 104B determination of 30% or more impairment, the client cannot then obtain damages).

Note: If the VWA fails to respond within **120 days**, the client is deemed to have a serious injury and can proceed to PLT (see below).

Pre Litigation Timetable

Each step in this timetable **must** be completed and completed within time. Non compliance with time limits may **eliminate** common law rights.

You should note that time runs from each step progressively so that the total period may be **substantially decreased**.

You **cannot** issue common law proceedings without complying with the timetable.



Costs consequences re statutory offers and counter offers

If the worker recovers less than the VWA's statutory offer, the worker must pay party/party costs and his or her own costs.

If the worker recovers more than the statutory offer but less than 90% of the worker's statutory counter offer, each party bears its own costs.

If the worker recovers 90% or more of the statutory counter offer and the amount is greater than the VWA's statutory offer, the VWA pays the worker's costs.

As section 134AB makes provision for reductions for contributory negligence and previously paid other benefits, such as weekly payments or lump sum compensation, care must be taken in assessing any statutory counter offer.

**Legal Practitioners'
Liability Committee**

Level 10
150 Queen Street
Melbourne VIC 3000
Telephone 9670 2001
Facsimile 9670 5538
www.lplc.com.au



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