

August 2018

PITFALLS IN PERSONAL INJURY LITIGATION

AN LPLC PRACTICE RISK GUIDE



Contents

Personal injury litigation	2
Claims statistics	2
The causes	4
The best risk management – an informed client	5
Common mistakes	6
1 Missed common law potential	6
2 Delay/strike out	9
3 Revisited settlements	11
4 Inappropriate terms of settlement	14
Workplace injuries	15
1 Failing to consider or investigate cause of action	16
2 Failing to issue proceedings	18
3 Timetable issues	21
Public liability and medical negligence	23
1 Failing to consider or investigate cause of action	23
2 Failing to issue proceedings	25
3 Jurisdictional uncertainties	27
4 Limitations of Actions Act issues	28
5 Significant injury thresholds and caps on damages	29
Transport accident claims	30
1 Jurisdictional issues	30
2 Failing to appeal a TAC assessment	31
3 Nervous shock claims	32
4 Pigeon-holed claims	33
Emerging area of risk	34
1 Personal cost orders	34
2 Further reading	36
LPLC Personal Injury Litigation Checklist	37
Appendix 1	42
Common law rights and the Accident Compensation Act 1985 (Vic) and the Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)	42

Personal injury litigation

Clients seek out litigation lawyers only when something has gone wrong. In the personal injury arena, they have the added difficulty of dealing with a physical or mental impairment and its consequences.

This means the relationship is going to be challenging from the start. It can be made even more difficult if litigants are faced with delays, unexpected costs and confusion with an unfamiliar court system.

So it is not surprising that personal injury lawyers, especially plaintiff personal injury lawyers, are faced with costly claims. The mistakes catalogued in this guide are drawn from LPLC's claims experience.

Pitfalls in personal injury litigation explains the steps you can take to minimise the risk of receiving a claim and provides a practical checklist to help you in claims prevention. Our companion publication *Commercial litigation – stay alert* is also a useful resource for personal injury lawyers as it examines the risks facing commercial litigators.

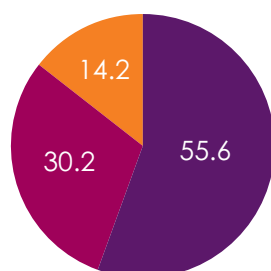
Personal injury lawyers will be aware of the extent of the immunity from suit for negligence which was the subject of High Court decisions in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 and *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16. Beyond the immunity and any available defences, there are many traps for practitioners in the complex area of personal injury law.

Claims statistics

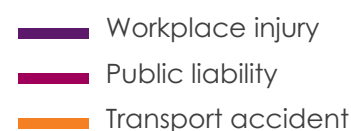
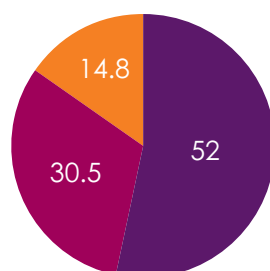
Between 2007 and 2017, claims from personal injury litigation matters accounted for around eight per cent of the number of claims received by LPLC and nine per cent of the total claims cost. This proportion of LPLC's total claims cost varied considerably from year to year during that period.

The proportion of personal injury litigation claims arising from each of the three main matter types between 2007 and 2017 is shown below.

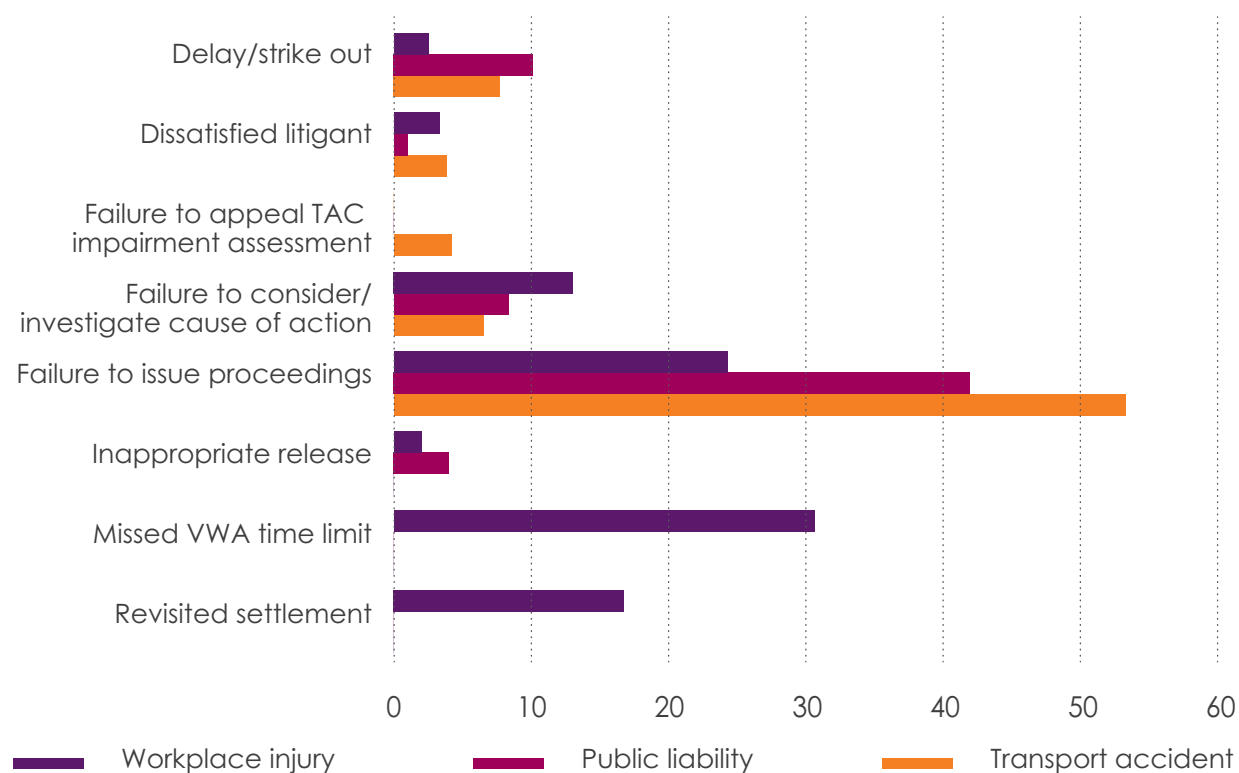
Percentage cost of claims



Percentage number of claims



The eight most costly types of mistakes between 2007 and 2017 are shown in the following diagram:



The causes

Litigation is unfamiliar territory for many plaintiffs. It can also be an emotionally-charged environment.

Claims arise for a variety of reasons including:

- > poor communication with the client
- > failing to manage the legal issues (typically at the front end of the retainer)
- > a reactive approach to managing the engagement, which often leads to time limitations problems
- > lack of continuity between operators handling a file
- > oversight, sometimes underscored by resourcing or systemic failures that allow the oversight to remain undetected
- > absence of contemporaneous files notes and correspondence.

More than 28 per cent of the cost of personal injury litigation claims in the five-year period from 2012 to 2017 was attributed to poor communication.

The best risk management – an informed client

Practitioners need to manage not only the law but also the client and the retainer. Find out what the client's expectations are and manage them from the outset. Explain the litigation process, including the limitation period, the steps to be taken and the time the matter could potentially take to resolve. Be clear about the costs that will be involved including disbursements and how you are to be paid. Continue to communicate with the client throughout the course of the matter.

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. For example, if the client will not consult a medical specialist or settle a matter as advised, you need to explain the risks so the client chooses from an informed position. It is important to use plain language and question the client to confirm they understand the risks.

Record that advice in a file note and then confirm this in a letter to the client. Make sure you include the client's response to the advice you gave.

Common mistakes

While personal injury litigation encompasses many different types of matters and legislative regimes there are some kinds of mistakes that are common to all areas. These are:

- > missing a potential common law claim
- > strike-out of a plaintiff's claim due to delay
- > revisited settlements
- > settlement on inappropriate terms.

1 Missed common law potential

This remains the most costly source of claims, especially in workplace injury and public liability claims. Commentary and examples are provided on specific areas of practice in later chapters of this risk guide.

The critical work for the practitioner at the front end of litigation is to thoroughly investigate the circumstances of a potential common law claim in order to provide informed advice to the client about the claims and likely outcome. This requires the practitioner to have excellent communications skills – listening to the client, asking the right questions and explaining the client's rights in a manner they can clearly understand.

EXAMPLES:

Inadequate investigations

The firm acted for a client who claimed injuries in the course of her employment. It advised the client that her physical injuries would be unlikely to be considered serious under the common law test, which led to settlement of the claim for a small amount. However, the firm did not investigate and advise on the client's mental condition. The client provided no instructions on the condition but it was mentioned in her medical reports. Several years later the claimant saw another firm about her ongoing mental condition and was advised the condition would likely satisfy the serious injury test. Because of the earlier settlement, the claimant was unable to make a common law claim for non-pecuniary loss.

More than one claim

The client consulted the practitioner about injuries suffered in an altercation in a licensed club. Twelve months later, the practitioner commenced a crimes compensation claim and gave generic limitations advice that the client had three years to commence any civil action. The client then told the practitioner he was scheduled to have an MRI scan but did not report the outcome. The client also failed to respond to the practitioner's follow-up email three months later. No further work was undertaken on the potential public liability claim.

When the crimes compensation file was transferred to another operator, the client learned the limitation period for a public liability claim had expired. The client subsequently claimed the firm had not done enough to protect his common law position.

Our recommendations

- ✓ Ascertain the date of injury as early as possible.
- ✓ Keep detailed file notes or record conferences with your client, paying particular attention to the initial conference.
- ✓ Advise your client in writing at the start of the retainer of the limitation period and the consequences if it is missed.
- ✓ Be forensic in your approach to taking initial instructions. Take the time with your client to tease out a comprehensive background.
- ✓ Send your client a retainer letter after the initial conference which:
 - » includes your notes of the conference and asks the client for any further instructions they may not yet have raised. Consider converting your file note into a proof of evidence and sending that to the client instead
 - » sets out your arrangement for costs
 - » confirms any advice you gave the client including the limitation period, even if it is preliminary advice subject to obtaining further information
 - » confirms what actions you will undertake for the client.
- ✓ Be alert to applicable time limits and court timetables throughout the course of a proceeding. Deal proactively with issues that have the potential to delay progress of the proceeding.
- ✓ Set up systems for tracking deadlines and actively monitor their effectiveness. Ensure your systems do not rely solely on one person.
- ✓ If advising a client they do not have a common law claim, provide clear written reasons why.
- ✓ Suggest that if your client has any concerns about your advice they should obtain a second opinion.
- ✓ If further investigations are possible, advise your client about the type of investigations that could be made and why you believe they should or should not be undertaken.
- ✓ Be proactive in following up requested information such as medical reports and instructions from your client. Diarise these tasks.
- ✓ Have documented policies and procedures for the effective handover of files.

2 Delay/strike out

Delay can be fatal to a plaintiff's rights of recovery. Plaintiff lawyers need to be alert to statutory time limits and court timetables to avoid strike-out applications by defendants.

Claims caused by delay and strike-out applications tend to occur because:

- > the case or an issue in the case is 'too hard' or the plaintiff's lawyer has a 'mental block'
- > the client is non-responsive or difficult
- > there are difficulties in obtaining a report from an appropriate medical specialist
- > the practitioner makes an error in recording a hearing date
- > the practitioner is too busy or becomes side-tracked
- > the practitioner ignores or overlooks counsel's advice
- > counsel sits on the brief.

EXAMPLES:

The 'too hard' case

The client consulted the practitioner in relation to injuries suffered in a motor vehicle accident while serving in the armed forces 17 years earlier. He had subsequently begun to suffer from epilepsy and mental illness. The client was impecunious and the practitioner encountered difficulties in obtaining legal aid funding for medical reports. The practitioner also experienced difficulty in obtaining evidence to support a claim against the Department of Defence.

The client then gave instructions about 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 many delays ultimately led to the claims being struck out.

The non-responsive client

The client had a fall in a supermarket and injured her back and shoulder. She consulted the practitioner four years later. Proceedings were issued 12 months later when negotiations failed. The client did not speak English, did not respond to correspondence and moved house without keeping the practitioner informed. The practitioner 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 practitioner allowed the writ to go stale. After the limitation period had expired, the client contacted the practitioner and complained.

Our recommendations

- ✓ Advise your client in writing at the start of the retainer of the limitation date and the consequences if it is missed.
- ✓ Do not allow the 'too hard' cases to drag on. Discuss difficult files with a colleague or seek advice from appropriate counsel. Peer review is an invaluable tool for dealing with difficult files.
- ✓ Explain clearly to your client reasons for delay and the consequences. Where your client is causing the delay set out in writing the ramifications of continued delay and any relevant time limits.
- ✓ Be proactive in obtaining medical reports in sufficient time to meet critical dates.
- ✓ Act quickly in obtaining evidence.
- ✓ Consider terminating the retainer if your client will not give you instructions to proceed and does not heed your warnings. If you do terminate the retainer, do so for just cause and on reasonable notice. **Do this in writing, giving details of any time limits.**
- ✓ If your client is unable to pay accounts as agreed, do not let the file languish in the hope the client will find the money. If you are not prepared to continue acting, terminate the retainer promptly.
- ✓ Do not allow briefs to languish with counsel.
- ✓ Find out what further information counsel requires and follow this up.
- ✓ Do not accept excuses for delay from counsel.
- ✓ Have an office policy about retrieving briefs from non-performing counsel.
- ✓ Set time limits within which counsel must perform.
- ✓ Review files on a regular basis.

3 Revisited settlements

Years after an apparently successful settlement, dissatisfied plaintiffs can materialise with a claim. This is often because the practitioner handling the file had not managed the client's expectations throughout the matter, particularly in the lead up to settlement negotiations. The client felt pressured into settling and then later regrets the settlement and seeks to blame the lawyer. Sometimes the mismanagement of the client expectations occurs when the practitioner handling the file changes during the course of the retainer.

In revisited settlement claims, allegations arise that the claim was worth far more than the amount the client was advised to settle for. These claims are difficult to defend without good file notes or correspondence on the file.

Revisited settlement claims typically involve communication issues including allegations that:

- > the practitioner failed to manage the client's expectations about the worth of the claim
- > the settlement process was not adequately explained to the client by the practitioner
- > the practitioner accepted a settlement offer without the client's authority
- > the client felt pressured into settling just before trial because of a perceived lack of preparation by the practitioner
- > the practitioner did not inform the client of a settlement offer that was subsequently withdrawn
- > an earlier settlement offer was rejected but the client followed advice to accept a later settlement offer for a lower amount
- > the effect of settlement on the client's entitlement to other benefits was not properly explained
- > the practitioner did not sufficiently explain and manage the client's expectations regarding costs.

EXAMPLES:

Not managing the client's expectations

A practitioner acted for a client who was badly injured in an industrial accident and the practitioner valued her claim at between of \$200,000 to \$400,000. The client was sent off to various medical appointments and the practitioner investigated the cause of the accident, but the results of these investigations were not fully explained to her at the time. The mediation date was changed at the last minute and the barrister originally briefed was unable to appear. The client met only briefly with her new barrister shortly prior to the mediation. She was shocked to receive advice at the mediation that she should settle for \$200,000. She had assumed she would recover in the upper range of figures first suggested and the practitioner had not displaced this assumption. She subsequently brought a claim alleging the matter had been under-settled.

No record of advice where client acts against advice

After granting a serious injury certificate, the Victorian WorkCover Authority (VWA) made a statutory offer. The client instructed their practitioner to make a statutory counter-offer at a much higher level than advised by the practitioner. The advice was given in conference and not confirmed in writing.

The matter eventually settled at a much lower level, mainly because of the costs risks, but the client later alleged that the amount was inadequate. The client relied on the high counter offer as evidence of the value of her claim. The practitioner had no written evidence of the advice he gave the client about the value of her claim.

Our recommendations

- ☑ Document your client's instructions. Obtain a full and complete statement which is checked and signed by your client.
- ☑ Manage your client's expectations about the value of the claim throughout the life of the case.
- ☑ Qualify any advice about the value of the case and stress to your client that this may change as evidence is obtained.
- ☑ Warn your client about the specific risks of litigation, particularly cost consequences, well before the door of the court.
- ☑ Check your client understands your advice and record their response.
- ☑ Update your client on the value of the case as new evidence is obtained.
- ☑ Prior to the settlement conference advise your client about how it will be conducted and what to expect.
- ☑ Before a settlement conference or when advising on settlement:
 - » ensure you have up-to-date medical evidence including copies of the other side's relevant medical reports you are entitled to
 - » read and review medical reports carefully, comparing any inconsistencies and discussions of future treatment
 - » look out for latent diseases or other injuries not covered in your client's claim and watch out for injuries that have not stabilised.
- ☑ Explain and document your advice. Where your client wants to settle against your advice, make a contemporaneous file note of your advice including the reasons your client has given you for settling. Confirm this in writing. Where an offer is made and rejected, either on or against your advice, confirm these instructions including the reasons given and the advice in writing.
- ☑ Advise your client on the impact of settlement on:
 - » entitlement to weekly payments and medical expenses
 - » common law rights
 - » entitlement to social security benefits, particularly the existence of preclusion periods.
- ☑ Provide your client with up-to-date information on costs.
- ☑ Advise your client about the progress of the trial and if appropriate make settlement recommendations.

4 Inappropriate terms of settlement

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

EXAMPLE:

All-injuries release for settlement of one incident

The client instructed the practitioner regarding her workplace injuries which affected her left leg, neck, back and arms. The Medical Panel assessed impairment at 10 per cent for both arms but no impairment for the other injuries. Proceedings were issued seeking damages for injuries to leg, neck, back and arms. The practitioner advised the client to accept an offer made for 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. The practitioner and the client did not read the release properly.

Our recommendations

- ☑ 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 explain the ramifications.
- ☑ Consider the consequences of an 'all forms all injuries' release.
- ☑ Advise your client of the impact of settlement on:
 - » entitlement to weekly payments and medical expenses
 - » common law rights
 - » entitlement to social security benefits, particularly the existence of preclusion periods.

Workplace injuries

Lost common law rights of recovery arising from the strict limits imposed by the *Accident Compensation Act 1985* (Vic) and *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) continue to generate costly claims. Claims from workplace injury matters accounted for 55.6 per cent of the cost of all claims from personal injury litigation matters between 2007 and 2017.

Not only are the relevant legislative provisions very difficult to overcome if not complied with but their complexity contributes to the number and cost of claims.

Practitioners in this area need to be familiar with all of the time limits and the various windows of recovery. Practitioners without specialist knowledge in this area should not dabble in it.

Statute-barred rights typically include the following omissions by practitioners:

- > failing to adequately investigate a cause of action
- > failing to issue proceedings
- > non-compliance with statutory timetables.

Our recommendations

- ☑ Do not dabble 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.
- ☑ Create a well-developed system for tracking timetables, including follow-up reminders.

See our commentary in Appendix 1.

1 Failing to consider or investigate cause of action

This category has always been a costly source of workplace injury claims. A critical issue in the defence of these claims is whether the practitioner has adequate file notes and correspondence to track what they investigated.

Scenarios in which these claims have arisen include:

- > the practitioner fails to ask enough questions or the right questions or seek enough evidence to determine the potential for a common law claim
- > the client's changing symptoms or the vagaries of the medical evidence, giving the practitioner an incomplete picture of the injury
- > the practitioner considers that the client does not have a good common law case but does not clearly advise the client why or does advise but fails to confirm this advice in writing
- > the practitioner is focused on statutory compensation, develops 'tunnel vision' and does not consider a potential common law cause of action
- > the client's condition deteriorates and the possibility that the client may cross the serious injury threshold is not revisited.

There is a tendency to 'typecast' claims and claimants from first instructions and sometimes a stoic client presents while still working and the practitioner assumes from that point their condition is not serious. Often a deteriorating condition is signaled during the course of the retainer by objective evidence such as a spinal fusion, the results of an MRI or a change in the number of hours worked. However, practitioners who have claims against them fail to recognise these prompts and reassess the prospects of a common law claim for the client. Strategies for monitoring changing medical conditions and reviewing the implications are essential.

EXAMPLES:

Advice on merits not communicated clearly

The practitioner made a cursory assessment of 'no negligence' at the initial conference with a client, without fully exploring the detail underlying the circumstances of the worker's lifting accident. The letter of advice to the client did not articulate the reasoning why a negligence claim was not viable.

Years later, a more thorough investigation revealed clear evidence of inadequate lifting systems to support allegations of negligence. Had more detailed questions been asked of the client initially or a letter of advice explaining why there was thought to be 'no negligence', the worker's rights could have been identified and pursued before they became statute-barred.

MRI signals changed condition

The client suffered back and elbow pain as well as severe headaches from her factory work. The practitioner advised her in writing after the initial conference that it was unclear whether she had a common law claim and further medical evidence would be required. He also told her about the limitation period. Sixteen months later, the practitioner advised the client not to apply for a serious injury certificate because the medical evidence would not support the application. A further eight months later, the client had an MRI and was told she may need surgery. At this time, the practitioner was focused on resolving the client's impairment benefits claim. He failed to appreciate the deterioration in her condition which should have caused him to re-evaluate her improved common law prospects.

Our recommendations

- ☑ See our recommendations under the earlier section on *Missed common law potential*.
- ☑ If your client has any concerns about your advice suggest they should obtain a second opinion.
- ☑ Advise your client to inform you immediately of changes in work arrangements, major alterations of medical treatment of the injury, specialist referrals or other medical investigations.

2 Failing to issue proceedings

This has been the most costly category of workplace injury claims in recent years, at 40.8 per cent between 2012 and 2017. These claims have arisen for a range of reasons including the following.

- > The practitioner does not review the legislation to ascertain the applicable time limit and how it is calculated.
- > The practitioner does not calculate and diarise the applicable limitation period effectively.
- > No advice on the limitation period is given when the practitioner gives preliminary advice on prospects of success and:
 - » the client goes away to 'think about it' but 'thinks' too long
 - » the practitioner is waiting for funds but the client takes too long
 - » the practitioner has difficulty obtaining instructions from the client.
- > The practitioner waits for the client to seek a further medical opinion but the client takes too long.
- > The client has a terminal illness or life-threatening condition and the practitioner fails to issue proceedings before the client dies.
- > The practitioner waits for the file from another practitioner but it takes too long.
- > The practitioner enters into settlement negotiations and loses sight of the need to file before the limitation period expires.
- > A shorter limitation period from another jurisdiction applies and is overlooked.
- > The practitioner tries to file at the end of the limitation period but the documentation is rejected by the court registry because of non-compliance with procedural requirements.

Some of these mistakes can be attributed to the difficulty of predicting whether a client will meet a serious injury threshold. Given strict time constraints, practitioners need to be proactive in ascertaining the client's condition and issuing proceedings.

EXAMPLES:

Failing to properly calculate limitation period

The practitioner represented a claimant regarding a workplace injury. When VWA rejected the client's serious injury application the client had 30 days under section 134AB(16) of the *Accident Compensation Act 1985* (Vic) in which to seek leave from the court to bring proceedings for recovery of damages. The practitioner was aware of the time limit. However, because the 30 days expired during the court's Christmas vacation period when time was suspended under the County Court Civil Procedure Rules 2008 (Vic) (Rules), the practitioner mistakenly believed that time fixed by the Act would also be suspended. That is not the case, as the Rules regarding time limits apply only to proceedings governed by those Rules and not other legislation. Time was not suspended and proceedings needed to be issued in accordance with the legislation.

Failing to advise of limitation period in writing

When the practitioner first saw the client about a work-related injury to the head and neck, it was agreed that the practitioner would seek approval from the relevant insurer to meet the costs for a medical assessment for permanent impairment. The client could not afford to pay for medical reports. The letter sent to the client after the first meeting merely confirmed the practitioner 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 practitioner. A handwritten note signed by the client was all that confirmed this. It was likely the practitioner did not even speak to the client at this point, nor did the practitioner 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 practitioner had no records to refute this.

Deteriorating condition

The client obtained a serious injury certificate for soft tissue damage. Her back injury precluded her from continuing work. After the statutory conference and before the required statutory offer and counter offer were made, her condition dramatically deteriorated. When disc damage was revealed, the practitioner explained that previous negotiations had been conducted on the basis that the injury was soft tissue in nature.

The deterioration in the client's condition made it difficult to assess the damages and whether she would recover. The medical advice was for the client to have surgery enabling her to return to work but she decided to take a 'wait and see' approach across the Christmas break.

The practitioner did not diarise the final date to issue proceedings and the limitation period expired over the holidays. The need to determine an appropriate strategy apparently went 'off the radar' for both practitioner and client.

Reluctant client

The claimant returned to work three months after suffering a workplace injury. He was reluctant to have medical treatment and seek compensation because his employer was a family member's company. The practitioner was retained two years later and a claim for impairment benefits was settled the following year. The client then instructed the practitioner to make a common law claim but did not follow the practitioner's advice to see a specialist. The practitioner made a serious injury application for pain and suffering only, as the client said he was coping with work. Serious injury was granted and the claim went through the usual statutory process. During this time, the practitioner became aware the client's condition was deteriorating and urged him to see an orthopaedic surgeon. The client finally did so. The matter did not settle as the practitioner chose to wait for the specialist's report.

On receiving the report three months later, it was clear the client could establish economic loss arising from his serious injury. However, such a claim was no longer possible because the serious injury application for pain and suffering could not be amended to add economic loss, or withdrawn and recommenced. The client subsequently alleged the practitioner should have made enquiries that would have shown a case for economic loss earlier. The client also alleged the serious injury application was made prematurely, when his injury was not stable. He argued his lost earning capacity would have been clear if the practitioner had waited as long as possible before making the application.

In addition, the practitioner failed to diarise the period for issuing common law proceedings 21 to 51 days after the statutory counter offer. Consequently, the writ was not issued in time.

Terminal illness or life-threatening condition

The practitioner consulted the client in hospital regarding a potential mesothelioma claim arising out of his employment exposure to asbestos. Almost three weeks later the practitioner emailed counsel that an urgent brief to draw a statement of claim was being delivered. The client died the following day with no statement of claim drawn. The client's estate was prohibited from recovering general damages and loss of life expectancy damages because proceedings were not issued before the man's death. When the practitioner met the client, he had been admitted to hospital for end stage mesothelioma which was diagnosed three months previously. The practitioner had difficulty identifying the correct defendants but should have been aware of the client's precarious position and the need to issue proceedings urgently.

Our recommendations

- ☑ See our recommendations under the earlier section on *Missed common law potential*.
- ☑ Calculate and diarise the limitation period as early as possible.
- ☑ Advise your client in writing at the start of the retainer of the limitation date and the consequences if it is missed. If the matter is unresolved when the matter is terminated, repeat the advice.

3 Timetable issues

We continue to see claims arising from a practitioner failing to comply with the obligation to file a writ with the court within the 21-51 day period of the statutory counter offer. The key to meeting the pre-litigation timetable is formal systems that do not depend entirely on the aptitude of individual operators. Oversights of this nature occur where a key routine relies on one person.

Examples: include:

- > file handovers where inadequate file notes exist
- > failing to correctly enter a date in a diary, a statute of limitations book or database
- > failing to consult a diary, a statute of limitations book or database
- > failing to appreciate that statutory time limits continue to occur during periods of court vacation
- > failing to check when a statutory offer is not received by an anticipated date. In some instances the firm received the relevant correspondence but it was not forwarded internally to the correct operator.

See page 47 for a further explanation of the pre-litigation timetable.

EXAMPLE:

Date not diarised when changing role in firm

The practitioner acted for a client who was injured at work as a result of the actions of a co-worker. The practitioner assisted the client in obtaining a serious injury certificate, attended the settlement conference and dealt with both the statutory offer and counter-offer. Counsel drew a statement of claim but the practitioner fell at the final hurdle by failing to commence common law proceedings within the 21-51 day period following the statutory counter-offer. This occurred when the practitioner moved departments in the firm and lost track of the matter, and filing the writ had not been effectively diarised.

Our recommendations

- ✓ See our recommendations under the earlier section on *Missed common law potential*.
- ✓ Make file notes of conferences with your client.
- ✓ Confirm your advice in writing.
- ✓ Calculate and diarise the limitation period as early as possible.
- ✓ Tell your client when the proceedings must be commenced and confirm it in writing at the start of a retainer as well as when the retainer is terminated.
- ✓ Diarise dates for receiving statutory offers and be proactive about checking if an offer is not received as anticipated.
- ✓ Comply with procedural requirements for filing applications and proceedings, particularly when deadlines are near as failing to do so may cause delays resulting the required date being missed.
- ✓ Be alert to applicable time limits and court timetables throughout the course of a proceeding. Deal proactively with issues that have the potential to delay progress of the proceeding.

Public liability and medical negligence

Claims arising from public liability proceedings typically concern threshold failures at the front-end of litigation. These include failing to investigate the cause of action or to issue proceedings against the correct defendant within time.

Claims arising from medical negligence proceedings are less common but are also addressed in this chapter because of the common limitations rules imposed under Part IIA of the *Limitations of Actions Act 1958* (Vic).

1 Failing to consider or investigate cause of action

Claims resulting from public liability proceedings are more likely to happen at the beginning of litigation. We commonly see mistakes about the identity of defendants and misjudgements about threshold liability issues.

EXAMPLES:

Pigeon-holed claim

A worker received injuries from a horse-riding accident during a work weekend at a country retreat. The workplace injury lawyer handling the file suffered from 'tunnel vision' about the scope of the claim and advised the client that she was unlikely to succeed at common law against her employer. Unfortunately, the liability of anyone else was not explored. It later emerged that there were good common law prospects against the lodge operator because the accident occurred due to an improperly saddled horse. The public liability dimensions of the claim had been overlooked because of the practitioner's initial assumptions about the injury occurring in the course of employment.

Missed public liability claim

A practitioner acted for a truck driver who was injured in the course of his employment when he slipped on loose packaging at an interstate location. The practitioner undertook a range of enquiries to ascertain the client's employer and appropriate jurisdiction for a worker's compensation claim as well as the extent to which previous injuries could affect an assessment of damages. However, the practitioner overlooked the possibility of a public liability claim against the occupier of the premises where the accident occurred. Any public liability claim was statute-barred when the practitioner eventually turned his mind to the issue.

Our recommendations

- ☑ See our recommendations under the earlier section on *Missed common law potential*.
- ☑ Identify all potential causes of action available to your client.
- ☑ If the cause of action is outside your retainer or expertise, advise your client of their potential rights and the need to consult an expert with relevant expertise.

2 Failing to issue proceedings

Out-of-time public liability claims have been costly in recent years. In many cases, the limitation deadline is on the practitioner's radar but is mismanaged for a variety of reasons. In some instances, the practitioner waited for a lengthy period of time for a medical report or instructions from the client and failed to be proactive in following up and ensuring the matter progressed. Changes of operator on a file featured in several claims.

EXAMPLES:

Cumulative errors

The practitioner 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 and the time limits should have been calculated when the file was opened and placed in the diary system so a reminder would be issued to the practitioner 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 and 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.

Hesitation where liability issues unclear

The practitioner acted for a minor who was seriously injured in a bike accident at the rural property of a family friend. There was confusion about whether the potential defendants were insured and if not, whether the client's family was prepared to issue proceedings against family friends. Given that liability was far from clear cut and the family was ambivalent about proceeding, time marched on, with the practitioner and client prevaricating. This hesitation led to a missed limitation period. The practitioner had limited experience in public liability matters, and was ill-equipped to manage a matter with complex liability issues and a looming limitation period.

Our recommendations

- ✓ See our recommendations under the earlier section on *Missed common law potential*.
- ✓ If it is longer than three years from the date of injury, obtain detailed instructions on facts relevant to the 'date of discoverability' provisions.
- ✓ Obtain detailed instructions to cover all the significant injury threshold issues.
- ✓ Ensure that clients on the borderline of the significant injury thresholds understand their rights and strategic benefits of proceeding or not.
- ✓ Identify prospective defendants early and determine their legal identity and insurance status.

3 Jurisdictional uncertainties

When public liability claims arise in the context of shipping or aircraft accidents, confusion can arise about the appropriate jurisdiction governing the potential claim. These claims require specialist knowledge as shorter limitation periods may apply. Practitioners without the requisite experience should never dabble in public liability claims with these jurisdictional complications.

EXAMPLE:

Which limitation period

The plaintiff suffered a heart attack aboard a cruise ship. He discussed with his lawyer a possible action against the cruise line for failing to stock certain drugs which can reduce the severity of muscular heart damage. Although the practitioner seemed to be aware that a one-year time bar may apply under the ship passage terms and conditions, proceedings were not commenced within a year. Subsequent confusion about whether these terms were effective because of the circumstances in which the cruise ticket was purchased led to further delay. By the time this issue was addressed, the ordinary three-year statutory limitation period had expired. Ultimately, the plaintiff's application for an extension of time failed, so he issued against the practitioner for a loss of the opportunity to bring his claim.

For another claims example, see the section on 'Aviation' at page 22 of LPLC's *Know your limits* practice risk guide.

Our recommendations

- ✓ See our recommendations under the earlier section on *Missed common law potential*.
- ✓ Calculate and diarise the limitation period as early as possible.
- ✓ When dealing with circumstances outside your usual practice always confirm limitation periods by checking the relevant legislation.
- ✓ Be aware that shorter limitation periods may apply for accidents on ships and aircraft.

4 Limitations of Actions Act issues

Major statutory reform from 2002/03 introduced reduced limitation periods for public liability and medical negligence claims under Part IIA of the *Limitations of Actions Act 1958* (Vic). Six-year limitation periods were generally reduced to three years from the 'date of discoverability'. These reforms do not apply to work or transport accidents, or accidents covered by other statutory regimes.

'DATE OF DISCOVERABILITY'

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, the following time limits apply:

- > three 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
- > six 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, that it was caused by the fault of the defendant and was sufficiently serious to justify the bringing of an action.

'Date of discoverability' and extension of time provisions offer personal injury claimants a potentially later moment than the 'date of injury' for the limitations clock to start ticking under Part IIA of the Act.

The case law has shown that the 'date of discoverability' is not always easy to determine. A line of authority culminating in the appeal *Vellar v Spandideas* [2008] VSCA 139 has interpreted Part IIA liberally in favour of plaintiffs who may be slow to appreciate the extent of their injuries. This authority requires a beneficial approach to plaintiffs' rights under the discoverability and extension provisions given the shorter three-year limitation regime plaintiffs must now live with. Practitioners need to take comprehensive instructions as to their clients' understanding of their injuries and how they were caused in order to identify and address the 'date of discoverability'.

5 Significant injury thresholds and caps on damages

Major statutory reform in 2002/03 also amended the *Wrongs Act 1958* (Vic) providing thresholds for recovery and damages caps. These changes included:

- > the introduction of a threshold for the recovery of general damages (other than injuries caused by an intentional act or sexual assault)
- > that general damages can only be recovered by those who have suffered a 'significant injury' defined as:
 - » more than five per cent permanent impairment for a physical injury
 - » more than 10 per cent impairment for a psychiatric injury
 - » loss of a foetus
 - » loss of a breast
- > that 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.

In 2015, the threshold levels were amended to mean:

- > in the case of injury (other than psychiatric injury or spinal injury) impairment of more than five per cent
- > in the case of psychiatric injury, impairment of 10 per cent or more
- > in the case of spinal injury, impairment of five per cent or more.

Practitioners should be aware that the transitional provisions give the new thresholds retrospective effect.

LPLC's claims experience has been that significant injury thresholds pose a specific claims risk, particularly in borderline cases. Claims typically arise when the practitioner's advice not to proceed is challenged sometime later, after the client's condition deteriorates. This risk can be managed with a detailed consideration and investigation of whether the threshold for general damages has been satisfied and by monitoring injuries that have not yet stabilised.

Given the statutory limitations on recovery, practitioners need to manage the client's expectations regarding the value of the case.

Transport accident claims

1 Jurisdictional issues

Confusion about limitation periods in jurisdictions other than Victoria can result in time-barred transport accident claims against Victorian practitioners. It is essential to take instructions from the client and appoint an interstate agent promptly as well as be proactive in communicating with the agent to determine the applicable limitation period.

EXAMPLES:

Poor communication between states

A truck driver involved in a transport accident in New South Wales was injured in an accident where another person was killed. A coronial inquest was conducted in NSW, handled by NSW agents. The agents advised the Victorian practitioner of an impending limitation period for issuing common law proceedings and that it was intending to close its file after the inquest. In Victoria, the matter was diarised but not followed up with the NSW agents, who in turn made no further contact. It was not until years later when the client finally escaped criminal conviction that the client's thoughts returned to his common law claim.

Unanswered questions

The client was injured in a motor vehicle accident in Queensland. The claim became statute-barred after protracted correspondence between the Victorian and Queensland agents about the circumstances of the accident, whether a Victorian vehicle was involved, whether it was in fact a workplace or a transport claim and the most appropriate way of proceeding. Where there is uncertainty about which law applies to a proceeding or any gateway to be accessed, this needs to be resolved quickly before the limitation period expires.

Our recommendations

- ✓ See our recommendations under the earlier section on *Missed common law potential*.
- ✓ Identify the relevant jurisdiction, and calculate and diarise the limitation period as early as possible.

2 Failing to appeal a TAC assessment

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

Claims continue to arise where practitioners miss this cut-off date or fail to consider the possibility of appealing the TAC decision.

EXAMPLE:

File note of instructions

The practitioner acted for a client who was injured in a motor vehicle accident. The TAC issued an impairment assessment of seven per cent which the client provided to the practitioner at a meeting four days later. The practitioner said that at the meeting, the client decided not to institute a review of the TAC's decision due to the costs that would be involved. Instead the client agreed that the practitioner was to brief counsel to advise on whether it was appropriate to apply to the TAC for a serious injury certificate. Further medical evidence was sought but the client subsequently terminated the retainer.

When the client went to a new lawyer two years later, she complained that her former lawyer failed to advise on her option to have the TAC's decision reviewed at VCAT and of the 12-month limitation period that applied. The client alleged this caused her to lose her entitlement to lump sum compensation. The claim was averted in large part by the practitioner's file note of the meeting with the client which supported the practitioner's version of events.

Our recommendations

- ✓ See our recommendations under the earlier section on *Missed common law potential*.
- ✓ Make file notes of conferences with your client.
- ✓ Confirm your advice in writing.
- ✓ Calculate and diarise the limitation period as early as possible.
- ✓ Tell your client when the appeal must be commenced and confirm it in writing.

3 Nervous shock claims

The application of nervous shock claims under the *Transport Accident Act* can be overlooked by practitioners focused on the physical injuries of family members directly involved in motor vehicle accidents. Given the broad application of the concept of an accident's immediate 'aftermath', practitioners need to be keenly attuned to the potential rights of family members who may have suffered nervous shock.

We have seen cases where an experienced practitioner failed to consider the issue of nervous shock for family members not in the accident. This has occurred where the practitioner was completely focused on parties directly involved who had suffered direct physical trauma or thought it was outside their retainer.

EXAMPLE:

Psychiatric injury was apparent

The client alleged he sustained psychiatric injury as a result of hearing about the death of his son in a motor vehicle accident and subsequently viewing his dead body. Prior to retaining the practitioner, the client made a Victims of Crime Assistance Tribunal application regarding his son's death. While this application was on foot, the client retained the practitioner to act. There was material available that should have put the practitioner on notice that the client was suffering from a psychiatric injury as a consequence of his son's death. However, the practitioner never turned her mind to whether the client had any entitlement to statutory benefits or common law damages.

Our recommendations

- ☑ Clarify who is your client.
- ☑ Identify all potential causes of action available to your client including possible psychiatric injuries.
- ☑ If the cause of action is outside your retainer or expertise, advise your client of their potential rights and the need to consult an expert with relevant expertise.

4 Pigeon-holed claims

As in the public liability area, LPLC has had several claims where the practitioner treated the client's matter as a worker's compensation claim and did not consider making a motor accident claim until it was too late, if at all.

EXAMPLE:

Missed motor vehicle accident claim

The client was injured in a motor vehicle accident in the course of his employment as a postman. The practitioner initially treated the matter as a worker's compensation claim rather than a motor vehicle accident claim. Consequently the limitation period for lodging a motor vehicle accident claim expired. In order to settle the matter, the practitioner paid the client a sum of money and indemnified the compulsory third party insurer for costs arising from its unsuccessful application for an extension of time.

Our recommendations

- ☑ See our recommendations under the earlier section on *Missed common law potential*.
- ☑ Identify all potential causes of action available to your client.
- ☑ If the cause of action is outside your retainer or expertise, advise your client of their potential rights and the need to consult an expert with relevant expertise.

Emerging area of risk

1 Personal cost orders

LPLC has seen an increase in the number of claims involving personal cost orders since the *Civil Procedure Act 2010 (Vic)* (the Act) was introduced. Many of the personal cost orders against personal injury practitioners have arisen from adjourned hearings where the adjournment was found to have been the fault of the practitioner.

The Act codifies practitioners' paramount duty to the court and sets out overarching obligations when acting in civil proceedings. It also gives the courts power to award costs against practitioners for contravening the overarching obligations.

These powers are different from those available in the court rules, such as rule 63.23 of the Supreme Court (General Civil Procedure) Rules 2005, which allows for costs against a practitioner where costs have been incurred improperly, without reasonable cause or wasted by failing to act with reasonable competence and expedition. The powers under the Act for ordering cost sanctions are arguably much broader than under the rules and are characterised as penalties rather than compensation. The courts have shown a willingness to inquire about possible breaches under the Act on their own motion as well as on application by the parties.

Consequently, practitioners need to be mindful of all their overarching obligations set out at sections 17 to 26 and the overarching purpose of the Act, which is to facilitate the just, efficient, timely and cost-effective resolution of disputes.

It is also important to note that these obligations override a practitioner's duty to act according to a client's instructions.

CASE EXAMPLE

Hudspeth v Scholastic Cleaning & Ors

Hudspeth v Scholastic Cleaning & Ors [2014] VSCA 78 involved a personal injury claim. The plaintiff's expert witness provided two reports and at trial gave evidence on the opinions expressed in those reports. During the trial it became apparent the second report was an altered version of the first and the defendants had not been alerted to the alterations. Cross-examination also revealed the existence of a third report which had not been made available to the court or the defendants. Senior counsel had instructed the expert directly to provide the third report.

On appeal, the court held there had been a mistrial and ordered the senior counsel and instructing lawyer to each indemnify their plaintiff client for 40 per cent of the costs of the appeal.

The matter was remitted to Dixon J, who entered judgment for the plaintiff. However he found the senior counsel, instructing lawyer and expert breached their overarching obligations regarding the third report and made cost orders against each of them.

Our recommendations

- ✓ Always be mindful of your obligations under the Act in the preparation and conduct of a case.
- ✓ Your client's instructions must always be considered in light of the Act, as the overarching obligations prevail over your duties and obligations to your client where they are inconsistent.
- ✓ Obtain and record clear instructions. When acting for more than one party, seek instructions from all of them.
- ✓ Inform clients about the overarching obligations.
- ✓ Ensure your client's case has a proper basis and is supported by the evidence.
- ✓ Ensure pleadings are drawn accurately.
- ✓ Be mindful of costs and consider whether they are reasonable and proportionate to the complexity of the matter.
- ✓ Retain control of the conduct of a case, including communications between counsel, experts and clients.

2 Further reading

LPLC's article *Making it personal* in Law Institute Journal, October 2015 edition

LPLC's *Key risk checklist: risk management strategies for litigation*

Yara Australia Pty Ltd & Ors v Oswal [2013] VSCA 337

Ilievski v Zhou [2014] VSC 442

Gibb v Gibb [2015] VSC 35

Babcock & Brown DIF III Global v Babcock & Brown International Pty Ltd [2015] VSC 612

Kenny & Anor v Gippsreal Ltd (No 2) [2015] VSC 737

Stapleton v Central Club Hotel & Ors [2016] VCC 799

LPLC Personal Injury Litigation Checklist

Although this is not a comprehensive checklist, working through it will help you to avoid the most common mistakes made in personal injury litigation. The checklist can be printed for ongoing use.

Client:

Matter:

Missed common law potential

- ☐ Ascertain the date of injury as early as possible.
- ☐ Keep detailed file notes or record conferences with your client, paying particular attention to the initial conference.
- ☐ Advise your client in writing at the start of the retainer of the limitation period and the consequences if it is missed.
- ☐ Be forensic in your approach to taking initial instructions. Take the time with your client to tease out a comprehensive background.
- ☐ Send your client a retainer letter after the initial conference which:
 - » includes your notes of the conference and asks the client for any further instructions they may not yet have raised. Consider converting your file note into a proof of evidence and sending that to the client instead
 - » sets out your arrangement for costs
 - » confirms any advice you gave the client including the limitation period, even if it is preliminary advice subject to obtaining further information
 - » confirms what actions you will undertake for the client.
- ☐ Be alert to applicable time limits and court timetables throughout the course of a proceeding. Deal proactively with issues that have the potential to delay progress of the proceeding.
- ☐ Set up systems for tracking deadlines and actively monitor their effectiveness. Ensure your systems do not rely solely on one person.
- ☐ If advising a client they do not have a common law claim, provide clear written reasons why.
- ☐ Suggest that if your client has any concerns about your advice they should obtain a second opinion.
- ☐ If further investigations are possible, advise your client about the type of investigations that could be made and why you believe they should or should not be undertaken.
- ☐ Be proactive in following up requested information such as medical reports and instructions from your client. Diarise these tasks.
- ☐ Have documented policies and procedures for the effective handover of files.

Delay/strike out

- ☐ Advise your client in writing at the start of the retainer of the limitation period and the consequences if it is missed.
- ☐ Do not allow the 'too hard' cases to drag on. Discuss difficult files with a colleague or seek advice from appropriate counsel. Peer review is an invaluable tool for dealing with difficult files.
- ☐ Explain clearly to your client reasons for delay and the consequences. Where your client is causing the delay set out in writing the ramifications of continued delay and any relevant time limits.
- ☐ Be proactive in obtaining medical reports in sufficient time to meet critical dates.
- ☐ Act quickly in obtaining evidence.
- ☐ Consider terminating the retainer if your client will not give you instructions to proceed and does not heed your warnings. If you do terminate the retainer, do so for just cause and on reasonable notice. **Do this in writing, giving details of any time limits.**
- ☐ If your client is unable to pay accounts as agreed, do not let the file languish in the hope the client will find the money. If you are not prepared to continue acting, terminate the retainer promptly.
- ☐ Do not allow briefs to languish with counsel.
- ☐ Find out what further information counsel requires and follow this up.
- ☐ Do not accept excuses for delay from counsel.
- ☐ Have an office policy about retrieving briefs from non-performing counsel.
- ☐ Set time limits within which counsel must perform.
- ☐ Review files on a regular basis.

Revisited settlements

- ☐ Document your client's instructions. Obtain a full and complete statement which is checked and signed by your client.
- ☐ Manage your client's expectations about to the value of the claim throughout the life of the case.
- ☐ Qualify any advice about the value of the case and stress to your client that this may change as evidence is obtained.
- ☐ Warn your client about the specific risks of litigation, particularly cost consequences, well before the door of the court.
- ☐ Check your client understands your advice and record their response.
- ☐ Update your client on the value of the case as new evidence is obtained.
- ☐ Prior to the settlement conference advise your client about how it will be conducted and what to expect.

- ☐ Before a settlement conference or when advising on settlement:
 - » ensure you have up-to-date medical evidence including copies of the other side's relevant medical reports you are entitled to
 - » read and review medical reports carefully, comparing any inconsistencies and discussions of future treatment
 - » look out for latent diseases or other injuries not covered in your client's claim and watch out for injuries that have not stabilised.
- ☐ Explain and document your advice. Where your client wants to settle against your advice, make a contemporaneous file note of your advice including the reasons your client has given you for settling. Confirm this in writing. Where an offer is made and rejected, either on or against your advice, confirm these instructions including the reasons given and the advice in writing.
- ☐ Advise your client on the impact of settlement on:
 - » entitlement to weekly payments and medical expenses
 - » common law rights
 - » entitlement to social security benefits, particularly the existence of preclusion periods.
- ☐ Provide your client with up-to-date information on costs.
- ☐ Advise your client about the progress of the trial and if appropriate make settlement recommendations.

Inappropriate terms of settlement

- ☐ 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 explain the ramifications.
- ☐ Consider the consequences of an 'all forms all injuries' release.

Workplace injuries

- ☐ If your client has any concerns about your advice suggest they should obtain a second opinion.
- ☐ Advise your client to inform you immediately of changes in work arrangements, major alterations of medical treatment of the injury, specialist referrals or other medical investigations.
- ☐ Calculate and diarise the limitation period as early as possible.
- ☐ Advise your client in writing at the start of the retainer of the limitation date and the consequences if it is missed. If the matter is unresolved when the matter is terminated, repeat the advice.
- ☐ Make file notes of conferences with your client.
- ☐ Confirm your advice in writing.

- ☐ Tell your client when the proceedings must be commenced and confirm it in writing at the start of a retainer as well as when the retainer is terminated.
- ☐ Diarise dates for receiving statutory offers and be proactive about checking if an offer is not received as anticipated.
- ☐ Comply with procedural requirements for filing applications and proceedings, particularly when deadlines are near as failing to do so may cause delays resulting the required date being missed.
- ☐ Be alert to applicable time limits and court timetables throughout the course of a proceeding. Deal proactively with issues that have the potential to delay progress of the proceeding.
- ☐ Review the applicable provisions of the *Accident Compensation Act 1985* (Vic) and the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), and the relevant ministerial directions.

Public liability and medical negligence

- ☐ Identify all potential causes of action available to your client.
- ☐ If the cause of action is outside your retainer or expertise, advise your client of their potential rights and the need to consult an expert with relevant expertise.
- ☐ If it is longer than three years from the date of injury, obtain detailed instructions on facts relevant to the 'date of discoverability' provisions.
- ☐ Obtain detailed instructions to cover all the significant injury threshold issues.
- ☐ Ensure that clients on the borderline of the significant injury thresholds understand their rights and strategic benefits of proceeding or not.
- ☐ Identify prospective defendants early and determine their legal identity and insurance status.
- ☐ Calculate and diarise the limitation period as early as possible.
- ☐ When dealing with circumstances outside your usual practice always confirm limitation periods by checking the relevant legislation.
- ☐ Be aware that shorter limitation periods may apply for accidents on ships and aircraft.

Transport accident claims

- ☐ Identify the relevant jurisdiction, and calculate and diarise the limitation period as early as possible.
- ☐ Make file notes of conferences with your client.
- ☐ Confirm your advice in writing.
- ☐ Tell your client when the appeal must be commenced and confirm it in writing.
- ☐ Clarify who is your client.
- ☐ Identify all potential causes of action available to your client including possible psychiatric injuries.
- ☐ If the cause of action is outside your retainer or expertise, advise your client of their potential rights and the need to consult an expert with relevant expertise.

Overarching obligations

- ☐ Always be mindful of your obligations under the *Civil Procedure Act 2010* (Vic) in the preparation and conduct of a case.
- ☐ Your client's instructions must always be considered in light of the Act, as the overarching obligations prevail over your duties and obligations to your client where they are inconsistent.
- ☐ Obtain and record clear instructions. When acting for more than one party, seek instructions from all of them.
- ☐ Inform clients about the overarching obligations.
- ☐ Ensure your client's case has a proper basis and is supported by the evidence.
- ☐ Ensure pleadings are drawn accurately.
- ☐ Be mindful of costs and consider whether they are reasonable and proportionate to the complexity of the matter.
- ☐ Retain control of the conduct of a case, including communications between counsel, experts and clients.

Appendix 1

Common law rights and the *Accident Compensation Act 1985* (Vic) and the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)

Amendments to the *Accident Compensation Act* ('AC 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 AC Act in late 2004.

Further, common law provisions were also enacted in the *Workplace Injury Rehabilitation and Compensation Act* ('WIRC Act'), for the purposes of common law rights for injuries arising out of or in the course of employment on or after 1 July 2014.

Be careful to check the transitional and application provisions in the two pieces of workers compensation legislation in order to determine which Act applies to a client's injury.

For what injuries are rights available?

Injuries before 1 December 1992:

Actions can still be brought under the AC Act 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: the facts which constitute serious injury incapacity were not known until after 12 November 1997, in which case the time limit to make an application is three years from date of knowledge of serious injury incapacity.

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

No common law rights.

Injuries on or after 20 October 1999 and before 1 July 2014:

Common law rights resurrected under the AC Act.

Injuries on or after 1 July 2014, or by way of gradual process over a period beginning on or after 20 October 1999 and continuing on or after 1 July 2014:

Common law rights available under the WIRC Act.

Time limits

There are strict procedures and time limits prescribed by section 135A of the AC Act for injuries suffered on or after 1 December 1992 and prior to 12 November 1997, by section 134AB of the AC Act for injuries suffered on or after 20 October 1999, and by Part 7 of the WIRC Act for injuries on or after 1 July 2014. 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 legislation's procedures for common law proceedings in relation to post-20 October 1999 injuries (and in accordance with the 2004 amendments). Reference to VWA includes self-insurers.

Please note there are also flow chart guides contained in section 195 of the WIRC Act regarding the impairment benefits process under that legislation, and section 324 of the WIRC Act regarding the common law process under that legislation.

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 (section 104B and section 134AB(3)(a) of the AC Act, or Division 4 of Part 5 and section 328(1)(a) of the WIRC Act)



B Serious injury pathway (section 134AB(3)(b) of the AC Act, or section 328(1)(b) of the WIRC Act)

An alternative pathway was introduced by the 2004 amendments to the AC Act, and is also available in the WIRC Act.

After at least 18 months from the date of injury, the client can elect to make an application to VWA on the ground that the injury is a 'serious injury' as defined:

- > permanent serious impairment or loss of a body function
- > permanent serious disfigurement
- > 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/or economic loss. There are detailed legislative provisions and extensive case law regarding the serious injury test. If the serious injury pathway is taken, proceed to Gateways.

Note: This pathway is subject to any ministerial directions specifying or limiting the classes of cases or circumstances in which an application of this type can be made. At the time of publication no directions have been made restricting the category of claim to which this pathway applies. However, there are detailed ministerial directions in force setting out procedures applying to serious injury applications and common law claims.

If you have commenced the impairment assessment pathway and the impairment claim has not been finalised, you cannot make a serious injury application under this pathway. It remains unclear if the Act permits a claim for impairment benefits to be withdrawn once commenced.

Gateways

1. An application must be made to 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 VWA and must include material as required by ministerial directions including medical reports, affidavits of client and witnesses, expert reports, proposed statement of claim, calculations as to loss of earning capacity, and also particulars of all employment and tax returns for three years before the injury and for each year following to the date of the application. The previous ministerial directions have been replaced by new directions effective from 1 July 2016 with some amendments.

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 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 VWA will **not** issue a certificate. If the client wishes to challenge that determination, 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).

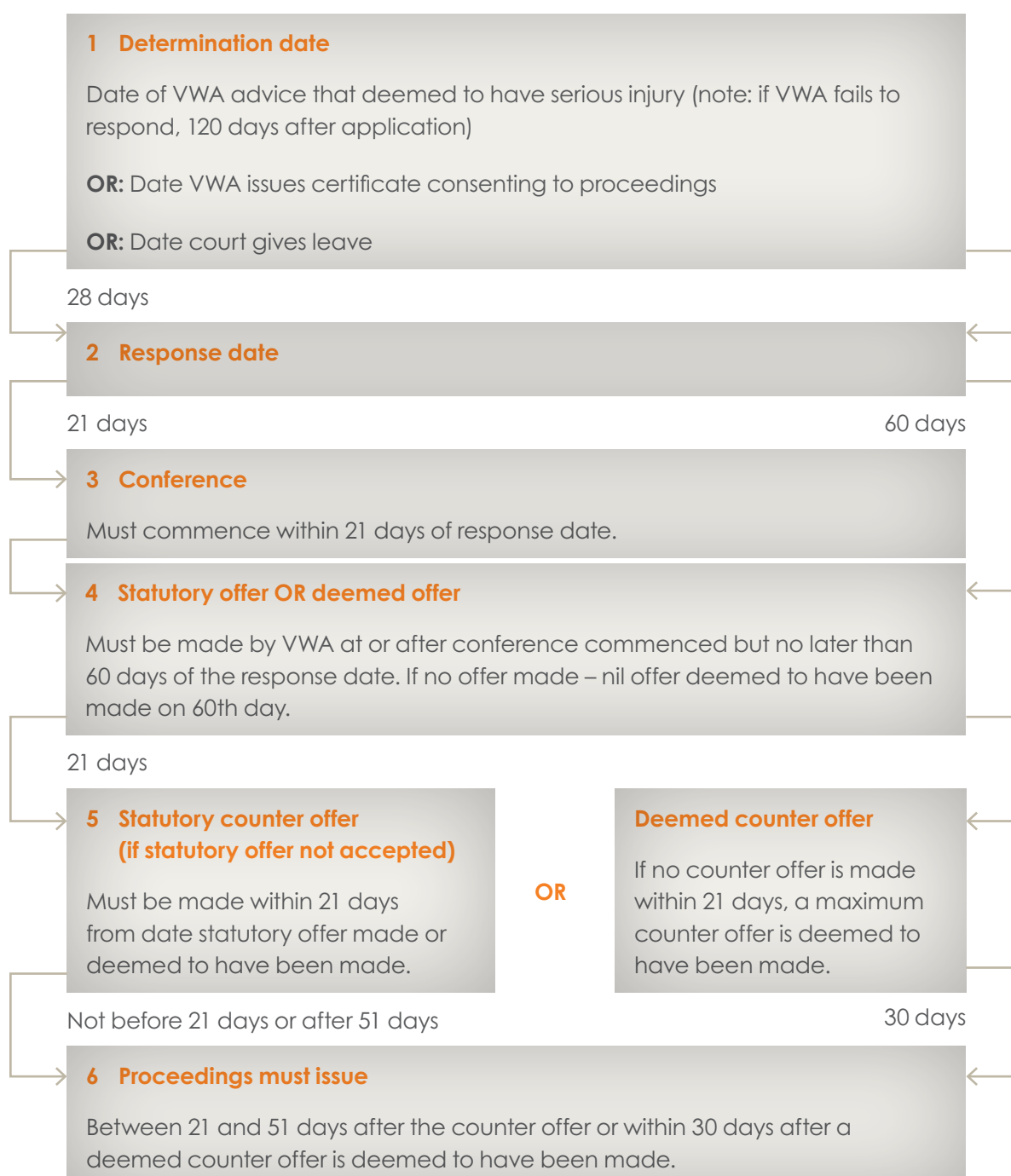
Note: If the client fails in the application for leave and then later obtains a permanent impairment determination of 30 per cent or more impairment, the client cannot make a further application for damages.

Note: If 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 result in the loss of your client's common law rights.

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



The legislation prescribes the last date when a statutory offer must be made. The above calculations will alter where a statutory offer is served before the last day. Upon receiving a statutory offer you should recalculate the dates for service of the statutory counter offer and the date to issue proceedings.

Action out of time: opportunity to remedy

Where an action for damages is commenced less than 21 days after service of the statutory counter offer or more than 51 days but within 81 days of service of the statutory counter offer, VWA may consent to the proceedings being maintained if it is satisfied that its defence is not prejudiced (see sections 134AB(20A) and 135A(6B) of the AC Act, and section 337(2) of the WIRC Act. If the time limit for commencing proceedings for damages has been missed you should commence proceedings within 81 days of the statutory counter offer and apply to VWA for its consent to maintain these proceedings. These provisions only apply to proceedings for damages and do not apply to proceedings which request a serious injury certificate.

Statutory offers and counter offers: costs consequences

If no liability to pay damages is established, or if the worker recovers less than VWA's statutory offer, the worker must pay VWA's party/party costs and his or her own costs.

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

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

As section 134AB of the AC Act and Part 7 of the WIRC Act make 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.

