

Personal Injury Claims: do the basics well

Presented by | John McGirr, Claims Solicitor LPLC



Acknowledgement of traditional owners and country

Our webinar is being held on the lands of the Wurundjeri people of the Kulin Nation and on behalf of LPLC I wish to acknowledge them as the traditional owners of the land.

I also acknowledge the traditional owners of the lands which all of those joining us online today are living, learning and working on.

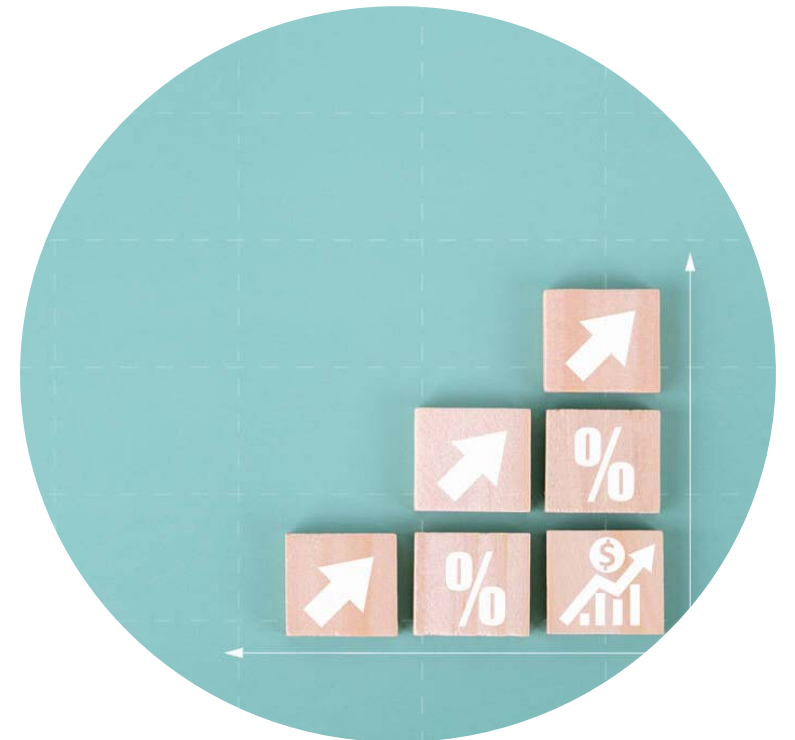
I would also like to pay my respects to their Elders past and present, and any Elders of other communities who may be present today.

Introduction - A growing area of claims

Personal injury litigation is a growing area of claims for LPLC.

It accounts for:

- 13 % percent of all claims the LPLC receives each year
- 12% of the costs of claims for each year



Why this is important

- Claims against you can result in **reputational damage**
- Claims are costly both from a **financial** perspective and a **time** perspective
- Professional negligence claims can be **stressful**



What we will focus on today

- Initial engagement
- Properly investigating all causes of action and avoiding missing limitation periods
- Gathering evidence as to liability and quantum
- Resolving the claim



Is the client right for me?

- **Meet** with the potential client in person (if possible)
- Consider the client **expectations**
- Identify any potential **challenges** with the possible client
- Don't be afraid to do due diligence on the potential client **before** taking them on
- Taking on the wrong client can result in an expensive and difficult claim against you



First key tip of the day

Properly **vet** your clients, make sure that they are **right** for you and don't be **afraid to say 'no'** to a matter.



Disclosure Statement and Cost Agreement

These are **key** documents:

Make sure you include a retainer letter

Don't use old precedents

Know your obligations under the
Uniform Law

Most personal injury files will exceed
\$3,000 so full disclosure is required



Disclosure Statement and Cost Agreement

You need to:

- Set out a full description of the scope of the work
- The basis upon which legal costs will be calculated
- Confirm their right to negotiate a billing method
- Provide a single estimate of the total legal costs, not a range

Confirm the client:

- Is entitled to receive a bill
- Can request an itemised bill; and
- Can contact the VLSB+C if they want to dispute the bill.



Conditional Cost Agreements

If you have a conditional cost agreement:

- It must be signed by the client
- It must include a statement that the client has been informed of their right to seek independent advice
- It must have a 5-business day cooling off period
- You cannot charge more than a 25% uplift
- You must estimate the uplift fee and explain the major variables may affect the calculation of the uplift

See:

Legal Professional Uniform Law Application Act 2014 – Schedule 1 – Part 4.3



Consequences of failure to give proper disclosure

- Cost agreement set aside
- No recovery until costs are assessed
- Costs could be reduced by the Costs Court
- May constitute professional misconduct
- Some breaches give rise to a civil penalty
- For estimating costs see webinar by Fiona McLay "*Making the most of your technology for good legal practice*" on LPLC website



Scoping the retainer

- Scoping the retainer is **not** an administrative task
- The client retainer “almost exclusively charts the parameters of the lawyer’s duty of care in tort to the client – with limited exceptions”

Poll

Is this an adequate scope of works?

“To act for you and investigate your entitlements in respect to your employment at ABC employer.”

- (a) Yes
- (b) No



Scoping the retainer

The retainer is **not clear** enough and might lead to a **claim against you**.

A scope of works in the following form would give the firm greater protection:

“To act for you and investigate your entitlements under the Workplace Injury Rehabilitation and Compensation Act 2013 (Vic) in respect to your neck injury on or about 1 January 2022 sustained during your employment with ABC Pty Ltd”.



Second key tip of the day

When you are preparing a cost agreement and disclosure statement, **take** the **extra time** to draft a **proper** retainer letter, setting out the **scope** of the retainer.



Key clauses in your Cost Agreement

- When can you cease to act?
- When can you switch your retainer from no-win no-fee?

Without certain clauses you **expose** your firm to:

- Breach of contract claims
- Criticism from the Court if you have to make an application to cease to act



Third key tip of the day

Ensure that you have **key clauses** in your cost agreement that **protect your firm** if your client refuses to follow advice or provide instructions.



What is the cause of action and limitation period?

- One of the **main causes** of claims in the personal injury space
- Can arise due to complex claims involving **multiple causes of action** and **multiple jurisdictions**
- Can also arise due to **simple oversights**



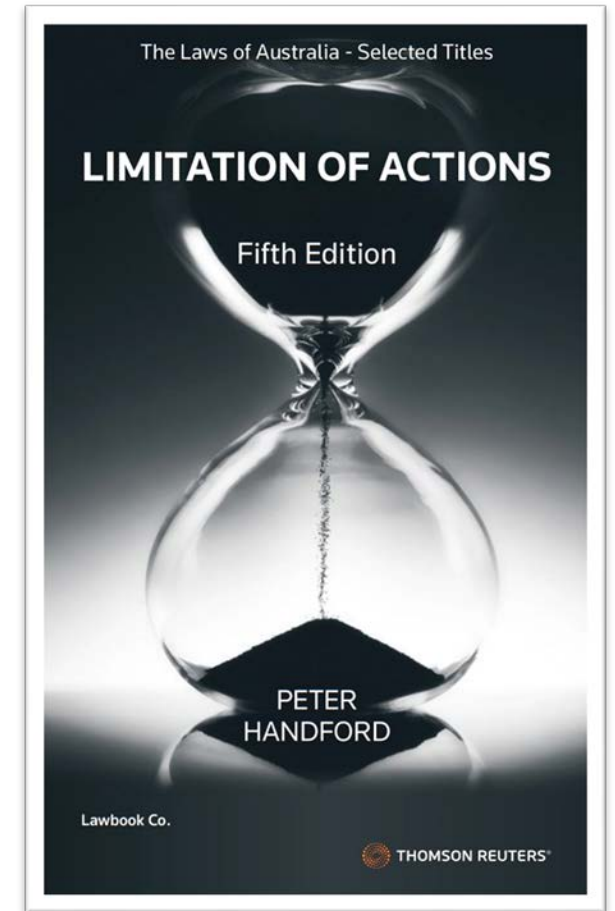
What is the cause of action and limitation period?

- Take **detailed instructions** as soon as you are retained
- You need to **take the time** to tease out the **complete circumstances** that give rise to the claim
- **File note** and **confirm instructions** in a letter
- Identify the causes(s) of action and the relevant **limitation periods**



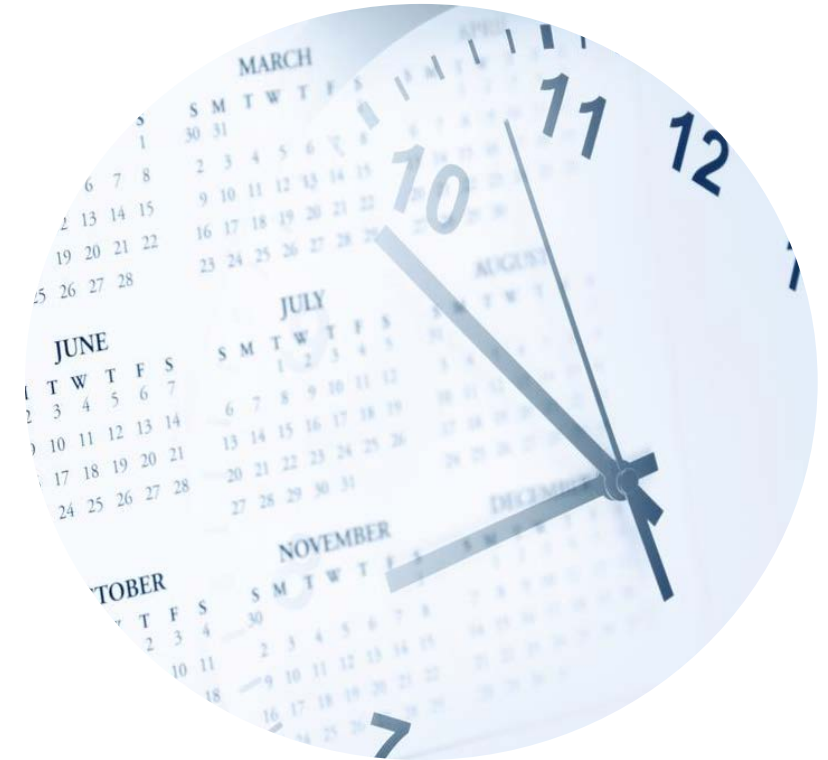
Limitation periods

- *'Limitations of Actions – The Laws of Australia'*, is an excellent resource
- It's OK to not know the answer, and if necessary:
 - brief Counsel; or
 - refer the client to another lawyer
- If you engage Counsel do not let the barrister sit on the brief



Diary System

- Run company searches **early** to **identify** any **issues**
- **Don't** only diarise the date the limitation period expires
- **Ensure** multiple people receive the reminder to issue proceeding
- Have **documented policies** and **procedures** for effective handover of files
- **Make sure** the proceeding is issued



Fourth key tip of the day

As soon as you are retained take **detailed instructions** on the circumstances that caused the injury, **identify** the **defendants** and **causes of action** and then **diarise** them properly.



Gathering and considering the evidence

Control **expectations** while gathering the evidence.

A standard personal negligence claim requires you to establish:

- Significant or serious injury
- Duty of Care
- Breach of Duty
- Causation
- Loss



Public Liability – Basic example

1. Significant injury:

(a) Established – see unchallenged WPI assessment of Dr Nick dated 1 January 2022

2. Duty:

(a) Admitted – see paragraph [3] of the defence

3. Breach:

(a) Events denied – see paragraph [6] of the defence

(b) Plaintiff's evidence:

- i. Plaintiff's proof of evidence at paragraph [10]
- ii. Mr Simpson (witness) proof of evidence at paragraph [10]

(c) Further investigations:

- i. Discovery: CCTV? Incident report?
- ii. Subpoenas: is the reporting to medical practitioners consistent with proof of evidence?



Public Liability – Basic example

4. Causation:

(a) No medical evidence from defendant yet

(b) Plaintiff's evidence:

i. Plaintiff's orthopaedic surgeon report dated 1 July 2020

ii. Plaintiff's proof of evidence paragraphs [15] – [20]

5. Loss:

(a) No material served by the defendant yet

(b) Plaintiff's evidence:

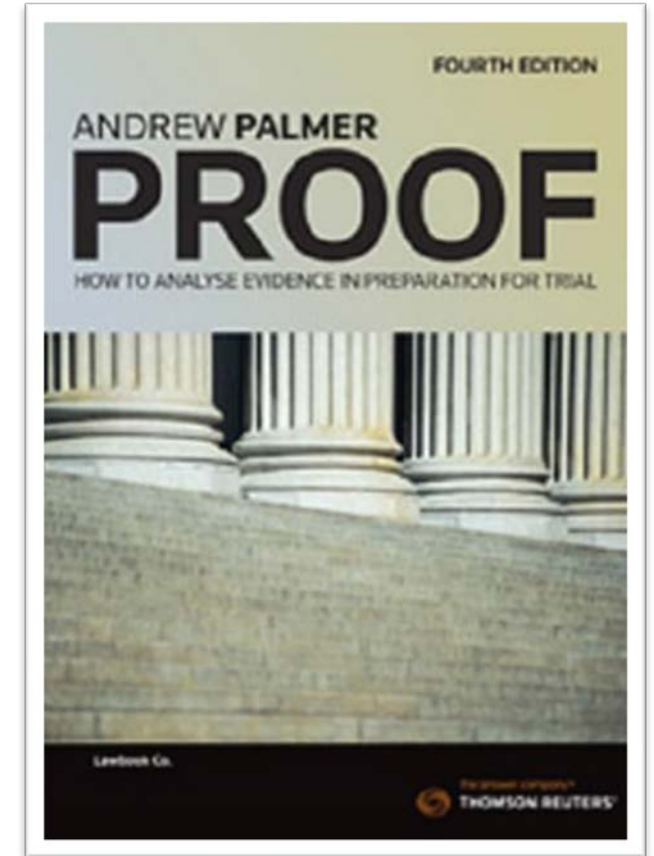
i. P&S, economic loss and specials: Orthopaedic surgeon report dated 1 July 2020 and proof of evidence of client: [30] – [35]

ii. Economic loss: How to prove? Forensic accountant (?) Ask Counsel – see *ZYX v Cable* [No 5] [2023] WADC at [642]

iii. Gratuitous care: No claim.

Areas of Risk

- Failing to properly investigate economic loss – make sure you have the right evidence
- Failing to properly investigate the extent of the injury:
 - Have up-to-date medicals
 - Read the medical reports closely and commission further reports when required
- Further reading: Andrew Palmer's book, '*Proof – How to analyse evidence in preparation for trial*'



Fifth key tip of the day

Make sure you have gathered the evidence **before** settling the case or running a trial and have a **system** to help you **analyse the evidence**.



Settling a claim

- Negligent settlements are no longer covered by advocates immunity
- Biggest growth area of claims against personal injury lawyers



Settlement – Keeping up-to-date with the law

Case	Brief facts	Injury	General damages, pain & suffering award	Economic loss award (past & future)	Other information
Swan v Monash Law Book Co-operative [2013] VSC 326	Workplace bullying by the plaintiff's manager	Mental 'breakdown'	\$300,000	Total pecuniary loss: \$292,554.38 Past loss of earnings: \$156,570.38 Future loss of earnings: \$135,984	
Lakic v TAC [2014] VSC 291	Transport accident Unidentified driver	Chronic pain syndrome, associated anxiety depressive illness and PTSD.	\$247,500 reduced by 10% (\$222,750.00)	Past pecuniary loss: \$334,400 Future pecuniary loss: \$256,902	
Doulis v State of Victoria [2014] VSC 395	Teacher repeatedly exposed to highly stressful circumstances whilst teaching "feral" classes.	Psychiatric injury	\$300,000	Past economic loss: \$446,433	Marked contrast with the plaintiff's previous condition. Previously an active, outdoor, bubbly person. A 'shell of his former self' with suicidal thoughts. This placed great strain on his wife. He could barely cope with basic tasks at home.

Capacity to settle

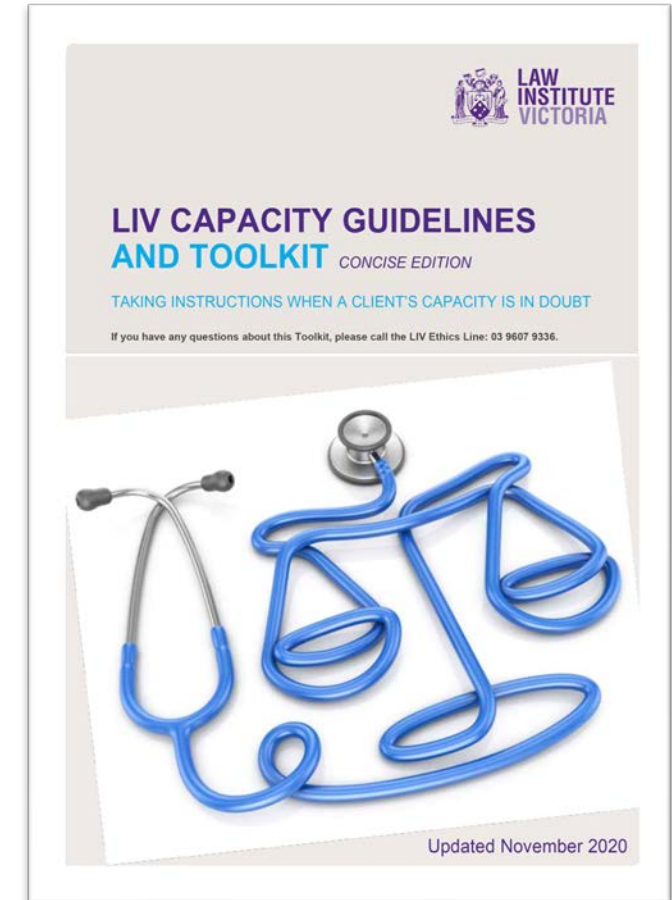
- May arise in psychiatric claims

Goddard Elliot (a firm) v Fritsch [2012] VSC 87 is the leading case:

- It is a breach of a lawyer's duty of care to take and act on instructions from a client who the lawyer knew, or should have known, lacked mental capacity to give instructions.
- The common law presumption is that every adult person has legal capacity to make his or her own decision. However, if the practitioner is on notice that the client's mental capacity is in the issue the lawyer needs to actively consider the issue.

“LIV Capacity Guidelines & Toolkit Concise Edition”

- “LIV Capacity Guidelines & Toolkit Concise Edition” is a very useful resource
- Look out for warning signs
- If concerned interview the client
- If still concerned speak to the client’s GP
- If necessary, get a proper medical report in respect of capacity



Documenting the settlement

- Clear advice on prospects and probable range of damages
- Clearly explain the settlement sum and how much the client will receive
- The client needs to understand the effect of the release



Sixth key tip of the day

Know the **evidence** and the **law** and give fulsome advice **before** settling the case.



What if the client is not following advice?

- Ensure that you are properly communicating your (and Counsel's) advice
- Make and keep contemporaneous file notes of all advice and instructions
- 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



Conclusion

Key points to take out from today's webinar:

1. Properly vet your clients and don't be afraid to say no to a matter
2. Take your time when preparing a cost agreement, disclosure statement and retainer letter – they are key documents
3. Take detailed instructions on the circumstances of the claim as soon as possible and identify all the defendants and causes of action and diarise the limitation periods properly



Conclusion

Key points to take out from today's webinar:

4. Gather all the key evidence before settling the case; particularly in respect of the extent of the injury
5. Be up-to-date with the law before setting any claims and if you are not, then brief Counsel
6. Give clear and detailed advice before settling a claim and confirm that advice in writing



Questions



Thank you

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