

The common law process fact sheet

Background

Generally, when we speak of “common law” we are referring to judge-made law. When we speak of “common law damages” we are referring to judge-awarded damages.

In making their decisions, judges must apply the “statute law” (eg. legislation such as the *WorkCover Queensland Act 1996*, *Workers’ Compensation and Rehabilitation Act 2003* and the *Workplace Health & Safety Act 1995*) as well as the “common law” (ie. previous decisions from higher courts).

Types of injury compensation

In Queensland, injured workers generally have two avenues for compensation.

Statutory “no fault” compensation

A person is entitled to compensation if injured at work or in the course of certain defined journeys in connection with that work, irrespective of “fault”.

Statutory compensation covers hospital, medical and rehabilitation expenses, the replacement of lost wages and, in some cases, lump sum compensation for permanent disability and care or assistance costs.

Statutory compensation payments are finite and do not usually continue after the injured worker’s condition becomes “stable and stationary”.

Common law damages

An injured worker usually seeks common law damages when the worker believes that the statutory compensation is inadequate and that the employer is legally liable for the injury.

In most cases, the injured worker must choose between a lump sum payment for permanent disability and a claim for common law damages.

Unlike statutory compensation, an injured worker is only entitled to recover common law damages if the court finds that the employer was legally liable for the injury. This can be through negligence, breach of contract or breach of statute.

An employer is considered negligent if there has been a breach of the “duty of care” owed to workers. A breach of duty of care is usually found in cases where the employer has failed to provide a safe system of work.

Common law damages are generally substantially larger than statutory compensation but the injured worker must approve “fault” on the part of the employer.

The common law process

There are six main steps in the common law process:

Step 1. Assessment of injuries

WorkCover arranges for the worker’s injuries to be assessed.

Step 2. Notice of Claim for Damages

The injured worker must serve WorkCover and the employer with a notice that sets out personal particulars, the circumstances and consequences of the injury and why the employer is considered to be liable for the injury. The injured worker must also make an offer to settle the claim.

A person from WorkCover’s Common Law Division will then be appointed to manage the claim. Others who may be involved in the management of the claim include:

- a factual investigator; and
- a lawyer, appointed by WorkCover.

WorkCover will contact the employer’s representative to discuss the claim and will arrange for any necessary investigations to be carried out and for all relevant documents to be collated.

Employers should volunteer any useful or relevant information to WorkCover and its representatives. This ensures that the matter is fully investigated and, if appropriate, defended.

If an investigation report is obtained, it will assist WorkCover to determine issues relating to:

- (a) Liability: Whether a court is likely to hold the employer liable and, if so, to what extent;
- (b) Quantum: The likely damages the court will award.

Further investigations and medical examinations may be carried out to ensure that any settlement or judgment is fair and reasonable.

At this point, the lawyer may wish to obtain further information from the employer and will either make direct contact or make a request through the investigators.

Step 3. WorkCover's response to the claim

Once the claim has been investigated, WorkCover must advise the injured worker:

- whether WorkCover admits liability and, if so, to what extent;
- how much WorkCover is prepared to offer to settle the claim.

Step 4. The compulsory conference

If WorkCover's response does not result in a settlement of the claim, a conference must be held within three months. The employer will be invited to attend the conference.

The conference will usually be attended by:

- the employer;
- the injured worker;
- the injured worker's lawyer;
- WorkCover's case manager; and
- WorkCover's lawyer.

In some cases, a mediator will also attend to help facilitate a resolution.

The conference allows the parties to discuss their differences and hopefully resolve the claim.

Most matters settle at the compulsory conference stage, which means significant costs savings for all parties.

Step 5. Court proceedings

If the matter cannot be settled at the compulsory conference, the injured worker may take legal proceedings in the courts.

To commence legal proceedings, the injured worker will serve the employer with a Claim and Statement of Claim. The employer should inform WorkCover as soon as this occurs.

After certain procedural steps and assuming the matter does not resolve, there will be a trial.

Step 6. Trial

Employers are invited to attend trials.

Trials may concentrate on liability and/or quantum issues.

Employers, their representatives and witnesses may also be required to give evidence. Experts (eg. engineers and doctors) may also be called to give evidence.

After all the evidence has been heard, the judge will hand down a decision. The decision is binding for both parties, unless appealed.

Managing the process

While WorkCover's case manager is responsible for managing the process, effectiveness depends on cooperation and communication between all team members. Employers play a particularly important role because they have an intimate knowledge of the industry, the incident and the injured worker. WorkCover encourages employers to be actively involved in the common law process.

Where can I get more information?

If you wish to have any of the above matters clarified or if you have any other questions, please contact WorkCover Queensland on 1300 362 128 or visit the WorkCover web site at www.workcoverqld.com.au.

Related WorkCover fact sheets include:

- What is a common law claim?
- Understanding the pre-proceedings process and time frames
- Duty of disclosure
- Common law liability
- What to expect at settlement conferences and mediations
- The court process
- What to expect at trial