

Managing Common Law claims

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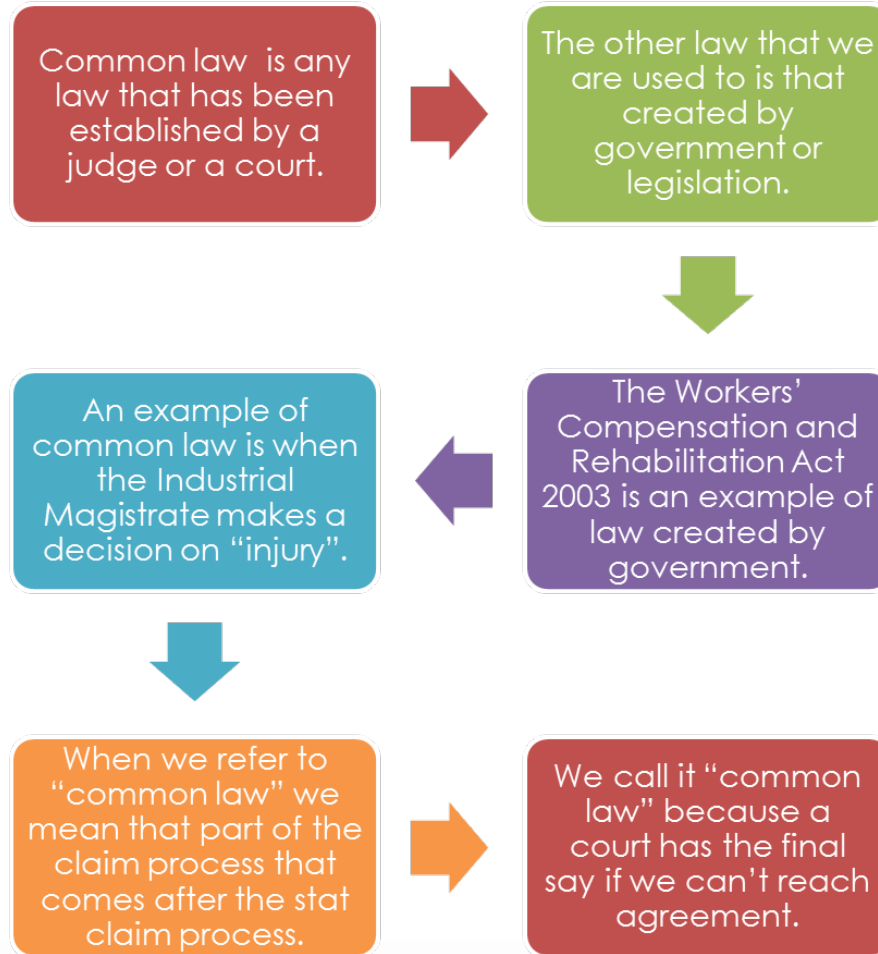
Topics

- What is common law?
- Basic principles of negligence
- What does this mean for employers?
- Other considerations
- Preventing common law
- Managing common law
- Case study

What is common law?

- Common law is any law that has been established by a judge or court and it isn't set out in legislation.
- A worker's right to sue is a common law right and the relevant legal principles have evolved over time.
- The Workers' Compensation and Rehabilitation Act 2003 (WCRA) sets out how the common law process works for claims against employers.
- Statutory claims are no fault
- Common law claims are at fault i.e. the injured worker must prove fault
- Benefits payable on statutory and common law claims are quite different

What is common law?



Basic principles of negligence

Duty of care

- An employer owes a duty of care to an employee

Breach of duty

- Was the risk of injury reasonably foreseeable?
- Was the injury preventable i.e. was it reasonably practicable to obviate the risk?
- The employer who knowingly (subjective) exposes the worker to a substantial risk of loss, breaches that duty. The employer who fails to realise the substantial risk of loss to the worker, which any reasonable person [objective] in the same situation would clearly have realised, also breaches that duty.
- 'Reasonable risk' cannot be judged with the benefit of hindsight

Factual causation – direct cause

- Did the breach of duty lead to the injury?
- Consider whether the injury would have occurred before, or without, the employer's breach of the duty owed to the injured worker

What does this mean for employers?

The duty owed by an employer to its worker, at common law and under the contract of employment, is to take reasonable care to avoid exposing the injured worker to unnecessary risk of injury

This duty is a non-delegable duty

The employer is expected to take those precautions which an employer acting reasonably would be expected to take. What is considered to be reasonable in the circumstances of the case must be influenced by current community standards.

An employer needs to devise a suitable system of work, to warn his workers of expected risks and to instruct them how best to protect themselves from injury and, further to take steps to see that those instructions are carried out i.e. enforce the safe system of work.

What does this mean for employers?

An employer's obligation is not merely to provide a safe system of work; it is an obligation to establish and maintain such a system. The Court will have regard to the power of an employer to prescribe, warn, command and cause obedience to its commands. Accordingly, the employer must give appropriate supervision to enforce compliance with safety procedures.

If the system of work was changed since the Claimant's injury then it is permissible to draw the inference that as this new system eliminated or minimised the risk then the employer had acted unreasonably in not previously adopting the new system (injuries prior to 01 July 2010)

Other considerations

Legislation that is relevant to the timber industry includes:

- *Workplace Health and Safety Act 1995*
- *Workplace Health and Safety Regulation 2008*
- *Electrical Safety Act 2002*
- *Electrical Safety Regulation 2002*
- *Building Fire Safety Regulation 1991*
- *Dangerous Goods Safety Management Act 2001*
- *Dangerous Goods Safety Management Regulation 2001*

NB. The above legislation will remain current for any injuries sustained before 01 January 2012, when the new harmonised national OHS legislation commences

WHSQ Sawmilling Industry - Health and Safety Guide 2011

What does this mean?

The *Workplace Health and Safety Act 1995* (the Act) imposes obligations on certain people at workplaces to ensure workplace health and safety. Workplace health and safety is ensured when persons are free from death, injury or illness created by workplaces, relevant workplaces areas, work activities, or plant or substances for use at a workplace. Ensuring workplace health and safety involves identifying and managing exposure to the risks at your workplace.

Under the Act, there are three types of instruments to help you meet your workplace health and safety obligations – regulations, ministerial notices and codes of practice.

If there is a regulation or ministerial notice about a risk, you **MUST** do what the regulation or notice says.

If there is a code of practice about a risk, you **MUST** either:

(a) do what the code says

(b) do all of the following:

- adopt and follow another way that gives the same level of protection against the risk
- take reasonable precautions
- exercise proper diligence.

Other considerations

Other factors

- the actual incident
- faulty equipment
- risk assessments
- training and instruction
- changes post-incident
- incident investigation

Contributory negligence

Vicarious liability

Preventing common law

Why do injured workers lodge a common law claim?

We know workers are more likely to lodge a common law claim if:

- they aren't working anymore, working less or are at risk of not working in the future
- they don't have/maintain a good relationship with WorkCover or their employer
- their employer didn't maintain communication with them after they were injured

And some workers will regardless....



Preventing common law

What can you do to prevent common law claims?

Prevent injuries in the first place

- Safe business is good business
- Ensure proper safety procedures are in place
- Effective and timely record keeping and documentation e.g. incident reporting
- Properly train and induct staff
- Undertake risk assessments and implement systems to address identified risk
- Ensure that non-complying staff activity is addressed i.e. enforce your system of work

Preventing common law

What can you do to prevent common law claims?

If an employee is injured:

- work with them, communicate with them post injury
- one of the main reasons people bring a common law claim is because they feel their employer has not helped them as much as they can
- look for ways to help return them to work – one of the most reliable predictors of a claim proceeding to common law is when an injured worker has not returned to work
- support and actively help the worker get back to work ASAP
- review incident and take all necessary action to reduce the risk of further injury – show the worker and their colleagues that you are serious about safety and that you care for your staff

Preventing common law

What can you do to prevent common law claims?

- focus on keeping injured workers at work or facilitating a safe, early and sustainable return to work plan
- maintain communication with and between the worker and WorkCover
- focus on the worker's capacity not incapacity
- be flexible
- educate and promote to your managers, supervisors and staff about the benefits of suitable duties, early return to work and build a supportive RTW culture

Managing common law

How are common law claims managed?

- Common law claims are managed in two models
 - Direct model – managed directly by internal common law staff
 - Panel model – allocated to internal staff but managed by an external panel solicitor
- Claims are managed under our Claims Management Framework (CMF) which can be found on the WorkCover Queensland website
- the CMF outlines the phases of a common law claim, relevant policies and procedures to successfully manage a common law claim including communication with all parties e.g. employers,

Claims Management Framework

Resolution

- We must resolve claims for the most appropriate amount at the earliest possible opportunity.
- We are model litigants—fair but firm.
- We make appropriate decisions that are sustainable and justified.

Informal negotiations



- We have ongoing effective communication with all stakeholders.
- We deliver excellent customer service by:
 - contacting employers at least every month
 - contacting employers before all major milestones and seeking your opinions before decisions are made
 - making contact verbally or face to face using site visits if appropriate
 - being flexible in how we work with employers so they perceive value for money, trust us and feel involved in the process.

Customer service

How can you help us?

What can you do if a common law claim happens?

- give us all information about both the event and the injured worker and don't hold back any information - if they are not sure about something, contact us
- this information includes:
 - copy of claimant's personnel file
 - training and induction records
 - risk assessment records, maintenance records, log books
 - file notes or documentation surrounding the event including incident reports , CCTV footage and witnesses
- keep the injured worker at work and maintain the relationship
- keep communicating with us (don't wait for us to contact you)
- if we appoint investigators, co-operate with them
- make sure you appoint a single person to work with us (where possible)

Case study

Simpson v North Aramara Sawmill P/L [2000] QSC 327 (99/0019) Brisb Atkinson J. 20/09/2000

<http://www.sclqld.org.au/qjudgment/2000/QSC/327>

Employer: Sawmill which milled hard logs

Claimant: Claimant was employed as a Docker.

Facts:

The claimant was required to receive scrap and stock and timber orders for sale. The timber needed to be cut and strapped into bundles for sale.

On the day of injury, he was attempting to put a new roll of strapping on the strapping dispenser. The strapping dispenser was a steel cart with drum on it and two wheels underneath it. The cart was about one metre in height and the drum about 60cm in diameter. The 19mm steel strapping was in a coil. The claimant picked up the coil from the floor and rolled it to the dispenser. The claimant laid down the dispenser, took the top cover off the coil holder and then attempted to flop the coil onto the coil holder in the dispenser. On this occasion it did not go into the dispenser properly and so the claimant picked up one side of the coil and pulled the dispenser into place and then dropped the coil onto the dispenser. As the claimant picked up the coil, which weighed about 50kg, he felt a pulling, tearing sensation in his lower back. He completed the task with assistance, albeit in discomfort.

Case study

Key points:

Injury reported next day to employer with claim lodged the following day

Claimant reported to WCQ that he believed claim might fail because he had not reported the injury to his supervisor immediately

Claimant had previous back problems and did not report to his employer or the independent medical examiners. These episodes were minor and insignificant and had no impact on his ability to work or function.

Claimant unable to return to work at sawmill or any other labouring job; the claimant had other training and skills but physically unable to work for more than eight hours per week; impacted concentration and needs to change position frequently i.e. unlikely to gain employment on open market due to injury restrictions

Case study

Liability:

Claimant given no instruction at all whilst employed at sawmill about lifting tasks; there were no signs displayed in the workplace or booklets available about safe lifting; there was no equipment to assist safe lifting and the claimant had no idea that by undertaking the task that caused his injury he might suffer an injury.

Expert evidence reported that mechanical assistance and/or team lifting arrangements should have been utilised, based on the Manual Handling Code of Practice. The task that caused the injury was a frequent task and required special control measures for the task. This should have been identified through risk assessment which was not undertaken by the employer. There was a need to ensure workers are trained in such work procedures and that the work procedure is enforced through supervision. The employer had placed reliance on the individuals identifying risks in tasks, seeking assistance and a work culture where “heavy lifting” was discouraged. These controls were assessed as inadequate as training must address additional risk factors in addition to weight levels e.g. reach distance, twisting, forward and lateral flexion.

Case study

Liability:

The employer was not aware of the Manual Handling Code of Practice. The employer was of the “old school” mind set; “where if you couldn’t do it you went and asked for help, but if you thought you could do it then you went ahead and did it”. Subsequent to this injury, the employer changed his system of work and instructed all staff that lifts over 25 kg had to be done by more than one staff member; and changed the size of the strapping rolls to only 25 kg rather than the original 50 kg rolls.

Damages:

The claimant was awarded over \$450K in net damages

FAQ

The injured worker is accusing me of being negligent – why?

This often causes quite a bit of emotion and distress on the part of the employer. This is particularly the case when the employer is close to the employee. It's very hard to defend this allegation. The courts impose a very high responsibility on employers to keep their employees safe from injury.

I heard that the injury was suffered outside of work....

This is probably the most difficult issue. People hear rumours and are often told things by other people. We bear the responsibility of producing evidence to prove this allegation. The evidence must be very reliable and often it is not (“a friend of a friend told me that ...”). The allegation is one that effectively says the injured worker is being fraudulent. As the consequences for the injured worker are serious the evidence must be very strong.

What about surveillance?

Yes, we do undertake surveillance but this does not necessarily stop a common law claim, unless the footage leads to the claimant being successfully criminally prosecuted for fraud. It goes to capacity and credibility if the surveillance reveals inconsistencies in presentation. Sometimes this may reduce the damages, sometimes it may not. It needs to give clear evidence, otherwise the claimant and the Court will find a way to explain or dismiss the evidence

You just pay these claims without even fighting....

The judge is human and forms opinions based on what the judge sees and hears. There is always the chance the judge will prefer the injured worker's side. At the end of the day, it becomes a pragmatic decision of cost to the scheme and impact on the employer's premium. We need to remove the emotion and make a decision based on cost. Evidence shows that the earlier a common law claim is settled the cheaper it is.

The injured worker always wins....

Largely this is correct. The courts place a very high duty on employers to ensure employees are kept safe. Sometimes it can feel like you can never do enough. Defending claims is very difficult cause of this.

But our specialist says that he can still work....

We get an IME and so does the plaintiff lawyer. Often they provide different opinions on what the impact of the injury was. The doctors are looking at disability (not impairment) and therefore they must make a subjective decision. There are always going to be at least two opinions on what the impact of the injury is. Impossible to disprove pain and, if there is any doubt, the court is more likely to favour the injured worker. The risk is high that the judge is going to prefer the injured worker's story

How can he be paid for economic loss if he has returned to work with our company or for another employer?

Economic loss addresses both past and future loss. Even though a worker has successfully returned to work, they may be suffering a loss of earnings through job or role change, inability to undertake overtime or higher paying roles due to ongoing incapacity or they just can't work as many hours due to the injury. The Court will also look at any disadvantage in the open labour market due to the injury or if they were to lose employment they may be disadvantaged in gaining further employment. Sometimes this allows economic loss for period where they may have to retrain/reskill due to the ongoing effects of the injury.

Summary

- Common law and the right to sue your employer for negligence is a long established right for injured workers
- Common law is the final stage of entitlement to compensation for injured workers
- Statutory claims are no fault
- Common law claims are at fault
- Common law claims can be prevented by preventing injuries in the first place
- Common law claims can further be prevented with effective communication between parties and successful rehabilitation and RTW outcomes