
MOTOR VEHICLE ACCIDENTS

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OUTLINE OF THE LAW FOR MOTOR ACCIDENT INJURY CLAIMS IN NSW

The current scheme of compensation in NSW is governed by the Motor Accidents Injuries Act 2017 which applies to all accidents occurring after 1 December 2017. There are two stages for such claims:

- **FIRST STAGE**

It is important for everyone to note that there are strict time limitations that apply and anyone who's been involved in a motor vehicle accident regardless of fault has an entitlement for benefits for the first six-month period.

To be eligible for such benefits you need to complete the statutory benefits claim form and have your treating doctor complete a certificate of fitness.

This then gets forwarded to your CTP insurer and they are obliged under the law to attend to payment of your medical and treatment expenses, your loss of weekly wages and any other treatment and care expenses you may require.

As is always the case if you have sustained an injury you should ensure that its reported to the police within 28 days and obtain details of the other driver and how the accident occurred.

If, however you were wholly at fault for the accident you will only receive benefits for the six-month period

Injuries that are more than a soft tissue injury or what is known as a minor injury will be eligible for ongoing benefits past that six-month stage and can continue depending on the nature of the injury for a continuing basis up to 5 years if the treatment is considered to improve your recovery.

It is important to ensure that you lodge your claim within the first three months of the accident.

- **SECOND STAGE**

Once the insurer has determined that you have not sustained a minor injury and that you are not mostly or wholly at fault then your benefits will continue. These benefits will include your weekly wage which after the first 13-week period will reduce to 80 or 85% of your pre-accident weekly earnings.

Having the benefit of a team of Accredited Specialist Solicitors at Gerard Malouf and Partners you will also be advised and guided with regards to lodging a claim for common law damages. Our team will work with you to prepare the claim to ensure maximum benefit.

Such claims incorporate the following two heads of damages:-

- Your pain and suffering (referred to as noneconomic loss) subject to your injury being classified as a non-minor injury and the injury exceeding 10% whole person impairment threshold, this is determined by independent medical assessment and will very much depend on your injuries.
- Past and future economic loss is a claim for your full wage loss including loss of any overtime or bonus benefits from the date of the accident on a continuing basis. These claims for past and future economic loss including loss of Superannuation Benefits are extremely valuable especially if someone has an injury which will impact on the future capacity to work and future employability

GERARD MALOUF AND PARTNERS WILL:

- Advise you as to the importance of ensuring that these claims are lodged within the relevant time period and focus on maximising your claim for these benefits.
- Will work with you in collating all the relevant information and guiding you through the process so as to ensure we maximise your claim.
- Advise you generally with regards to the nature of your injuries and provide you with the relevant information so as to ensure that both you and your doctors are fully investigating your injuries and providing you with the optimum treatment.
- Provide you with a brochure as to the nature of injuries and most likely what treatment is required, what investigations need to be undertaken and what specialists you will need to see. The purpose of this is to ensure we legitimately maximise your claim.
- Take a common sense approach to all claims and provide you realistic advice as to the value of your claim.

- MOTOR VEHICLE ACCIDENT CHECKLIST FOR NSW

1 CIRCUMSTANCES OF THE ACCIDENT

Who is at fault?

- If you are completely at fault: There is no legal claim however there is a claim for statutory benefits covering wages and medical up to 6 months.
- If you are not at fault: Proceed with next section 2. Please note If single vehicle accident: then we cannot assist - no damages claim available. May be able to get statutory benefits paid for up to 2 years if blame can be placed on another person eg motorbike slipping on oil spilled on road.

2 MINOR INJURIES

An injury to muscles, tendons, ligaments, menisci, cartilage, fascia, fibrous tissues, fat, blood vessels and synovial membranes – but no rupture to same Eg.s: soft tissue, whiplash, bulging discs, stress, spinal nerve, root injury– without radiculopathy (eg bulging disc pressing on nerve), adjustment disorder, acute distress disorder.

For a minor injury no damages claim is available and benefits will cease after 6 months. You are still able to request treatment from the insurer after this date if your treatment is deemed to be required to improve your recovery

It is advised that you:

- Obtain an MRI scan to check for tears or radiculopathy.
- Obtain a nerve conduction study if you have numbness/tingling see a neurologist.
- Obtain a sleep study for disrupted sleep.
- See a psychologist to get any psychological injuries diagnosed.

3 NON MINOR INJURIES

These include:

- breaks or fractures
- tears in discs/Disc prolapse
- brain injury
- radiculopathy: eg numbness and tingling you need 2 or more of the following:
 - loss of symmetry or reflex
 - sciatic nerve root
 - muscle atrophy
 - muscle weakness
 - sensory loss
- nerve damage
- rupture to ligaments/cartilage/tendons
- scarring
- vision/hearing loss
- internal organ damage
- depression or PTSD - diagnosed.

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OBTAIN IMAGING AND SCANS

It is advised that you obtain MRI or nerve conduction studies for Radiculopathy. If not you have not obtained imaging you must get referrals to get scans completed.

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ARE YOU A JOBHOLDER?

If you are at least 15 years old and:

- were employed or self-employed (whether or not full-time):
 - at any time during the 8 weeks before the motor vehicle accident (MVA);
 - during a period or periods equal to at least 13 weeks during the year before the MVA, or
 - during a period or periods equal to at least 26 weeks during the 2 years before the MVA, AND, had not retired permanently from all employment.

OR

- before the MVA had entered into a contract for employment with employer or to commence self employed business.

OR

- was, immediately before MVA, receiving weekly wage payments under MVA Act or the *Workers Compensation Act* 1987.

If you can confirm :yes" to any of the above options then you are able to claim damages.

Are you off work for an injury/illness, even if it is not related to the subject accident? It might be worth talking with Total Permanent Disability legal specialists within the firm.

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ARE YOU UNEMPLOYED?

Are your injuries significant enough that they may get over 10% Whole Person Impairment?- If not then no damages can be claimed.

What is your future income circumstances?- If you would have been earning an income "but for the accident" then you may have a damages claim available.

OUTLINE OF THE LAW FOR MOTOR ACCIDENT INJURY CLAIMS IN QLD

If you have been injured in a motor vehicle accident in QLD which you were not wholly at fault for, and wish to make a claim, you will need to do the following:

- Report the accident to the police;
- Lodge a Notice of Accident Claim Form with the CTP insurer of the vehicle you believe is at fault for the accident;
- Attend upon medical practitioners and ensure you continue to undergo the required treatment to aid in your recovery; and
- Be sure to inform the insurer of any significant changes in your medication condition immediately.

• WHAT TO INCLUDE IN A NOTICE OF ACCIDENT CLAIM FORM

- A certified ID;
- Medical Certificate completed by a medical practitioner;
- If you have a legal representative, the supervising principal must complete the law practice certificate which is attached to the claim form. This must be verified by a statutory declaration;
- Complete the 'Payment to you/offer of settlement section' by writing the monetary amount you would be willing to accept to finalise your claim. In order to substantiate your offer, you should attach all relevant evidence including the following:
 - Medical treatment receipts;
 - Medical reports;
 - Photographs;
 - Statements;
 - Tax returns;
 - Payslips; and
 - Other proof of economic loss.

• TIMEFRAMES TO LODGE NOTICE OF ACCIDENT CLAIM FORM

For Nominal Defendant claims (where the vehicle that caused the accident is unidentified or uninsured):

- Notice must be lodged within 3 months. If the claim is lodged outside of the 3 months, the claimant must provide a statutory declaration outlining the reason for the delay.

For all other claims (whichever comes first):

- Within 9 months after the MVA or
- If symptoms of the injury are not immediately apparent, the first appearance of symptoms of the injury or
- If the claimant has a solicitor managing the claim, within 1 month of the first consultation with the solicitor.

If liability is accepted, the insurer will be liable to make payments to or for your reasonable and appropriate medication and treatment expenses.

- **COMMON LAW DAMAGES (LUMP SUM COMPENSATION CLAIM)**

- Once the insurer has accepted liability, the insurer will either accept the offer proposed in the claim form or make a counteroffer.
- The Heads of Damages that can be claimed are:
 - Future medical treatment and rehabilitation expenses;
 - Out of pocket expenses such as medical, travel and pharmaceutical expenses;
 - Past and future wage loss;
 - Past and future superannuation loss;
 - Past and future gratuitous care; and
 - General damages (pain and suffering).
- The entitlement to general damages is subject to the claimant's injury being assessed using the Injury Scale Value System (ISV).

Table 11—For an injury arising on or after 1 July 2020			
Item	Injury scale value	Base amount	Variable amount
1	5 or less	—	Injury scale value x \$1,620
2	10 or less but more than 5	\$8,100	(Injury scale value - 5) x \$1,890
3	15 or less but more than 10	\$17,550	(Injury scale value - 10) x \$2,230
4	20 or less but more than 15	\$28,700	(Injury scale value - 15) x \$2,550
5	25 or less but more than 20	\$41,450	(Injury scale value - 20) x \$2,850
6	30 or less but more than 25	\$55,700	(Injury scale value - 25) x \$3,190
7	35 or less but more than 30	\$71,650	(Injury scale value - 30) x \$3,520
8	40 or less but more than 35	\$89,250	(Injury scale value - 35) x \$3,830
9	50 or less but more than 40	\$108,400	(Injury scale value - 40) x \$4,120
10	60 or less but more than 50	\$149,600	(Injury scale value - 50) x \$4,400
11	70 or less but more than 60	\$193,600	(Injury scale value - 60) x \$4,670
12	80 or less but more than 70	\$240,300	(Injury scale value - 70) x \$4,990
13	90 or less but more than 80	\$290,200	(Injury scale value - 80) x \$5,280
14	100 or less but more than 90	\$343,000	(Injury scale value - 90) x \$5,570

OUTLINE OF THE LAW FOR MOTOR ACCIDENT INJURY CLAIMS IN VICTORIA

The law is governed by the *Transport Accident Act* 1986. A "Transport Accident" is defined in S.3(1) of the Act as follows:

- An incident directly caused by the driving of a motor car or motor vehicle, a railway train or a tram.

s3(1A) extends to include incidents:

- (a) involving a motor vehicle, a railway train or a tram which is out of control;
- (b) involving a collision between a pedal cycle and an open or opening door of a motor vehicle;
- (c) involving a collision between a pedal cycle and a motor vehicle while the cyclist is travelling to or from his or her place of employment; or
- (d) involving the opening or closing of a door of a bus, tram or railway train.

Victorian legislation has both Statutory benefits and common law claims. The Transport Accident Commission (TAC) deals with the claims for compensation under this legislation.

- **TIME LIMITS & LODGING A CLAIM**

- Section 64 – if a driver in an accident receives a notice from TAC regarding the accident, the driver must make a report within 28 days of receipt of that notice.
- Section 68 - a person who is injured in a transport accident has 12 months from the date of accident or from when the injury manifested itself, in which to make a claim for compensation.
- Section 69:
 - a claim for deprivation or impairment of earning capacity (made under s149) can be made within 6 years after the date of the accident.
 - Claims for costs or expenses (made under s 145) for a person that has died from an motor vehicle accident, can be made within 6 years after the death of the deceased person.
 - Claims for out of pocket expenses of a parent or guardian of an injured child (s145(3), can be made within 6 months of incurring the expense.

- **EXCLUSIONS TO STATUTORY BENEFITS**

There is no claim for statutory benefits if:

- A Claimant was injured in a transport accident in the course of employment and thereby has workers compensation entitlements.
- A Claimant was injured in a transport accident on private land when driving an unregistered motor vehicle.
- A Claimant who commences a common law claim for damages in another state will cease to be entitled to statutory benefits.

- **STATUTORY BENEFITS INCLUDE:**

- Lifetime medical expenses, vehicle and home modifications.
- Loss of earnings (LOE) for the first 18 months post accident if the claimant is an "earner" - s6.
- Loss of earning capacity benefits (LOEC) for the second 18 months post accident if the claimant is or is not an earner.
- Lump sum impairment benefit (based on the AMA 4th Edition Guides for the Evaluation of Permanent Impairment for physical injuries and Guide to the Evaluation of Psychiatric Impairment for Clinicians GEPIC for psychiatric injuries).
- LOEC benefits continued after the second 18 months if impairment is 50%.

- **DISPUTE RESOLUTION PROCESS**

- A claimant has 12-months from the date they are notified of a decision, to lodge an Application for Review to the Victorian Civil and Administrative Appeals Tribunal (VCAT).
- A claimant can elect for an internal review- but this does not extend the 12-month period within which to lodge the review in the Tribunal.
- A claimant can elect to lodge a Dispute Resolution Application under the No Fault Dispute Resolution Protocols:
 - A claimant has 3 months after a decision to lodge an application for review at VCAT if the 12-month period has expired.
 - TAC pays a fixed fee for the claimant's legal costs if resolved at protocol stage.

- **COMMON LAW PROCESS**

A Claimant must have a serious injury to bring a claim for common law damages. A 30% impairment automatically is deemed a serious injury.

Regulation 5 of the Transport Accident Regulation 2017 states a serious injury includes;

- an injury that results in permanent blindness;
- burns to not more than 50% of the body that cause severe disfigurement and comprise of full-thickness burns—
 - (i) to the head, neck, arms or lower legs; or
 - (ii) that result in severe difficulties in performing mobility, communication and self-care tasks.
- a brachial plexus injury that results in the loss of the use of a limb.

Reg 5 (2) "permanent blindness" means—

- a field of vision that is constricted to 10 degrees or less of arc from central fixation in the better eye, irrespective of corrected visual acuity; or
- a corrected visual acuity of less than 6/60 of the Snellen Scale in both eyes; or
- a combination of visual defects resulting in the same degree of visual loss as referred to in paragraph (a) or (b).

If the impairment is less than 30%, a serious injury is only satisfied if the TAC grants a Serious Injury Certificate or a Court gives leave to bring a common law claim for damages based on the 'narrative test' set out in Section 93(17). A claimant can elect to lodge a Serious Injury Application under the Common Law Protocols to obtain a Serious Injury Certificate.

- **SECTION 93(17)- NARRATIVE TEST COMMON LAW**

(17) In this section— serious injury means:

- (a) serious long-term impairment or loss of a body function; or
- (b) permanent serious disfigurement; or
- (c) severe long-term mental or severe long-term behavioural disturbance or disorder; or
- (d) loss of a foetus.

- **SERIOUS INJURY MEANINGS**

- Serious has been held to mean “more than moderate”
- “Where the impairment of a body function is the product of both organic and mental conditions, it will not fall within para (a) unless it is predominantly the product of the organic condition”: TAC v Kamel [2011] VSCA
- Mental harm injuries must satisfy the “severe “ test- i.e PTSD.

- **SERIOUS INJURY LITIGATION**

If the TAC refuses to grant a Certificate or the TAC is deemed to have refused to grant one (when the TAC exceeds the time frame for making a decision and the claimant has put the TAC on notice) , the claimant is able to issue an Originating Motion to the County Court seeking leave to commence a common law claim.

- **COMMON LAW DAMAGES RESOLUTION**

If the TAC is the only CTP insurer on risk in the common law claim, and the TAC or court has granted a certificate or leave, the protocols require the parties to attend a settlement conference for the purpose of discussing settlement.

- **COMMON LAW LEGAL COSTS UNDER THE PROTOCOLS**

- The TAC will pay a set fee for the claimant's legal costs if the common law claim is resolved in the protocol process.
- The protocol fee is in addition to legal costs payable if the claimant is successful in the Originating Motion.
- The fee is indexed and allows for uplifts where liability is denied or financial documents are provided, plus counsel's fees or a set fee if a solicitor attends the settlement conference without counsel.

- TIME LIMITS FOR COMMON LAW PROCEEDINGS

The *Limitation of Actions Act 1958* allows a claimant 6 years from the date of the injury/accident to commence a common law proceeding- issue a Writ at Court.

The TAC will waive the limitation period if it is the only CTP insurer on risk and a request is made before the expiry of the 6 year period:

- The TAC will impose a condition that the claimant lodge a Serious Injury Application under the protocols within 3 months from the date the waiver is granted.
- The TAC will also require that the claimant issue an Originating Motion within 28 days of the date that TAC refuses to grant a certificate.
- If a certificate is granted by TAC or leave granted by the Court, and the common law claim does not resolve at a conference the claimant has 28 days to issue a Writ.

GMP LAW WILL FIGHT
FOR THE MAXIMUM
BENEFITS YOU'RE
ENTITLED TO.

**SIGN
HERE**



Client's signo

Client's telep

Contact nam

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