Common law claims

A worker who is injured in circumstances involving the *negligence* of the employer, or of fellow workers for which the employer is liable, may have a claim for *common law damages*. There may also be a claim against a third party such as the occupier of premises where a worker is injured.

Negligence

An action for *common law damages* is based on the *negligence* of the employer or of fellow workers for whose negligence the employer is liable, or even of a third party.

An employer owes all employees a duty to take reasonable care for their safety. If there is failure to observe the standard of care required in the circumstances, the employer is liable to them for most damage that results. Fellow workers also owe a *duty of care* to each other. A worker who is injured by a fellow worker's negligence may be able to *sue* both the employer and the fellow employee for damages. An employer is liable for the negligence of the workers committed in the course of their employment, even where the employer is not personally at fault.

The usual factors that go towards an employer's failure to take care can be classified as follows:

- failing to provide safe plant and equipment;
- failing to provide safe premises and safe means of access to the premises;
- failing to provide competent fellow workers; and
- failing to provide a safe system of work.

The last, broad category covers the organisation of the process or work. It can involve a single incident or incidents over a period of time, such as repetitive work. Among other acts and omissions, it may include a failure to:

- provide adequate or competent staff to assist;
- instruct the worker or the fellow workers in the operation of their part of the process; or
- properly warn of the dangers involved.

There is no absolute *liability* on the part of an employer. The important question is whether the employer has taken all reasonable precautions available in the circumstances to eliminate a foreseeable risk of injury.

Breach of statutory duty

Breach of *statutory* duty is discussed generally in Chapter 18.1: Negligence and Injury. Whether the employer may have breached a safety duty imposed by *legislation* will often form an important part of a worker's action for *negligence*. In Victoria, working conditions are regulated by a number of Acts and Regulations. Breach of this legislation will generally

lead to the employer being prosecuted for an *offence* and probably being liable to pay *damages* to an injured worker.

A number of Victorian Acts and Regulations deal with employers' duties to their workers, for example, the *Occupational Health and Safety Act 2004* (Vic).

Contributory negligence

A common defence is that of *contributory negligence* (see "Establishing liability", in Chapter 18.1: Negligence and Injury). The High Court of Australia has shown that it is difficult for an employer to succeed on such a defence for claims involving injuries at work. It appears it will be difficult for the employer to prove such *negligence* if there has been no disobedience, no departure from usual practice and no awareness of danger by the worker. Also, the employer must, when taking reasonable care for the safety of workers, have regard to the risk of injury because of some inattention or misjudgement by the worker.

Workers compensation

In almost all cases where a worker is injured in circumstances giving rise to a *common law* action for *damages*, there is also a right to workers compensation. It is now not necessary for a worker to make a choice whether to receive workers compensation or damages.

The right to obtain common law damages in respect of a workers compensation injury is vastly different, depending on when the worker was injured.

Injuries before 1 December 1992

See sections 135 and 135B of the 1985 Act. Legal advice should be sought for such claims.

Injuries between 1 December 1992 and 11 November 1997

See section 135A of the 1985 Act. Legal advice should be sought for such claims.

Injuries between 12 November 1997 and 19 October 1999

No such *damages* can be obtained for any work-related injury that occurred between 12 November 1997 and 19 October 1999 (inclusive), except claims by dependants of deceased workers who died as a result of a work-related injury. See section 134A of the 1985 Act.

Injuries on or after 20 October 1999

As in the case of injuries that occurred before 12 November 1997, *damages* can be obtained if the injury is a "serious injury". See generally sections 134AA–134AG of the 1985 Act.

However, the definition of "serious injury" is more restrictive than for injuries prior to 12 November 1997. A worker must generally wait for 18 months after an injury before applying for a "serious injury" certificate, although special provisions (s 135BA) allow terminally ill workers to have their claims for damages heard speedily.

In particular, an injury (excluding any reactive psychiatric or psychological injury) is *deemed* to be "serious" if permanent impairment is more than 30% under the AMA Guides (fourth edn) (see "Table of Maims", above).

Also, any impairment, loss of a body function, mental or behavioural disturbance or disorder must be "permanent" rather than "long-term".

A claim cannot be made for damages for loss of earning *capacity* unless there is a loss of earning capacity of 40% or more.

For injuries prior to 12 November 1997 a worker had to claim damages for pain and suffering as well as loss of earning capacity. Now a worker can choose to claim damages for either pain and suffering or loss of earning capacity, or both.

However, if a worker claims compensation for the relevant injuries under the lump sum provisions of section 98C or section 98E, then no claim can be made for damages for pain and suffering for these injuries.

There are also minimum and maximum limits on the award of damages for injuries on or after 20 October 1999.

Pecuniary or monetary loss damages can only be awarded between the sums of $56,650 and $1,275,570.

Pain and suffering damages can only be awarded between the sums of $54,730 and $555,350.

Damages for wrongful death (s 135C) can be awarded to a maximum of $886,330.

Conclusion

It is important that legal advice be sought if a worker believes they may have a claim for *damages* for an injury. The *legislation* covering this area is very technical and rigorous as to time requirements. Generally, court proceedings should be issued within six years of the date of injury, or after that time if a court allows. Also, the legislation has been, and will continue to be, subject to interpretation by the courts from time to time.

If damages are obtained but they are less than the above minimum amounts for injuries prior to 12 November 1997 and on or after 20 October 1999, then each side must bear its own *costs*. There are also other provisions covering such matters as the amount of costs that can be awarded and the right of a solicitor to charge their own clients costs as well.

Generally, once the proceedings for damages are finalised, a worker will not be able to make any further claims save for medical and like expenses (see “Medical and like expenses”, above).

Pecuniary or monetary loss damages will not include any claim for medical and like expenses.

When assessing damages, benefits received to date, by way of either weekly payments or other benefits, will be taken into account.

As of 10 October 2010 there are limitations on the amount of legal costs paid on successful *serious injury* applications.