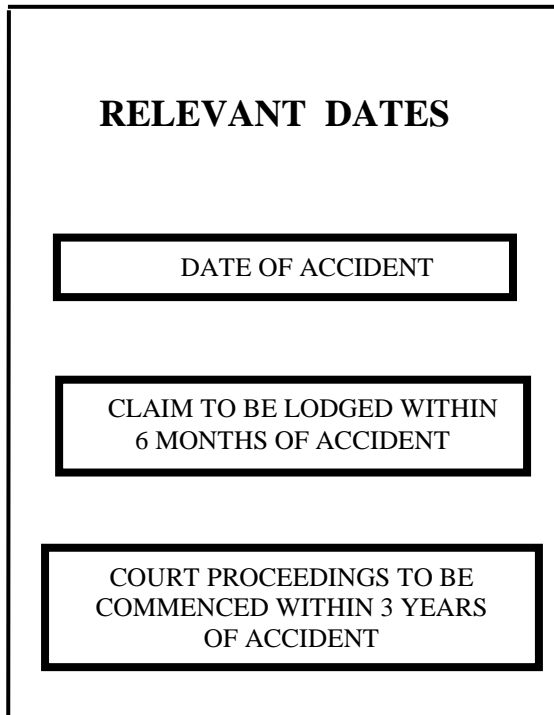


Personal injury pro-active analysis of claims

Introduction



Pre-litigation management

Receipt of claim

A number of matters should be checked immediately:

- Was the accident reported to the Police within 28 days? [s42 MAA, s70 MACA]
- Has the claim been made within 6 months of the accident? [s43 MAA, s72 MACA]
- Is the Claim Form complete and in the approved form? [ss44 & 44A MAA, ss74 & 75 MACA]
- What is the claimant's involvement in the accident? (ie. driver, passenger, pedestrian, etcetera).

Claims not reported to police within 28 days

In dealing with these claims, keep in mind a claimant is not entitled to provisional liability for payment of treatment expenses up to \$500 [s48 MACA]. There are no other immediate actions that need to be taken for the relevant breach. However, the claimant must provide to the Court

a 'full and satisfactory' explanation for the non-compliance [s42 MACA, s70 MACA]. It may therefore be prudent for the explanation to be requested from the claimant upon receipt of the claim to avoid any changes to the explanation at a later time.

Late claims

For claims not lodged within 6 months:

- Check Claim Form to determine whether an explanation is provided;
- Request explanation for delay from claimant within 2 months of receipt of claim [s43A MAA, s73 MACA];
- If appropriate, reject claimant's explanation for delay within 2 months of receipt [s43A(6)(b) MAA, s73(3)(b) MACA].

If an explanation is not requested within 2 months of receipt of the claim, the insurer loses the right to challenge the claim on the ground of delay [s43A(6)(a) MAA, s73(3)(a) MACA].

If a provided explanation is not rejected within 2 months of receipt, the insurer also loses the right to challenge the claim on the grounds of delay [s43A(6)(b) MAA, s73(3)(b) MACA].

For accidents occurring between 1 January 1996 and 4 October 1999, a further consideration Pursuant to s43A(4) MAA, if a claim is made in excess of 12 months after the accident, the claimant must also demonstrate that the damages that he/she would likely to be entitled to would be not less than 10% of the maximum amount for non-economic loss under s79 or s79A as at the date of the accident. Accordingly, for an accident that occurred on 1 January 1999, the claimant would be required to demonstrate likely damages in the order of \$27,300.

The area of law regarding 'full and satisfactory' explanations for delay is complex and it may be prudent, where acceptance of an explanation is considered, to approach a panel lawyer for confirmatory advice. If an explanation is rejected, the right to challenge continues when proceedings are commenced and the explanation can then be reviewed by the panel lawyer.

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The provisions relating to claims made in excess of 12 months after the accident do not apply to legally incapacitated persons, due to their age or mental capacity [s43A(5) MAA].

Claim not in proper form

If rejection of the claim does not occur within 2 months after receipt of claim, the insurer loses the right to challenge the claim on the ground of non-compliance with that section [s44B(1) MAA, s76(1) MACA].

However, the rejection for non-compliance will not be successful in any Court proceedings if the relevant non-compliance is technical and of no significance.

Claimant's involvement in accident

Prior to a decision on liability, it would be wise to obtain a Police Report and a statement and/or Accident Report Form from the insured.

An admission of breach of duty of care should only be made where the evidence is clear.

However, under MACA, a claimant may be able to bypass certain procedural requirements so as to enable Court proceedings to be commenced earlier, if liability is denied.

If the accident involves a contributing unidentified vehicle, notice must be given to the Nominal Defendant within 3 months of receipt of the claim. The entitlement to continue an action against the Nominal Defendant after the 3 month period will only be possible if the insurer is able to demonstrate to the Court that there is a 'full and satisfactory' explanation for not having given notice within the 3 month period.

Sharing should also be considered.

Further management under MAA

MAA matters:

- Request further and better particulars approximately 4-6 months after receipt of claim
- Independent medical examination less than, but proximate to, 12 months after accident
- If appropriate, surveillance less than, but proximate to, 12 months after accident.

The claimant will be entitled to commence proceedings in respect of the claim, subject to the following:

- Request for particulars have been provided [s48 MAA]
- Particulars have been provided pursuant to section 50A
- At least 90 days have elapsed since the provision of particulars pursuant to section 50A [s52(1A) MAA]
- At least 28 days have elapsed from the date that the claimant responded to the first offer of settlement from the insurer [s52(1A) MAA]
- At least 6 months have elapsed since the provision of the Notice of Claim [s52(1) MAA].

Except where:

- All liability is denied
- Partial liability is admitted and the claimant is dissatisfied with the extent of the admission
- In the case of a late claim, the explanation for delay is rejected or the claim is otherwise rejected on the ground that the total damages of all kinds likely to be awarded to the claimant if the claim succeeds are less than 10% of the maximum amount under section 79 and 79A as at the date of the accident.

The claimant must also commence proceedings within 3 years of the accident or, in respect of a claim for the death of a person, the date of death [s52(4) MAA].

For accidents after 1 January 1996, the claimant will only be able to commence Court proceedings in excess of 3 years after the accident if the following is able to be demonstrated:

- That there is a 'full and satisfactory' explanation for the delay [s52(4B)(a) MAA];
- The total damages of all kinds likely to be awarded if the claim succeeds are not less than 25% of the maximum amount that may be awarded for non-economic loss under section 79 or 79A as at the date of the motor vehicle accident [s52(4B)(b) MAA];
- That there is no prejudice to the defendant in allowing the claimant to proceed outside the limitation period.

The first two conditions above do not apply to accidents before 1 January 1996.

Section 52(4B)(b) MAA does not apply to a claimant who is legally incapacitated, because of age or mental capacity [s52(4C) MAA].

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Where section 50A has been complied with but, as a result of the waiting periods contained within section 52(1A), the claimant is not entitled to commence proceedings. Accordingly, the claimant is entitled to commence proceedings before 28 days after the expiration of the waiting periods detailed by section 52(1A) [s52(4A) MAA].

MACA

A claimant may submit an Accident Report Form within 28 days, seeking acceptance of provisional liability for the payment of medical expenses up to \$500 [ss48, 49, 50 & 51 MACA].

An insurer must provide notice of acceptance of provisional liability within 10 days [s50(2) MACA] and if the insurer fails to notify within the relevant period, provisional liability is taken to be accepted [s50(4) MACA].

The time limits in relation to late claims is mirrored under the MACA, with the exception that there is no requirement for a claimant to prove likely 10% of maximum 79A damages for claims made in excess of 12 months of the accident.

Requirements upon insurers under MACA are:

- Claimant to be notified of decision on liability within 3 months after notice of claim received [s81(1) MACA];
- If liability is admitted only in part, notification to include details sufficient to ascertain the extent of the admission of liability. For example, if contributory negligence is alleged, what is the extent of the allegation, such as 25% or 50% [s81(2) MACA]
- If insurer fails to comply with the 3 month advice on liability, liability is taken to be wholly denied [s81(3) MACA]
- Insurer must request further relevant particulars, if original particulars are felt to be deficient, within 2 weeks [s82(6) MACA]
- Duty on insurer to make a reasonable offer of settlement to the claimant, unless liability wholly denied, within 2 months after all relevant particulars provided, or within 1 month after injury has stabilised, as agreed by the parties or as determined by a medical assessor, whichever is the later [s82(1) MACA].

The claimant may be referred for medical assessment pursuant to Part 3.4 of MACA. This

by either party or by a Court or a claims assessor disputes regarding the following:

- extent of the claimant's injuries;
- reasonableness of treatment;
- whether the injury has stabilised;
- degree of impairment of earning capacity.

Any certificate generated as a result of a medical assessment is conclusive evidence in any Court proceedings or any assessment [s61(2) MACA].

A party may apply for a review of the medical assessment, such review to be undertaken by a panel of medical assessors [s63 MACA].

A matter is then subject to a pre-litigation assessment process called the Claims Assessment Resolution Service (CARS) [Part 4.4 MACA].

A claim may be referred to CARS by either party [S91 MACA], upon the following:

- At any time if it is a claim in which insurer wholly denies liability;
- At any time in respect of a claim for the death of a person;
- At any time if it is a claim in respect of an injury which has not stabilised within 3 years after the motor accident;
- Once 2 months has elapsed since the insurer has made an offer of settlement;
- The period within which the insurer is required to make an offer of settlement has expired.

Matters that are otherwise exempt from assessment are where:

- Insurer denies breach of duty of care or liability for the claim;
- Allegation of contributory negligence in excess of 25%
- Insurer makes an allegation of a false or misleading claim
- Claimant lacks legal capacity.

The application for exemption may also be made in other matters that involve complex issues [s92(1)(b) MACA].

For matters not exempt from CARS, the matter is then referred before a trained assessor and assessment of the claim is made.

Thereafter, a claimant is not entitled to commence Court proceedings unless a certificate has been issued as to the assessment of claim by an assessor or a certificate has been issued that

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the claimant is exempt from assessment [s108 MACA].

Section 110 of MACA provides for an insurer to initiate the litigation process. It provides that the insurer may give a claimant notice requiring him/her to commence Court proceedings in respect of a claim if:

- The claimant has been entitled to commence proceedings for a period of at least 6 months (claims assessment certificate or exemption certificate issued)
- At least 18 months have elapsed since the date of the motor accident.

If the claimant does not comply with the notice under s110, the claimant is to be taken to have withdrawn the claim and must provide a 'full and satisfactory' explanation of the failure to comply with the notice if seeking to have a Court reinstate the claim.

Matters may be referred back for general assessment in any Court proceedings if significant evidence is adduced in Court proceedings that was not made available to the claims assessor [s111 MACA].

Court proceedings

Court documents

A claimant commences proceedings by filing a Statement of Claim which makes allegations as to liability, injury, loss and damage.

The Statement of Particulars Pursuant to Part 9 Rule 27 of the District Court Rules includes detailed particulars of injuries, ongoing disabilities, past medical expenses, future medical expenses, claims for economic loss and claims such as for domestic assistance or home care.

In respect of late claims and claims not made in their proper form [ss43&44 MAA, ss73&74 MACA] a Notice of Motion must be filed within 2 months seeking to dismiss the Statement of Claim, or the insurer loses the right to challenge the claim on these grounds.

Pursuant to the District Court Rules, a Notice of Motion seeking to dismiss a Statement of Claim, for a failure to provide a reasonable request for particulars [s48 MAA, s85 MACA] or failure to comply with other requirements of the Motor Accidents Act [s50A, s52(1A) MAA], must also

be filed within 2 months of the service of Statement of Claim. However, the right to challenge the Statement of Claim for these breaches is not lost if such breaches are pleaded in the Notice of Grounds of Defence.

The Notice of Motion will be supported by an affidavit, usually from the panel lawyer. In some circumstances, it may be appropriate for a claims officer to provide an affidavit.

For Court proceedings commenced in excess of 3 years of the accident, claimants will be required to file a Notice seeking leave to continue with the claim outside the limitation period and satisfy matters detailed at the top of page 5.

As proceedings continue, Notices of Motion may also be filed for other reasons including ongoing failure to provide further particulars or outstanding documentation. Notices of Motion may also be required seeking to vacate hearing dates or seek specific orders in relation to the inclusion of other parties to

A Notice of Grounds of Defence should be filed by the defendant within 2 months of the service of Statement of Claim, although it may be filed any time prior to hearing.

Evidence gathering in the litigation phase

There are two other extremely significant investigation tools.

Surveillance can be very useful, as claimants generally appear more incapacitated via medical reports than when observed.

Subpoenas for Production may be of great benefit in investigating a claimant's past medical history to determine whether there have been prior relevant complaints of disability.

Ongoing claims management

Early settlement opportunities continue to be explored by way of invitations to participate in informal conferences.

If matters do not appear capable of early resolution, an Offer of Compromise can be served upon the claimant's solicitors. The effect of an Offer of Compromise is that if a claimant does not achieve a more favourable result at a hearing or arbitration, a defendant is entitled to a costs order for costs incurred from the date of the Offer of Compromise.

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Claimants may also serve Offers of Compromise at any particular time. If a claimant serves an Offer of Compromise in excess of 28 days prior to a hearing date and obtains a result more favourable, s/he will be entitled to indemnity costs for the whole of the action.

In our view, the service of conservative Offers of Compromise usually has no impact.

The hearing of the action would be conducted before a Judge alone, as juries are not permitted in motor accident claims. A Judge may give his decision immediately upon the conclusion of the case or may reserve the decision until a later time. In our experience, approximately 50% decisions are reserved and of that 50%, a further 50% are reserved for a period in excess of 3 months.

Once a District Court Judge has made a decision, he/she will also have to rule on various costs orders, which may be affected by Offers of Compromise, other offers of settlement or the results of arbitration. If a defendant wishes to appeal the decision, it would usually be appropriate to seek a 'stay' of at least part of the Judgment immediately. A stay is an order that only part of the Judgment amount be paid within 28 days, with the remainder payable at the conclusion of the appeal.

A 'Holding Appeal' may be filed within 28 days, allowing a further 3 months before filing papers for a full appeal. This may be appropriate in lengthy matters where transcripts are required to be obtained, both of the evidence and Judgment. In most instances, obtaining transcripts takes 6 to 10 weeks.

However, if the appeal disputes an amount less than \$100,000 or involves an interlocutory matter, a special application needs to be made to the Court seeking leave to appeal. This is heard by one Judge.

A full appeal hearing is heard by three Judges of the Supreme Court, except for quantum appeals, where usually the appeal is heard by only two Judges.

In exceptional circumstances application for special leave may be sought to appeal to the High Court on a specific point of law. The special leave application is usually heard by a High Court Judge to determine whether the matter is appropriate to proceed to Canberra for hearing before the 'Full Bench'.

Once a decision is made by the High Court, there is no further point of appeal. As a note of interest, prior to 1986, a matter could be appealed to the Privy Council in England. This was abolished by the Australia Act.

Conclusion

The ultimate outcome of a claim can be influenced by actions undertaken early and correctly. It is vital for every claim to receive close scrutiny to ensure compliance with relevant requirements.

Proactive early steps usually mean that claim life and costs are reduced which, in turn, enables an insurer to enter the premium pricing market in a more competitive position.

For further information, please contact TLlawyers.