

Work related accidents: advising your client

Diana Farah, Carroll & O'Dea, Sydney

Diana Farah writes about electing to proceed with a common law claim.

Advising seriously injured workers as to their rights and in particular as to whether to bring a common law claim will now involve a number of additional considerations compared with the old law. The client will require careful advice indicating the advantages and disadvantages of proceeding with a particular course of action. The client will need a recommendation from the solicitor as to whether or not to sue backed up with reasons. The solicitor may need to obtain advice from counsel and will certainly need to obtain careful written instructions making it clear that the various issues relevant to the decision as to whether or not to proceed with a common law claim have been considered.

Some of the factors which will be looked at in this process will include:

- a) are the plaintiff's injuries and disabilities so severe that it can be confidently expected that he or she will demonstrate an impairment or non-economic loss entitlement sufficient to overcome the common law threshold?
- b) is liability reasonably clear cut bearing in mind that the plaintiff's damages will now be reduced for contributory negligence notwithstanding a breach by the employer of a statutory obligation?
- c) if contributory negligence is a risk, is the client likely to be left with a result after unrecoverable legal costs, a liability reduction and interest foregone, sufficient to justify:
 - i) finalising the client's statutory compensation rights for all times;
 - ii) risking the client's Table of Disabilities entitlements;
 - iii) the costs risk if a verdict for the defendant is a real possibility.
- d) is the client suffering economic loss of such a magnitude that it cannot be recovered through the statutory compensation arrangements and particularly through a claim pursuant to section 40 (bearing in mind the increase in the section 35 limit and the more flexible approach now to be taken in connection with such claims?). If so, a common law claim may well be indicated.
- e) are there substantial areas of potential recovery for the client in a common law claim which are not available otherwise, for example, lost superannuation benefits or special home care services or lost career advancement prospects or lost concurrent earnings?
- f) does the client wish to maintain chance it? A common law claim may be the client's only chance to secure the maximum compensation available under the scheme and/or a final lump sum payment. Achieving a workers' compensation commutation pursuant to section 51 is often difficult. Different people have different approaches to risk taking. Ultimately it is for the client to finally decide which course of action is to be implemented. Clearly if the client decides to take a course of action with risks attached to it careful instructions must be procured before:
 - i) the filing of a Statement of Claim;
 - ii) accepting payment of an entitlement pursuant to sections 66/67 of the Act.
- g) if the client is back at work and not losing income or losing income of an order which is recoverable under section 40 of the Act, is the client going to recover general damages in a common law action sufficiently greater than

the alternative statutory entitlement so as to justify finalising his or her rights forever as well as the taking of the relevant statutory risk?

Settlement Instructions

Always get instructions in writing especially if proceedings involve settlement or the making of an election pursuant to section 151A of the 1987 Act. Always advise your client about any possible reimbursement to the Department of Social Security and preclusion period that may apply. It should be noted that you are unable to guarantee your client the advice given in respect of Social Security benefits but that you base your advice on the formula used by the Department.

It is also essential that you advise your client with respect to any charges to be made by Medicare and any preclusion period that may be imposed by Medicare for the applicant to recover any reimbursement of medical expenses incurred subsequent to the settlement of his/her claim.

An applicant should also be advised as to the possible taxation implications, including capital gains tax, on the settlement which may reduce the ultimate settlement figure.

Finally, I would suggest that when you are sending off to your client cheques for their entitlements under sections 66 and 67 it is appropriate once more to emphasise to them that the acceptance of these cheques and the banking of same constitutes an election not to sue at common law.

Diana Farah is a Partner with Carroll & O'Dea, solicitors in Sydney. Diana is an APLA NSW committee member and is on the Conference Committee for the 1997 APLA National Conference.