



## BRADLEY BAYLY LEGAL

### **MOTOR VEHICLE ACCIDENTS**

This section discusses claims for personal injury and death arising out of motor vehicle accidents.

Persons who suffer personal injuries or death as a result of a motor vehicle accident may be entitled to claim compensation under the following laws:

- the common law (negligence);
- the *Motor Vehicle (Third Party Insurance) Act 1943* (“the MV Act”);
- the *Motor Vehicle (Catastrophic Injuries) Act 2016* (“the MVCI Act”);
- the *Civil Liability Act 2002* (“the CLA”); and
- the *Fatal Accidents Act 1959* (“the FAA”).

### **TYPES OF CLAIMS**

Different laws and schemes apply to a claim depending on the circumstances of the accident, as follows:

- ‘fault based’ claims pursuant to compulsory third party insurance;
- ‘no fault’ claims for persons who have suffered ‘catastrophic injury’; and
- dependency claims for fatal accidents.

### **COMPULSORY THIRD PARTY INSURANCE**

In Western Australia, the MV Act provides that the Insurance Commission of Western Australia (“ICWA”) is the compulsory third party insurer to Western Australian drivers and registered vehicles.

#### **Who is insured?**

Personal injury insurance through ICWA is compulsory with vehicle registration. Section 4 of the MV Act provides that all motor vehicles that are on a road are required to be registered each year with the motor registration division. Payment of the registration fee creates a contract of insurance (Compulsory Third Party Insurance or “CTP”) entered into by the owner of the motor vehicle for any liability (such as causing bodily injury or death) which may be incurred by the owner of the motor vehicle or any person who drives the motor vehicle in circumstances where the bodily injury or death was “*directly caused by, or by the driving of, that motor vehicle*” in any part of Australia.

#### **Who is not insured?**

A number of provisions of the MV Act apply to make owners and drivers personally liable for damage in certain circumstances.

For example, where a motor vehicle accident occurs on private property and the motor vehicle is unregistered, section 4 and section 8 of the MV Act may operate to exclude a claim against ICWA.

Further, there are several circumstances in which ICWA will be required to pay compensation in the first instance and will then seek a recovery from the owner or driver of the uninsured motor vehicle, such as the following:

- where a vehicle being driven on a road is unregistered (uninsured); and
- where the driver or owner of a vehicle has breached one of the “warranties” of the insurance policy (contained in the Schedule to the MV Act).

The most common circumstances in which an owner or driver are in breach of a warranty are as follows:

- where the vehicle is unroadworthy, unsafe or damaged;
- where the driver is unlicensed to drive; or
- where the driver is under the influence of intoxicating liquor.

### **Who can claim?**

When a person (including drivers, passengers, motorcyclists, cyclists and pedestrians) is injured in a motor vehicle accident and the fault is either totally or partially caused by another driver or the owner of another motor vehicle, they can make a claim. The process for determining fault is set out in more detail below.

#### What if I cannot identify the driver or vehicle? (Hit & Runs)

Where the driver of a motor vehicle at fault has caused bodily injury or death and the driver/vehicle cannot be identified, a claim is to be made directly against ICWA and legal advice should be sought immediately.

The injured person is required to make enquiries as to the identity of the driver/vehicle and provide ICWA with notice in writing of the claim under section 7(3) of the MV Act.

#### What if the other vehicle is not registered in Western Australia?

Where a person is injured in a motor vehicle accident as a result of the negligence of a driver of a motor vehicle registered in another State or Territory, any personal injury claim may be covered under the relevant motor injury insurer in that State or Territory and legal advice should be sought immediately.

#### What if the other vehicle had no driver?

The CTP insurance policy covers claims for bodily injury and death caused “by” a motor vehicle and caused “by the driving of” a motor vehicle.

In Section 3(7) of the MV Act, bodily injury caused ‘by’ a motor vehicle is defined to mean “*by the driving of that vehicle or of the vehicle running out of control*”.

This means that you may still be able to make a claim if you are struck by a motor vehicle which has no driver. You should seek legal advice if this occurs.

### Determining fault

Being injured in a motor vehicle accident does not mean that a person will be able to claim damages for personal injuries or death. Under the CTP scheme, the injured person must be able to prove that the accident was either totally or partially caused by the fault of the driver or owner of the motor vehicle involved in the accident.

In law, determining 'fault' translates to proving that the driver or owner of the motor vehicle has been 'negligent' and caused injury or death. In order to prove negligence, an injured person needs to prove that:

1. the defendant owed the injured person a duty of care;
2. the defendant breached that duty of care; and
3. the defendant's breach of duty caused the injured person to suffer loss and damage.

The answers to these questions depend on all of the circumstances of the accident.

### Breach of a Duty of Care

Under the common law, all drivers owe a duty of care to all road users including passengers, motorcyclists, cyclists and pedestrians. Common breaches of the duty to exercise reasonable care include:

- speeding;
- failing to keep a proper lookout for other traffic and road users;
- driving with insufficient control – for example, driving under the influence of alcohol or drugs;
- failing to give way;
- failing to keep sufficient distance to the vehicle in front; and
- entering an intersection or roundabout without regard for other traffic that may also be entering that intersection.

Committing a breach of the *Road Traffic Act 1974 (WA)*, the *Road Traffic Code 2000 (WA)* or committing a criminal offence does not automatically mean that a driver has been negligent, because all of the circumstances of the accident are considered.

Certain provisions of the CLA apply to motor vehicle accidents which codify and/or modify the common law. The duty of care provisions under section 5B of the CLA apply to motor vehicle accidents but do not substantially affect the common law.

### Causation

Damages can only be claimed where loss and damage is suffered as a result of the motor vehicle accident.

Where a pre-existing injury or condition has been aggravated by a motor vehicle accident and loss is suffered as a result, there may be an entitlement to compensation.

Various causation issues arise and there is a large body of common law dealing with these issues. Section 5C of the CLA is also applicable to the question of whether loss and damage is caused by an accident. Legal advice should be sought as soon as possible if such an issue arises.

## **Defences to a claim**

A number of defences may be raised to a claim under the CTP scheme which may result in a claim being refused in full or in part. It is critical to seek legal advice if you are advised that your claim is being refused or reduced on certain grounds. Some common defences are set out below.

### **No Fault**

If an injured person is unable to prove fault of another driver or owner of a motor vehicle then their claim may be refused.

### **Contributory Negligence**

Drivers, passengers, motorcyclists, cyclists and pedestrians who fail to take reasonable precautions to protect themselves from harm may be guilty of contributory negligence. Their claim can be reduced if contributory negligence is successfully argued, to the extent (percentage) they are found to be responsible for the damage suffered.

Examples of actions by an injured person which may result in a claim being reduced for contributory negligence may include:

- failure to wear a seatbelt;
- accepting a lift with an intoxicated driver;
- speeding;
- failing to keep a proper lookout for other traffic and road users.

### **Other defences**

The CLA also applies to motor vehicle accidents and sets out a number of defences, including notably where a motor vehicle accident occurs in the course of a 'recreational activity'. Where a person is injured as a result of a recreational activity, liability may be limited and persons should seek legal advice for further assistance.

## **What can be claimed?**

An injured person can claim compensation for the loss and damage they have suffered as a result of their injuries. The compensation which can be claimed usually fits into a number of defined categories which are explained in some detail below.

### **Economic Loss**

An injured person is compensated for their loss of earning capacity if their loss of earning capacity has been or is likely to be productive of financial loss. This includes both past loss of earnings and future loss of earning capacity. For example, if an injured person is unable to work as a result of their injuries then they may be entitled to compensation as a result.

Claims for economic loss are restricted by the MV Act to a maximum of three times the full-time adult average weekly earnings in Western Australia.

### Past and Future Medical Expenses

This includes:

- ambulance transport services;
- hospitalisation expenses;
- consultations with general practitioners, specialists, pathology tests, pharmaceuticals;
- the cost of undergoing X-rays, CT scans, MRI and ultrasounds;
- therapy services such as physiotherapy, massage, chiropractic, podiatry, optometry, osteopathy and psychology;
- nursing services including home nursing services; and
- dental services.

### Care & Assistance (both paid and voluntary)

This includes:

- personal care such as assistance with toileting and showering;
- domestic assistance with tasks such as cleaning and cooking;
- gardening, home maintenance and handyman expenses;
- community access and transport; and
- respite care.

### Travel Expenses

This covers journeys to and from medical and treatment appointments and expenses such as parking associated with those appointments.

### Additional Expenses

This includes:

- equipment , aids and appliances such as crutches;
- medical aids such as glasses, hearing aids, mobility aids or dentures;
- rehabilitation services such as working with a physiotherapist on a return to work program;
- home and transport modifications; and
- prostheses.

### General Damages

Section 3C of the MV Act provides that persons injured in a motor vehicle accident may be entitled to compensation for “non-pecuniary loss”, commonly referred to as general damages. This means compensation for:

- pain and suffering;
- loss of amenities of life;
- loss of enjoyment of life;
- curtailment of life expectation; and
- bodily or mental harm.

Restrictions apply to accessing general damages.

Under section 3C(2) of the MV Act, the amount of general damages to be awarded is a proportion, determined according to the severity of the injury, termed “a percentage of a most extreme case”. The maximum amount payable for general damages is currently \$418,000,

which is the amount of general damages payable for “a most extreme case”, such as someone who has suffered quadriplegia.

As of 1 July 2018, the general damages award is subject to a threshold/deductible sum of \$21,500. For the 2018-2019 financial year the general damages threshold provides that:

- where the amount of general damages is assessed at \$21,500 or less, no damages are payable (MV Act, section 3C(4));
- where the amount of general damages is assessed to be more than \$21,500 but less than \$63,500, the threshold amount of \$21,500 is deducted from the amount assessed for general damages (MV Act, section 3C(5));
- where the amount of general damages is assessed between \$63,500 and \$85,000, a deductible continues to apply but the amount deducted gradually reduces to zero (MV Act, Section 3C(6)); and
- no deduction applies to general damages that are assessed above \$85,000 and the full amount is payable.

You should seek legal advice to determine to what extent the threshold/deductible might apply to your claim.

### **CATASTROPHIC INJURIES SUPPORT SCHEME**

The introduction of the Catastrophic Injuries Support Scheme (the “CIS scheme”) under the *Motor Vehicle (Catastrophic Injuries) Act 2016* provides that all persons catastrophically injured in a motor vehicle accident may claim compensation for treatment, care and support, regardless of whether the injured person was at fault.

#### **Eligibility for compensation under the CIS Scheme**

To be eligible to claim compensation under the CIS scheme the following criteria apply:

- the motor vehicle accident must have caused the claimant’s injuries (causation);
- the motor vehicle accident must have occurred in Western Australia;
- the motor vehicle accident must have occurred after 1 July 2016;
- the claimant was at fault or unable to prove that another driver was at fault; and
- the injuries are assessed as “catastrophic”.

The CIS scheme also covers catastrophic injuries resulting from accidents involving unregistered motor vehicles (that are registrable).

The CIS scheme does not cover injuries sustained in motor vehicle accidents where:

- the accident occurred on private property;
- the accident occurred as a result of organised motor sports;
- the accident involved only unregistrable vehicles such as quad bikes; or
- the injuries occurred as a result of an act of terrorism.

If there is a dispute over your eligibility under the scheme then you may wish to seek legal advice.

### **What are 'catastrophic' injuries?**

Catastrophic injuries include:

- spinal injuries;
- traumatic brain injuries;
- multiple amputations;
- severe burns; and
- permanent traumatic blindness.

If there is a dispute over whether your injuries meet the definition of 'catastrophic' then you should seek immediate legal advice.

### **What can be claimed?**

Under the CIS scheme, catastrophically injured persons are entitled to receive necessary and reasonable treatment, care and support in a number of defined categories which are set out below.

#### Past and Future Medical Expenses

This includes:

- ambulance transport services;
- hospitalisation expenses;
- consultations with general practitioners, specialists, pathology tests and pharmaceuticals;
- the cost of undergoing x-rays, CT scans, MRI and ultrasounds; and
- dental treatment.

#### Care & Assistance (both paid and voluntary)

This includes:

- attendant care services such as assistance with dressing, grooming and showering;
- domestic assistance such as assistance with laundry, household cleaning, gardening, home maintenance and handyman expenses;
- nursing services;
- household support services; and
- respite care.

#### Additional Expenses

This includes:

- aids and appliances such as wheelchairs, hoists and continence equipment;
- rehabilitation services such as physiotherapy, clinical psychology, occupational therapy and driver training;
- home and transport modifications such as ramps, rails and vehicle modifications to assist with driving.
- prostheses; and
- educational and vocational training.

## **WHEN TO MAKE A CLAIM UNDER THE CTP SCHEME VS. WHEN TO MAKE A CLAIM UNDER THE CIS SCHEME**

### **CTP Scheme**

Persons who suffer injuries, including catastrophic injuries, as a result of the fault of another driver should make a claim through the CTP scheme as economic loss and general damages for pain and suffering are not claimable through the CIS scheme.

### **CIS Scheme**

Persons who suffer catastrophic injuries and are at fault or are unable to identify another driver at fault in the accident should make a claim through the CIS scheme, as they will be unable to obtain damages through the CTP scheme.

## **DEPENDENCY CLAIMS**

### **Who can claim?**

When a person (including drivers, passengers, motorcyclists, cyclists and pedestrians) is killed in a motor vehicle accident and the fault is either totally or partially caused by another driver or the owner of another motor vehicle, a 'relative' of that person can make a claim under the FAA.

The term 'relative' is defined in the FAA to include:

- spouses;
- de facto partners (at least 2 years duration);
- parents, grandparents, and step-parents;
- children, grandchildren and step-children;
- persons who stood in the place of a parent or child of the deceased person;
- brothers, sisters, half-brothers and half-sisters;
- in certain circumstances former spouses and de facto partners.

It is a requirement that the person making a claim must have been dependent in some way on the deceased person.

### **What can be claimed?**

Under the FAA, persons who were dependent on a person who was fatally injured in a motor vehicle accident may be able to claim:

- funeral and headstone expenses;
- loss of financial benefits provided by the deceased; and
- loss of services provided by the deceased.

If you think that you may be eligible to make a dependency claim, legal advice should be sought immediately.



## **HOW TO MAKE A CLAIM FOR COMPENSATION**

### **CTP scheme**

1. Report your accident as soon as possible by using the Online Crash Reporting Facility: [www.crashreport.com.au](http://www.crashreport.com.au); and
2. Contact ICWA and complete a Notice of Intention to Make Claim Form.

### **Catastrophic Injuries**

1. Report your accident as soon as possible by using the Online Crash Reporting Facility: [www.crashreport.com.au](http://www.crashreport.com.au); and
2. Contact ICWA and complete an Application Form for the Catastrophic Injuries Support Scheme.

### **What happens if there is a delay before making a claim?**

The MV Act (sections 7, 29 and 29A) provides ICWA with mechanisms to defend a claim if there is an unreasonable delay in making the claim. If your claim is refused on the grounds of late notification then you should seek legal advice immediately.

## **MINORS AND PERSONS UNDER A DISABILITY**

Where the injured person is under the age of 18 years or incapable of managing their own legal and financial affairs, the law requires a "Next Friend" to be appointed to act as the Plaintiff's representative on legal proceedings.

If a claim for an injured person under the age of 18 or under a disability is settled, then settlement is subject to the approval of the Court and settlement monies need to be invested with a Court appointed trust.

It is essential to engage legal representation to manage the claim of a minor or person under a disability.

## **IMPORTANT TIME LIMITS**

### **Lodging a Claim**

It is important to contact ICWA as soon as practicable after a motor vehicle accident to obtain the necessary claim forms, as ICWA may be able to refuse the claim if there is a significant delay in notification.

### **Limitation Periods**

#### **Personal injury**

In relation to personal injury claims, if legal proceedings are not commenced within 3 years of the accident then the claim will become statute barred (*Limitation Act 2005 (WA)*, section 14).

### Dependency Claims

There is a 3 year time limit to commence legal proceedings for a dependency claim under the FAA (*Limitation Act 2005 (WA)*, section 14)

### Minors & Persons Under a Disability

Different rules apply for minors and persons under a disability.

There is a 6 year limitation period for personal injury claims arising out of motor vehicle accidents involving an injured person under the age of 15 years (*Limitation Act 2005 (WA)*, section 30).

For a person between the ages of 15 and 18 when an accident occurs, legal proceedings must be commenced prior to the injured person's 21<sup>st</sup> birthday (*Limitation Act 2005 (WA)*, section 31).

### **SETTLEMENT OF CLAIM**

Settlement for any personal injury claim should not be entered into until an injured person's medical condition has stabilised.

In the event that settlement cannot be achieved through informal negotiations, the injured person has the right to commence legal proceedings.

Settlement of a claim is usually effected by either obtaining a signed deed of release or a consent judgement from the Court (in cases where legal proceedings have been commenced).

Once settlement has been reached and the documents are signed and executed an injured person is precluded from bringing any further action arising out of the accident.

An injured person should obtain independent legal advice prior to settlement of their claim.

### **CONTACTS**

Persons who have suffered personal injuries as a result of a motor vehicle accident should seek independent legal advice immediately. A list of recommended legal service providers specialising in this area of law can be obtained by contacting the following:

#### **Law Society of Western Australia**

Address: 4/160 St Georges Terrace, Perth WA 6000

Phone: (08) 9324 8600

#### **Sussex Street Community Law Services Inc**

Address: 29 Sussex Street, East Victoria Park WA 6101

Phone: (08) 6253 9500

#### **Insurance Commission of Western Australia**

Address: 221 St Georges Terrace, Perth WA 6000

Phone: (08) 9264 3333