The Queensland Law Handbook
YOUR PRACTICAL GUIDE TO THE LAW

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## Contents

**Chapter 1:** Where law comes from

**Chapter 2:** The court system

**Chapter 3:** Accessing legal assistance and resolving disputes

**Chapter 4:** Self-representation

**Chapter 5:** Consumers and contracts

**Chapter 6:** Consumer credit and banking

**Chapter 7:** Debts

**Chapter 8:** Bankruptcy

**Chapter 9:** Taxation

**Chapter 10:** Insurance

**Chapter 11:** Employment

**Chapter 12:** Social security payments

**Chapter 13:** Family law

   1. Marriage and divorce
   2. Post-separation parenting
   3. Maintenance and child support
   4. Property
   5. Domestic violence
   6. Same-sex relationships
   7. Surrogacy and in vitro fertilisation

**Chapter 14:** Children

   1. Parents, children and the law
   2. Child protection
   3. Working and other rights
   4. School
   5. Children and crime

**Chapter 15:** Neighbours

**Chapter 16:** Wills and estates

**Chapter 17:** Laws relating to individual decision making

**Chapter 18:** Medical law
General principles

Introduction

Activities of daily life can cause injuries to people and damage to property. Sometimes, the person(s) who caused the injury can be required to compensate anyone who suffers loss as a result of the accident.

In some cases, the parties may be able to agree upon appropriate compensation, but usually legal action is necessary to force the payment of compensation. The courts and the parliament have developed rules to determine when compensation must be paid.

This chapter explores the general principles that apply to injuries and accidents and provides further detail in relation to the most common types of accidents, including motor vehicle accidents, accidents at work and injuries involving defective premises or defective products.

The terms plaintiff and defendant are used throughout this chapter. The plaintiff is the person who starts proceedings in a court to obtain damages. The defendant is the person sued for damages.

Accidents caused by negligence

What is negligence?

Negligence in the legal context means a specific legal wrong—a failure in law to do what a reasonable person would have done in the circumstances to avoid loss or injury to the plaintiff. If negligence is established, then, subject to certain requirements, any person who has suffered personal injury as a result of the negligence can sue the negligent person (the defendant). This is known as a negligence action.

The negligence action is the most common type of court action taken by people who suffer personal injury. The law determining liability for negligence is a combination of the common law (law that has been developed by judges) and law enacted by parliament (see Chapter 1: Where law comes from).

For some types of accidents, statutory (or parliament-created) rights to compensation have been created in addition to any rights that might exist at common law. The most significant examples of these are workers’ compensation and motor vehicle accidents.

As the common law evolves through court judgments, it can change over time, making it more or less difficult to succeed in various sorts of actions. For an up-to-date analysis of the law of negligence in any particular area, it is recommended that plaintiffs consult a lawyer with specialist qualifications or experience in personal injury law.

The elements of a negligence action

Before a plaintiff can recover compensation from a defendant in a negligence action, the plaintiff must show three things:

1. that the defendant owed them a duty of care
2. that the defendant breached that duty
3. that personal injury was suffered by them as a result of that breach of duty.

The elements of negligence actions have developed through common law, but the Queensland Parliament has attempted to further define some of these concepts with the introduction of the Civil Liability Act 2003 (Qld) (CLA).

This Act came into effect on 9 April 2003, and most of it applies to injuries sustained on or after 2 December 2002.

It applies to all injuries other than:

- work-related injuries
- dust-related injuries (e.g. asbestosis)
tobacco-related or smoking-related injuries (s5).

The Act attempts to define legal principles previously determined by the common law including duty of care, standard of care and contributory negligence. It also imposes a system of assessing and regulating general damages (damages for non-economic loss).

The CLAIM was implemented in response to a campaign by general insurers who had been hit financially by the worldwide effects on the reinsurance market after September 11 and the collapse of HIH in Australia, one of the largest general insurers at the time.

The insurers mounted a campaign attributing their huge rises in premiums not to the above factors but instead alleging that injured plaintiffs and their lawyers were to blame. No evidence was ever advanced to justify that assertion. Nevertheless, parliaments around Australia responded by enacting laws that severely restricted the rights of the injured. Similar amendments have been made to the Workers' Compensation and Rehabilitation Act 2003 (Qld) (WCRA), which apply to all work-related injuries that occurred after 1 July 2003.

**Duty of care**

A defendant has a duty of care when they have a legal obligation to be careful for the safety of the plaintiff. This legal obligation arises when the defendant should have foreseen that injury or damage could result to the plaintiff from the defendant's conduct (Donoghue v Stevenson [1932] AC 562). A duty of care is often easily established. For example, every road user can easily foresee that if they drive carelessly, other road users could be injured. Therefore, all road users owe a duty of care to other road users. Similarly, employers can readily foresee that if they fail to provide a safe place of work, employees could be injured. Therefore, employers owe a duty of care to employees. The owner or occupier of a supermarket can foresee that if the supermarket has slippery floors, shoppers could be injured. Consequently, the owner or occupier owes a duty of care to people coming into the supermarket.

**Standard of care**

A person does not breach a duty to take precautions against a risk of harm unless:

- the risk was foreseeable
- the risk was not insignificant
- in the circumstances, a reasonable person would have taken the precaution (s9(1) CLA and s305B(1) WCRA).

In deciding whether a reasonable person would have taken precautions, the court must consider:

- the probability of harm
- the likely seriousness of the harm
- the burden of taking precautions to avoid the risk of harm
- the social utility of the activity that creates the risk of harm (s9(2) CLA and s305B(2) WCRA).

These concepts of courts, taking into account the burden (i.e. the cost) and the social utility, have serious implications for injured plaintiffs. For example, a shop owner may argue that it was too expensive to replace the flooring of the premises to prevent a customer from tripping on that flooring and suffering injury. An amusement park operator may argue the social benefit of providing rides generally outweighed the necessity to maintain the rides up to the highest possible standard.

Generally, however, it is expected that the courts will uphold the standard of a reasonable person. In other words, the safety measures required are those that a reasonable person would have implemented to prevent injury to others.

**Breach of duty by the defendant**
Breach of duty is the act of failing to do what a reasonable person would have done in the circumstances. The question of what a reasonable person would have done in the circumstances is a question of fact in each case. For example, would a reasonable shire council take steps to prevent children using a rope swing to dive into a river adjacent to a picnic area under its control? A council may argue that it is not reasonable to expect it to take such steps, whereas a child rendered quadriplegic after using the rope swing may argue that the swing or tree branch ought to have been removed.

**Damage**

If a plaintiff suffers no loss or damage as a result of the defendant’s conduct, no liability arises, no matter how negligent the defendant has been.

Two types of damage can give rise to a negligence action: personal injury and property damage. Both types of damage can include consequential financial or economic loss (e.g., loss of earnings arising from an injury that prevents the person working).

Compensation (damages) can only be paid for either type of damage if the damage was:

- the result of the defendant’s conduct
- not too remote. This means that the damage must, in a broad sense, have been likely to result from the defendant’s conduct. The courts are unwilling to award damages for unforeseeable losses, particularly in relation to property damage. However, compensation is sometimes paid for unusual and unforeseeable types of personal injuries, when the ultimate injuries have resulted from some initially foreseeable injury to the plaintiff caused by the defendant. This principle allowed an injured worker to recover compensation from his employer for massive brain damage and/or psychiatric illness resulting from a small scratch on his hand which had become infected (*Stephenson v Waite Tileman Ltd* [1973] 1 NZLR 152).

Financial loss, other than that which results from property damage or personal injury (called pure economic loss), may also attract compensation in limited circumstances (see Chapter 5: Consumers and contracts).

**Mitigation of losses**

The plaintiff in a negligence action is under a duty to mitigate their damages. This means that if steps can be reasonably taken to reduce the extent of any loss, these steps must be taken. The defendant will not be liable for any loss that might have been reasonably mitigated. For example, a person who is injured and rendered totally incapacitated for their type of employment as a result of the negligence of their employer cannot simply sit at home and allow damages to accumulate. The injured person is under a common law duty to attempt to rehabilitate themselves and try to re-enter the workforce.

Parliament has also passed laws that impose a statutory duty on those injured at work, on the road and in public liability circumstances to mitigate their losses.

In assessing the amount of damages payable, a distinction is drawn between special damages and general damages. Special damages are those losses capable of precise arithmetical calculation suffered by the plaintiff, up until the matter is determined by a court or otherwise resolved. This includes out-of-pocket expenses such as medical bills, travel expenses, medication, past loss of wages, interest on past loss of wages and loss of past superannuation contributions. In practice, because the amount of special damages generally can be accurately established and easily verified, the plaintiff and defendant will often agree as to the amount payable by way of special damages.

General damages are those losses that are incapable of precise calculation. In a claim for damages for personal injuries, this includes compensation for the actual injuries sustained, pain and suffering, any loss of enjoyment of life and any future loss of wages or future medical expenses. The Regulations to the CLA and WCRA contain a statutory prescription for calculating general damages for pain and suffering.
lodgement of a Notice of Claim for Damages form (s275) and participating in a compulsory settlement conference (s289). There are various costs consequences that flow from the offers made at the conclusion of the compulsory conference.

This area of law is complex and legal advice must be obtained, or the claimant will risk losing their right to pursue a personal injuries claim.

Rehabilitation

Obligations throughout the statutory claim have been discussed above. These obligations continue throughout the common law process. WorkCover must take steps to rehabilitate and return to suitable duties those workers who have an entitlement to compensation. WorkCover must pay the reasonable costs of rehabilitation (s 268), and if it has not made proper attempts to rehabilitate a worker, a written request should be made to the claims officer handling the file. Workers also have an obligation to mitigate their loss and participate in all reasonable rehabilitation (s 268).

It is common practice for WorkCover to engage investigators to check on claimants. However, if the worker is honest about what they can and cannot do and what work they are doing, this cannot harm the claim.

The employer does not have the right to terminate a worker’s employment on the grounds that they have made a claim for compensation or pursued a claim for damages. However, employers will often use other reasons as they are usually eager to replace an injured worker. Urgent legal advice should be sought should an employer take steps to terminate a worker’s employment.

A worker has the right to be treated by a doctor of their own choosing.

Accidents due to defective premises and products

Introduction

A person might suffer injury or property damage while visiting a friend, shopping in a supermarket, playing in a public park or sitting in a cinema. Similarly, people may suffer injury or damage to their property as a result of using a product that is defective in some way. For example, a person who bought a defective power tool may use that tool without knowing the defect and may suffer serious injury.

This part will outline the laws relating to legal responsibility for defective premises or products.

Defective premises

If a person is injured or their property is damaged as a result of some defect in the premises (which includes land), the occupier of the premises might be liable to pay damages to the injured person. The law governing this type of liability is known as the law of occupiers’ liability. This section explores the obligations and duties of occupiers to take care of people on their premises.

The occupier

An occupier is the person in possession of the premises. The person in possession of the premises has the power to admit or exclude people wanting to enter the premises.

Often, an occupier will also be the owner of the premises, but owning the premises is not the same thing as being in possession of that premises. A landlord owns a rented house, but it is the tenant who has possession of it. Therefore, if someone comes onto the rented premises and suffers an injury, it may be the tenant and not the landlord who will be liable as the occupier. Generally, however, the landlord has the primary responsibility to ensure the premises are safe.

Two or more people can be occupiers. If a couple purchase a home together and live there, they are both occupiers. Similarly, if two or more people sign a tenancy agreement, they are both occupiers.

The person whose business is being carried on in a shop or other commercial premises is the occupier.
Public places, such as playgrounds and parks, are occupied by the local government or other body that exercises control over them.

**Occupier's duty of care**

At common law, an occupier owes a duty to take reasonable care to avoid foreseeable risks of injury to entrants.

Reasonable care is the amount of care that an ordinary person of common sense would have taken in the circumstances. There is no hard and fast rule about what amounts to a lack of reasonable care. It depends very much on the nature of the premises, the type of danger and the reason for the entry. A highly polished floor might not be an unusual danger in a ballroom, but it would be in a supermarket. A defective front step would be a danger to most people calling at a private residence, but it would not be so to a tradesman who had been requested to come and repair the step.

**Breach of duty**

In assessing whether an occupier will be liable for injuries sustained by an entrant, a court will next assess whether the occupier has breached their duty of care (see *Duty of care* above).

**Causation**

The mere occurrence of an accident is not enough to make an occupier liable for any injury that results from that accident. The injured person must also prove causation by establishing that, if the occupier had taken reasonable care, the person would not have been injured (see *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479).

**Obvious risks**

If the occupier warns of a risk or danger, then they may not be liable for any injury, provided that the entrant's knowledge of the danger or the warning about the danger is sufficient to make them safe. This means that a warning will not always be sufficient. An occupier has a duty to take reasonable care to protect an entrant from danger on the premises, not to simply warn them of the danger.

If a danger or risk is obvious, then the occupier may not be liable for any injury. At common law it has been held that an occupier is in most cases entitled to assume that an entrant will take reasonable care for their own safety, and where a risk is obvious to an entrant exercising reasonable care for their own safety, then it may not be necessary for the occupier to warn the entrant about that risk (see *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431).

The CLA now requires courts to place greater weight on the activities, actions and responsibilities of individuals, and in particular on the limits of their rights to recover against a defendant in circumstances where the risk is held to be obvious. An obvious risk is defined as one that, in the circumstances, would have been obvious to a reasonable person in the position of that person. Further, a risk can be obvious even though it has a low probability of occurring, is not prominent, conspicuous or physically observable (s13). A plaintiff is presumed to have been aware of an obvious risk unless they prove they were not aware of the risk.

A defendant is held not to owe a duty of care to a plaintiff to warn of an obvious risk (although some specific exceptions apply) (s15 CLA). A person is not liable in negligence for the materialisation of an inherent risk (s16).

**Types of occupiers**

**Liability of occupiers generally**

Before the High Court decision in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479, the duty of care owed by an occupier depended on the classification of the entrant (e.g. invitee, licensee or trespasser). The duty is now stated much more generally. An occupier owes a duty to take reasonable care to avoid foreseeable risks of injury to entrants. Of course, the circumstances of the person's entry onto the
premises might affect the standard of care it would be reasonable to expect in each case. However, all situations are assessed on a case-by-case basis, and the broad categories discussed here are no more than a general guide.

**Landlords**
The liability of landlords as occupiers has been the subject of some debate in recent years. At common law, a landlord was not considered to necessarily owe a duty of care to tenants even where there was an obligation to repair.

In many states other than Queensland, this immunity was removed by legislation.

This has changed as a result of the decision of the Court of Appeal and has subsequently been confirmed by the High Court in the case of *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313. In that case, an electrical contractor negligently performed work at a rental property that resulted in a young child suffering very serious injuries. The contractor was liable but was not insured and was bankrupt. The tenant was not insured but the landlord was. The trial judge, the Court of Appeal and the High Court found in favour of the child against the landlord. Although the various judges found liability against the landlord for various reasons, the High Court held that, in general terms, a duty of care is now owed at common law on the basis that there is proximity (or a relationship) between a landlord and tenants, family and entrants onto the property.

However, the duty of landlords (in residential premises) is only to take reasonable care to avoid foreseeable risks of injury from defects of which they are advised or of which they would reasonably become aware by appropriate inspection (*see Jones v Bartlett* (2000) 205 CLR 166).

In addition to the duties owed at common law, a landlord of a dwelling house has a statutory duty under the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) to keep the premises in good order and repair.

**People entering business premises**
An occupier of a business premises is liable to a person who suffers injury on the premises if the occupier failed to take reasonable care to protect the entrant from dangers of which the occupier knew or should have been aware of. The duty of care and standard of care is usually higher where a person enters upon premises for the purpose of a commercial transaction.

**Entrants into public parks and other public places**
All people who lawfully use facilities open to members of the public are entrants. Entrants use playgrounds and other recreational reserves, public toilets, airports and railway stations. The CLA prescribes certain restrictions on persons suffering injury in these circumstances.

A person is not liable for injury sustained by the materialisation of an obvious risk of a dangerous recreational activity (s19).

A dangerous recreational activity is an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm (s18).

**Defective roadways and pathways**
The CLA gives local governments and other public authorities broad protection against claims made for defective footpaths or roadways. In deciding whether a council is liable, a court must apply principles such as:

- the limitation imposed on the council by its financial resources
- the general allocation of financial resources by councils, which is not open to challenge (s35).

The law used to be that highway authorities were immune from prosecution if they failed to act (or in legal terms for nonfeasance). In effect, this meant that highway authorities could not be held responsible in