

Chapter 1

1.1. CONCEPT OF LIABILITY

A person or thing that causes injury to another person or thing is generally responsible to make good the damage, by way of paying for medical treatment, loss of earnings, damages, etc. This is a common law principle in Australia and in western countries where the old English common law is the basis of the judicial system.

For example, a driver who by his negligence causes injury to another driver is generally responsible under common law. However, to effect a result under common law, one has to take legal action. This is expensive and lengthy, therefore unduly a burden on the injured person. That is why we have statute law, for example the CTP legislation, to make the end result more easily achievable. Essentially, it is not a requirement to take legal action in the courts to achieve an end result under the statutory law covering motor vehicle accidents.

A risk of taking action under common law is that the person being sued may in the end not be able to afford the award made against him. The injured person can miss out.

Motor vehicle accident insurance was therefore created whereby the person or thing at fault will settle a claim far quicker than by going through the courts and the injured person is assured that there is money to pay for his award.

Motor vehicle accident insurance is also referred to as motor accident insurance and compulsory third party insurance. Essentially, it's insurance for personal injury arising from a motor vehicle accident involving one or more vehicles. It is different from the many types of insurance that can be purchased voluntarily on the open market, such as is usually offered in addition to a life policy or loan insurance.

The difference of motor accident CTP insurance is in the basis on which an injured person may make a claim, that is, the injured person has to be able to prove that it is someone or something which is to blame for the accident and injury. This is where we see that it is fundamentally based on common law principles – the presumed duty of care we all have to one another. The injured person must not be at fault and he cannot make a claim under his own policy but has to claim against the person or thing that is at fault.

The principle of insurance under CTP is that cover is provided for the driver adjunct to a specific vehicle and in turn covers any drivers operating that vehicle. With other types of personal accident insurance policies it is the person, the policy holder, that is covered.

Thus, under this Act the insurance is effectively intended to pay for the negligence (or the blame or the liability) of the driver of that insured vehicle, as opposed to a private policy where fault is not an issue.

In Queensland, similarly as in NSW and most other states and territories, an authority operates under the MOTOR ACCIDENT INSURANCE ACT. Section 15 of the Act shows that the law is quite simple and the criteria for liability is straight forward. This Queensland Act is virtually the same in its workings as the acts in other States and Territories.

The authority licenses insurance companies in the State of Queensland to issue policies generally referred to as “Green slip” insurance. The authority, thus the Act, enforces the law strictly in how insurance is issued and how claims are processed. The Act specifies that an insurance company cannot refuse to insure any particular person. The Act also specifies the strict rules under which an injured person can make a claim and under which insurance companies must process such claim.

For the private investigator investigating a claim under the Motor Accident Insurance Act 1994 it is not essential to know the Act. It’s simply a case of investigating as if it is a common law claim.

Common law, thus indirectly the Queensland Act in this case, poses the question:

1.1.1. Was there negligence?

Negligence means fault or blame or responsibility or error.

It is defined by examination of the facts surrounding the accident/injury through a continual process of seeing whether the driver fulfilled his presumed duty of care, whether he did the “right” thing, whether he acted with due care and consideration, whether what he did is the normal thing to do or whether he should have acted with greater care (such as not being drunk whilst driving and causing the accident, or such as giving way to avoid hitting the car coming through a green light).

In searching for evidence whether there was negligence, the investigator will look for evidence of blame – such as the opinion of police (perhaps having fined the insured). Note that under the Act the opinion of the police (or even the admission of a traffic offence by paying a fine) is not acceptable as crucial proof of blame.

This is because our legal system does not permit a court to take into account any other court’s decision (or “guilt” verdict) as proof of a fact. This point will be discussed in more detail later.

Keep in mind, this Act regarding motor vehicle accidents exists to protect the injured driver who was not at fault.

1.2. INSURANCE CONCEPTS

As mentioned previously, insurance for motor vehicle accidents causing injury in the State of Queensland is covered by the Motor Accident Insurance Act 1994. That is, the conditions of policy issue and claims processing are clearly defined. It might be said that insurance companies much more closely adhere to these conditions than they do in practice under, say, the Insurance Contracts Act 1984 covering property loss.

The general insurance concept is that you cannot insure something that’s not yours and that you rate the risk of something to decide whether you should insure it.

Under the Act (Section 16) insurance companies do not have the same liberties. The licensed insurers must insure any vehicle and any person that wants to insure with them. As long as they pay the policy premium they are covered (and as long as the vehicle is correctly

classed (Section 25). Not only that, but the insurer must also cover anyone else who drives the vehicle covered by that policy.

For the purposes of the Act, let's consider that "driving" viz liability also means "being in charge of" the vehicle. That vehicle might be parked by the side of the road, or being unloaded (such as a truck). If the vehicle, or the insured driver or another person using that vehicle, causes injury to another person, then that injured person has the legal right to make a claim.

An oddity that is peculiar to CTP insurance is that even a driver using the insured vehicle can claim against the insured driver. That means, if the insured person gives his brother permission to use the insured vehicle and he then has an accident caused by the front wheel falling off, then the injured brother is entitled to make a claim.

However, an important exclusion applies to the insured driver. He cannot make a claim for an injury he suffered driving his own vehicle. Even if the insured driver is not at fault in the traditional sense of the word, such as the wheel falls off his own car.

In investigating a claim under the Act, or under common law, whether litigated or not, the investigator must always test whether the other driver, the claimant, has a right to make the claim and whether the insured driver is actually to blame, or whether the vehicle was at fault (either by its design or maintenance or manufacture).

Remember, this insurance exists to protect the injured driver who was not at fault.

1.2.1. Nominal Defendant

The Nominal Defendant (Section 16 of the Act) is a legal entity, yet a process that is defined in the Act. Essentially it is a concept created to protect the injured driver who is not at fault, who is not able to identify the vehicle or person who is at fault. Or, to protect the injured driver who is not at fault who was injured by an uninsured driver/vehicle.

The law says that the authority that administers the Act nominates the insurance company who will be responsible to process a claim against the Nominal Defendant (Section 31). That insurance company has no connection with the driver or the vehicle, yet has the burden of processing the claim. If it refuses the claim, it has to defend legal action by the claimant and if it loses the court case, it has to pay the injured person.

Insurance companies are entitled to investigate claims. They do not investigate all CTP claims. They often rely on the apparent validity of the evidence presented in support of a claim, such as medical reports, witnesses' statements, police action.

Where the issues are more complex or fault (thus, liability) is not so easily decided, they will investigate. However, when it comes to claims made against the Nominal Defendant, insurance companies usually will investigate.

Insurance companies, being entities that are not connected with the authority that administers them, use the services of contract private investigators. Each company chooses their investigators on the open market, but essentially an investigator might be included on a panel of investigators regularly used by an insurance company.