

11 ACCIDENTS

11.1 Accidents on private and public property

This chapter looks at the legal responsibilities of certain people for injury or damage caused by accidents on private and public property in NSW.

These include owners, occupiers, other people who control buildings and land; and owners or keepers of animals.

11.2 Injuries on private property

An occupier of private property must take reasonable care to prevent foreseeable risks of injury to those who may enter the land or premises. The standard of legal responsibility is what a reasonable owner or occupier would have done in the circumstances to prevent injury.

(a) Who is liable?

An occupier is the person with possession of the land, building or premises - the person with the power to decide who may come and go on the land. This could be an owner, a tenant, or a building site manager.

Tenants can be responsible for injuries caused by property defects even if it is the owner's duty to maintain the property. It is therefore important to be insured for contents and householders insurance with a clause covering liability for dangerous premises. If required this insurance can be taken separately from home or contents insurance.

11.3 Injury on public property

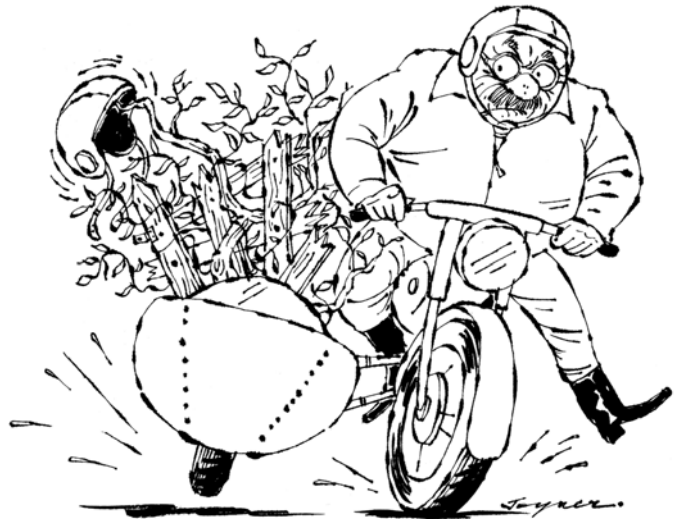
Again, the occupier must use reasonable care to make the premises safe for visitors. For example:

- (i) A local council may be liable for a dangerous structure in a park, or for not having warning signs at its swimming pool;
- (ii) Sydney Water may be liable for an injury caused by a danger its drains create;
- (iii) State Rail may be liable for an injury caused by the condition of a railway station; and
- (iv) Shopping centres are covered by the law concerning occupiers.

Please note that roads are a special situation and we strongly recommend legal advice if you are injured, or you injure someone, on a public road.

11.4 The Civil Liability Act

The *Civil Liability Act 2002* has modified the way in which liability for negligence is determined. Under the Act, even if you are injured, you may not have a claim if that injury was caused by something which could have been avoided (eg, by walking around an oil spill which was clearly in view).



11.5 Injury or damage to property caused by animals

There are several ways to obtain compensation for this. If the owner or keeper is negligent you can bring civil proceedings. Negligence can be hard to prove. An ideal example would be where the animal is known to be dangerous; perhaps it caused an accident before. For example, in a case where a dog caused an accident by chasing a car, neighbours can give evidence that that particular dog was always chasing cars. If the owner has not taken reasonable precautions, eg, to keep the dog from getting out on the street, the owner may be negligent.

Make sure you have up-to-date insurance and check your policy closely as to whether it covers injury or damage caused by pets or other animals.

11.6 The Companion Animals Act

All dogs and cats are treated as companion animals under the *Companion Animals Act 1998*. A person who owns a dog or cat may be liable for injury caused by their cat or dog, even where there is no negligence. A person who suffers injury or loss from a dog attack may sue the owner or person in control of a dog for compensation.

For example, the owner or any person in control of a dog can be prosecuted if the dog rushes at, attacks, bites, harasses or chases any person or animal, whether or not it causes any injury.

There are exceptions, if the injury occurred because:

- (a) the dog was provoked (teased, mistreated, attacked);
- (b) the person or animal was trespassing on the property where the dog was kept;
- (c) the dog was acting in reasonable defence of a person or property;
- (d) the dog was being used in lawful hunting;
- (e) the dog was working stock or training to work stock;
- (f) it was a police dog.

Under the *Victims' Support and Rehabilitation Act 1996*, a person who suffers injury or loss from a dog attack may obtain a direction for compensation of up to a maximum of \$50,000 to be paid out of the property of the owner, after the owner has been convicted. An application for compensation can be commenced in the Local Court by filing a summons alleging the offence and claiming damages.

A Court or the Local Council may declare a particular dog to be dangerous. Also, certain dogs are classified as 'restricted' dogs. Owners of dangerous and restricted dogs must meet special requirements to control them, or the owners may be charged and the dog seized. Some breeds of restricted dogs include pit bull terriers, Japanese tosas, and Argentinean and Brazilian fighting dogs.

If you have a dog, you should make sure it is registered before it is six months old, or you may be found guilty of an offence and be fined. At the time of printing the maximum penalty is \$500.00, or \$2,000.00 if your dog is a dangerous or restricted dog.

11.7 Injuries to animals under the Prevention of Cruelty to Animals Act

Under the *Prevention of Cruelty to Animals Act 1979*, if you are in charge of an animal you must:

- (a) exercise reasonable care, control or supervision of an animal to prevent cruelty to the animal;

- (b) take reasonable steps to ease any pain being inflicted on the animal;
- (c) provide the animal with veterinary treatment when necessary; and
- (d) provide it with adequate exercise or in the case of a caged animal (except for a stock animal), it must not be confined in a cage that is too small to provide it with adequate exercise.

If you have accidentally struck an animal with your vehicle you must take reasonable steps to alleviate any pain inflicted and if the animal appears to be a domestic animal, you need to inform either an officer (for example a police officer, or an officer of the RSPCA) or a person in charge of the animal being injured.

The possible criminal offences include:

- not providing an animal with proper or adequate food, drink or shelter;
- tethering an animal for an unreasonable time or by using heavy or unreasonably short rope, chain or cord;
- animal baiting or fighting;
- purchasing, acquiring, keeping or selling (or offering for sale) an animal that is so severely injured, diseased or in such a condition that it is cruel to keep it alive.

Compensation can be claimed, and criminal prosecution may be possible.

Cruelty to animals may result in criminal penalties and the payment of compensation to the owner. Police can take action and you can also contact the RSPCA or the NSW Animal Welfare League.

11.8 **Motor Vehicle Accidents**

(a) Police should be called to the scene when:

- A person is killed or injured;
- A vehicle needs to be towed away;
- A driver does not stop or exchange details;
- A driver is believed to be under the influence of alcohol or drugs; or
- There is damage to property or animals.

(b) Legal obligations after an accident, where the vehicle damage is minor and no one is injured

You do not need to report the accident to the police. But if asked, you must provide certain details to:

- Other drivers involved in the crash;
- The owner of the property damaged in the crash;

The information that must be provided is:

- Driver's name and address;

- Vehicle owner's name and address;
- Vehicle registration number (licence plate); and
- Other details which may be needed to identify the vehicle.

(c) Legal obligations after an accident, where there personal injury or property damage is significant

Within 24 hours of the accident, all drivers involved must report the crash to the police station nearest to where the crash happened. You are not required to report the crash if injuries from the accident prevent you from doing so.

If you wish to make a personal injury claim you must report the accident to police within 28 days of the accident. Tell the police:

- The place and nature of the accident;
- Registration numbers of all involved vehicles;
- Names and addresses of all drivers and witnesses; and
- Extent of any injury or damage caused.

Drivers of vehicles involved in an accident must give all possible assistance to any injured person, including phoning 000 for an ambulance.

If you are injured you may have a claim against the driver of the other vehicle which caused you injury. You should go see your doctor about it and consult a solicitor who practices in personal injury law and in particular, in motor vehicle accidents, as soon as possible. You will need to fill in a personal injury claim form and the doctor will fill in the medical certificate that accompanies the personal injury claim form.

Your solicitor will then send your claim form and medical certificate to both the owner of the vehicle and the insurer of the vehicle. Your solicitor must do this within 6 months of the date of the accident otherwise you will be required to give a full and satisfactory explanation as to why it was not sent in this time. Your solicitor will then proceed to pursue your interests according to the *Motor Accidents Compensation Act 1999* (NSW).

(d) Practical steps at the scene of the accident.

A driver should:

- (i) Take necessary precautions to prevent further collisions;
- (ii) Do not admit fault - it may invalidate insurance claims;
- (iii) Obtain the names and addresses of any witnesses;
- (iv) Make handwritten notes of any conversation with the other person involved in the accident;
- (v) Make a sketch plan of the scene including distances, width of the street, land marks, and any other relevant details;
- (vi) Take photographs of the scene (if possible);
- (vii) Get the other driver's licence and address details, those of the owner (if different), the licence plate of the other vehicle, and the insurance company with which the vehicle is insured. The Motor Accidents Authority will give you details of their insurer if you have the licence plate number and the accident date.

- (viii) Contact the insurer. Even if a driver is undecided about whether to claim on his/her insurance policy, it is best to report the accident to the insurer as soon as possible. If the accident is not reported to the insurance company immediately after the accident, then the insurer may try to deny a later claim for compensation;
 - (ix) Clean up the scene before you leave. If the driver cannot do so due to injury, the person removing the vehicle must do so.
- (e) Compensation

Two types of damage may be suffered in a motor vehicle accident:

- (i) Personal injury (cuts, bruises, broken bones); and
- (ii) Property damage (to cars, motorcycles, clothing).

This will require you to make claims on two separate insurance policies. Both require you to prove that the other person was negligent, that is, that the damage was caused wholly or in part by the other person's lack of reasonable care in driving, controlling or maintaining the vehicle.

It is possible to sue first for property damage only and then later sue for personal injury.

If the other driver is found guilty of a criminal offence for causing the accident (e.g. negligent driving) this does not mean that the court will decide this in a civil case. However, criminal cases have a higher standard or level of proof (beyond reasonable doubt) than civil cases (on the balance of probabilities).

If you are going to make a claim, you should do so quickly as there are time limits that apply to making court claims. For personal injury this time limit is 3 years from the motor vehicle accident (however you must still have your personal injury claim form sent within 6 months of the accident). For property damage, the time limit is 6 years from the date of the accident, however it is best to claim as soon as possible.

Again, we advise that you should contact your solicitor or, if you have trouble contacting your solicitor, contact the Law Society for contact details of solicitors in your area, or for information on making a complaint.

11.9 Property damage from motor accidents - Options

If the damaged vehicle is uninsured you can either:

- (i) Pay for your own repairs; or
- (ii) Demand payment from the other person and if necessary sue them within the 6 month time limit (see below).

If the damaged vehicle is insured, the owner has a third option, in addition to the above

- (iii) Make a claim on his/her insurance policy.

11.10 Making a claim

Consider the factors such as type of insurance you have, how much "excess" you have to pay, the effect on your no-claim bonus/premium (if you make a claim), whether the other person is insured (and you can claim on their policy), and the amount of damages involved compared with legal costs of pursuing the matter.

(a) No-claim bonus

Insurance companies reward owners who have not made claims, by offering them a lower premium the next year. The reward of the lower premium may be lost if a claim is made later.

(b) No-fault claims

A number of insurance companies will allow you to keep your lower premium (no claim bonus) even if you have made a claim, if:

- (i) the accident was not your fault (or whoever was driving your vehicle); and
- (ii) the insurance company can identify the driver and recover damages from them.

If so, it will normally try to recover the excess from the other driver.

(c) Excess

This is the amount the insured person has to pay when a claim is made. It is stated in the insurance policy. The amount varies depending on the insurance company, the age of the driver and their driving history. All insurance companies insist on special age excess for drivers younger than 25 years (and, in some cases, 30 years). The standard excess for all drivers is around \$350; for drivers under the age of 25, it may be as much as \$1,000. If the insured has a previous claim, the excess may be increased.

Know what your excess is before making a claim. It is possible to reduce or remove the excess by paying a higher policy premium.

(d) Advantages of claiming

A major benefit is that your vehicle will be repaired quickly.

The insurance company can also sue the other driver for you, in your name. This is a common practice. The insurance company will pay all the costs of suing. If the insurance company receives more in damages than it paid you, it will generally deduct its legal costs and give what is left to you.

11.11 Suing for Damages

Going to court is expensive. Before suing someone it is important to check that he/she is insured and, if not, whether they can pay for the repairs. There is no point in throwing good money away. If the other party is not insured and cannot pay for the repairs you should seriously consider making a claim on your own insurance policy.

(a) Legal costs

Court cases can be expensive. Carefully consider likely legal costs (see Chapter 1 - You & Your Lawyer). To minimise costs, it is possible to handle all or part of a damages claim personally. However, in many cases this is not advisable especially where the claim is defended. It would be at least worthwhile discussing the matter with a solicitor before going to court.

If a solicitor handles a claim, some of the legal costs (between 50% - 60%) for the work done may be recovered from the defendant if the claim is successful, but this can depend on the amount of the claim. It is also possible that the solicitor's charges may be more

than the costs the losing party is ordered to pay. The other party may not be able to pay your legal costs.

Example -

A sues B for property damage arising from a motor accident. The court decides for A and orders B to pay \$3,000 for damages to A's car and \$1,000 for legal costs.

However legal costs awarded by a court do not generally cover all of the actual legal costs. A's solicitor charges him \$2,000, which A has to pay whether or not B actually pays the court order for \$4,000 total.

If B does pay the full amount, A would have \$2000 after payment of his legal fees.

If A lost the case, A would have to pay for the repairs and legal costs, plus B's legal costs and possibly for repairs to B's car.

Alternatively, if the matter is in the local court, either party can request the court to refer motor vehicle property damage claims to an arbitrator.

(b) Repair costs

If the cost of repairing a car is small (say, under \$250), it is often not worth claiming on insurance or getting a solicitor to pursue a claim. However, it may be worthwhile handling the claim personally to try and recover some of the cost.

If the damages are substantial and court proceedings are involved, seek legal advice.

If someone sues you for damage to his or her car, which s/he says is your fault, you should seek legal advice immediately.

(c) Contributory negligence

Deciding whether another driver was at fault (i.e. by being negligent, or not acting reasonably) is often quite difficult. A driver who is drunk at the time of the accident is generally negligent.

In other situations it is often not as clear-cut. If in doubt about who is at fault, obtain legal advice.

Often it is impossible to say that one driver was completely at fault. Courts can share the blame between the drivers according to the degree of responsibility. Where one driver shares responsibility for the accident they are said to contribute to the accident by their negligence. This is called contributory negligence.

An example of contributory negligence is an accident at an intersection where the driver of the vehicle with right of way may be held 25% responsible because every driver is supposed to drive safely in all circumstances. Likewise, a driver who did not take reasonable steps to avoid an accident may be held partly responsible.

In some cases, a person may recover 100% of their damages (e.g. if the car was parked at the side of the road and was hit by another car). However, the possibility of apportionment of the blame between drivers must be considered.

- (d) Which court?

Court proceedings are often complicated and stressful. If you do proceed to court consider whether to instruct a solicitor- particularly if the other party has a solicitor.

The first step is to establish which court will hear the claim. If the amount of damages claimed is more than \$60,000, legal action is commenced in the District Court. Normally, where the claim is this large it is best to claim on an insurance policy and leave it to the insurance company to handle the claim.

For claims up to \$60,000 legal action will start in the Local Court. The Local Court has a Small Claims Division for claims under \$10,000. Small Claims proceedings are designed to be informal and to encourage conciliation of claims. Lawyers are allowed to represent drivers but, as outlined above under 'Legal Costs', there are limits on the legal costs recoverable.

11.12 **Motor vehicle insurance**

The price of compulsory third party insurance depends upon the type of vehicle, the area in which you live and other factors approved by the Motor Accidents Authority which may be applied by the insurers.

Insurance for pensioners is based on the number or types of claims that have been made. The pensioner category has been amalgamated with non-pensioners. However, insurers are permitted to provide an additional discount for vehicle owners 55 years old and over.

You should shop around for the insurance policy that meets your needs the most. The most common types of insurance are:

- (a) **Compulsory Third Party (CTP)**

Compulsory third party insurance covers claims made against the owner of the vehicle for personal injury. It must be paid before registering a vehicle. The premium is paid to a licensed insurer when the vehicle's registration is renewed. The certificate of insurance is the "green slip". You must present the "green slip" to the RTA when you register your vehicle. CTP is often cheaper if you also have some other form of insurance with that company.

Contact the Motor Accidents Authority for further information.

- (b) **Third Party Property**

Third party property insurance only covers damage to someone else's property. Every vehicle owner should have at least this type of insurance. It is usually taken out on vehicles not valuable enough to insure comprehensively or the owner feels they cannot afford to.

Policy holders must notify their insurance company of any accidents and resulting claims made against them.

- (c) **Comprehensive**

Generally only covers claims for property damage. It is similar to Third Party Property Insurance but also covers damage to the policy holder's property arising from an accident. It may also cover hospital and medical expenses and a benefit if a person is killed or injured in an insured vehicle.

11.13 Losing your insurance cover - Insurance conditions

To avoid losing your insurance cover you must read your insurance policy carefully. Most comprehensive and third party property policies have special conditions, which must be met or the insurance company will reject a claim. Some common conditions imposed include:

- (i) An obligation to report the accident as soon as possible;
- (ii) No cover if the vehicle is driven by a person under the influence of alcohol or of another drug;
- (iii) No cover if the vehicle is driven by an unlicensed driver. This includes the situation where the owner has given his/her permission;
- (iv) Past history - When filling out an insurance application it is important to answer all questions truthfully. If, for example, your driving history is not declared, the insurance company may refuse your claim and your insurer could possibly cancel your policy altogether.