

# The Life Cycle of a Claim

Presented to: Unimutual Members

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# Disclaimer

This information is current as of April 2024.

The information in this presentation does not constitute legal advice and does not give rise to any solicitor/client relationship between Meridian Lawyers and the reader.

Professional legal advice should be sought before acting or relying upon the content of this presentation.

# Overview

## What will we talk about?

- What happens immediately following an incident?
- The information lawyers and/or Unimutual may need to investigate the incident and why
- The role of factual investigators/loss adjustors
- Why communications need to be managed carefully
- The claim - the litigation process and in particular the discovery and interrogation process and why it is important to get this right
- The mediation process
- Factors that are involved in determining whether to run a matter to trial
- The trial process
- Resolution of the claim

# What happens immediately following an incident?

- There are a variety of claims that we could talk about. For today's purposes, we focus on the example of a visitor to a Member who has fallen down some campus stairs
- **First priority:** the person's health
- **Second priority:** make sure an incident report is completed that details:
  - the date and time of the incident
  - how the incident occurred
  - if the injured person is able, a description from them as to what happened
  - any photographs of the incident site at the time of the incident, and
  - any witnesses to the incident including their name and contact details

If possible, a brief description on the incident form (which you all should have) as to the witnesses' observations of the incident

# What happens immediately following an incident?

## Why do we need all of this information?

- Provides contemporaneous documentary evidence and observations of the incident which is the most valuable evidence in defending or assessing a claim
- This allows an immediate baseline for more detailed investigations, as necessary, to be conducted into the incident
- Types of things we might ask for:
  - Policies/Procedures re various activities at the Member
  - In case of stairs, whether they comply with various standards
  - Any contracts or agreements the Member might have with 3Ps that is relevant to the circumstances of the claim. This would be for the purposes of investigating and seeking contributions from other parties. E.g. a 3p may be responsible for maintaining Campus grounds etc
  - In certain property damage claims, involving research samples, in order to quantify loss, we may need to ask specific questions of various academic and Member staff to verify loss that has been substantiated.

# The information lawyers and/or Unimutual may need to investigate the incident and why

Such incidents should be immediately notified to Unimutual, for a number of reasons:

- Unimutual can make a determination as to whether further investigations should be undertaken now or later (noting as time goes on, memories fade and people move on)
- Whether the incident is serious enough to retain factual investigators and/or lawyers to investigate the claim so as to maintain legal professional privilege or dominant litigation privilege over those investigations (more on this later)
- Often, we contact members about these issues, and individuals may become frustrated by why we are asking so many questions about what they may perceive to be an innocuous claim.

# The information lawyers and / or Unimutual may need to investigate the incident and why

## Reasons we ask

We ask these questions for the following important reasons:

- Preservation of evidence in case a claim is made
- Witness statements contemporaneous to the incident so that witnesses' memory of events is preserved, in case the matter proceeds to trial and they are required to give evidence many years later
- Assessment of the claim to allow Unimutual (in cooperation with the Member) to develop a strategy for managing the claim early and if necessary, settle the claim early. This has a direct effect on the Member's loss ratio and potentially underwriting/ contributions charged.

# The role of factual investigators / loss adjustors

## What is the difference?

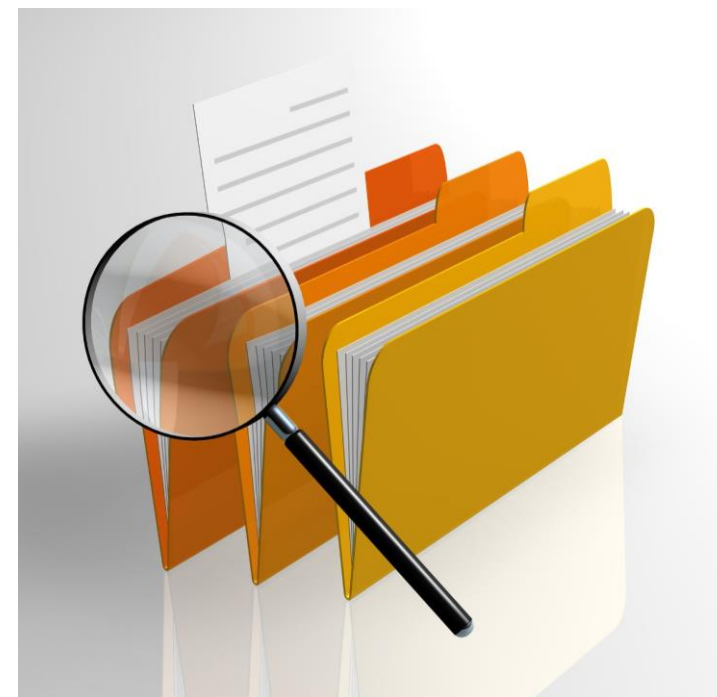
- **Factual investigators** obtain the facts surrounding the incident by condensing everything into a report. This can be a more cost-effective way of obtaining all primary information than retaining lawyers to do so.
- Often lawyers retain factual investigators to maintain legal professional privilege. The factual investigator will report to the lawyer or Unimutual. Lawyers and/or Unimutual will then assess those facts in the context of the law to consider the Member's exposure to the claim and the subsequent management of it
- **Loss adjustors** focus on the quantification of a claim, mainly in the property damage space. Often, a firm will conduct both factual investigation and loss adjusting services together but some individuals within that firm may specialise in one or the other.



# The role of factual investigators / loss adjustors

## What is the difference?

- It is important the Member cooperates with these individuals in order to give lawyers / Unimutual the best information possible to assist with the claim
- Difficulties can arise if we are drip fed information. This may ultimately lead to an increase in the costs of a claim and can cause logistical difficulties if people have moved on
- This is of course, adverse to the Member's interests in the case of large self-retentions.



# Why communications need to be managed carefully

## Legal professional privilege / litigation privilege

- The reason lawyers and/or Unimutual ask for a lot of documents created for a claim to be addressed and sent directly to them on their direction is to maintain privilege over this material
- This is so that if such documentation does not assist the Member, it can be considered objectively and without concern about the plaintiff seeing such material
- This may not apply to documentation that would have been discoverable in any case.



# Why communications need to be managed carefully

## Legal professional privilege / litigation privilege

### Expert opinion

- In many matters, expert opinion is required. The rules around communicating with experts vary depending on the jurisdiction
- It is extremely important that the communication with experts is carefully managed so as to try and avoid material, upon which they base a subsequently exchanged expert opinion, not being exchanged if adverse to the Member's interests
- This involves providing careful instruction as to the questions the expert is being asked to opine on. In addition to careful consideration of the documentation the expert is provided with and careful planning of any conferences to take place between the lawyer/expert/Member, the detail of which could become discoverable in a subsequent court proceeding.

# The claim

## The litigation process – discovery and interrogation – why it's important to get this right

- Some states (e.g. SA and QLD) have prelitigation processes before proceedings can be issued
- Claim issued in relevant court in relevant state
- Member files a defence
- Most states then have some form of case management process, whereby the court sets down an interlocutory timetable including discovery, interrogatories (where allowed depending on the state), the exchange of expert reports, exchange of particulars of damages and compulsory mediation. If the matter does not resolve by this stage (noting the majority of claims do), the matter will be listed for trial and a number of programming orders will be made in preparation for hearing. In VIC, it may be a trial before a six person jury, if a personal injury matter (which brings its own considerations)
- If the claim is ripe for settlement, of course, there is no need to go through all these processes and attempts should be made to resolve the claim as early as possible.

# The claim

## The litigation process – discovery and interrogation – why it is important to get this right

- Discovery is important because it forms the basis of the documentation that the parties will rely on in attempting to prosecute or defend a case.
- Broadly speaking, it involves two steps – preparing a list of all documents that fall within the agreed categories of documents for discovery and providing for inspection and copies of those documents (except for privileged documents). In turn, we are given access to the other party's documents
- Preparing a list of documents can be a major exercise. It is the Member's responsibility to undertake a thorough search
- The term 'document' is very broad
- Discovery is a central part of the litigation process in Australia. The Court treats a failure to properly comply very seriously, and adverse findings can follow from any failure.

# The claim

## The litigation process – discovery and interrogation – why it is important to get this right

- Interrogation is also important because the answers provided are given under oath and therefore if someone lies, they could be guilty of contempt of court
- Additionally, answers provided in interrogatories can be used against the deposer during cross examination in a trial. It is therefore important to make sure your answers are accurate so no inconsistencies are exposed should you be required to give evidence based on those interrogatories at a subsequent trial
- In answering interrogatories, the Member must make enquiries of their servants and agents, including former servants and agents. The deponent of the affidavit must also answer in accordance with the information supplied to them as well as their own knowledge, information and belief.

# The claim

## The litigation process – mediations

- In WA this is called a PTC - Compulsory conference after the case is entered for trial (unless dispensation due to a prior mediation). In VIC they are mediations
- The aim is to reach a settlement before the matter proceeds to trial to avoid significant costs of trial
- Depending on the state, the parties including Unimutual and the Member may need to attend in person unless leave is granted to attend/be available by telephone. Generally, mediations are the last chance to settle a claim without incurring significant costs and inconvenience to staff members who may need to be involved in the trial. They should be treated seriously
- What happens afterwards? Settlement or listed for trial.

# Resolution of the claim

## Factors in determining whether to run a matter to trial

- Prospects of successfully defending the claim
- Quantum of claim
- Plaintiff's settlement expectations
- Costs of trial
- Balancing exercise all of the above
- Examples





# Resolution of the claim

## The trial process

The Judge or Jury will consider the evidence led by each party and then make a decision.

In most cases, a Judge will reserve their decision and produce written reasons, usually within a few months, following completion of the trial. If a jury, they will deliberate and provide a verdict shortly thereafter without written reasons.

The trial proceeds as follows:

- The plaintiff's barrister provides an opening, which is a summary of all aspects of evidence regarding liability and quantum that they will lead to prove their case
- The plaintiff's barrister calls all witnesses and experts to give evidence, starting with the plaintiff themselves. Each of those witnesses are cross examined by the defendant's barrister.

# Resolution of the claim

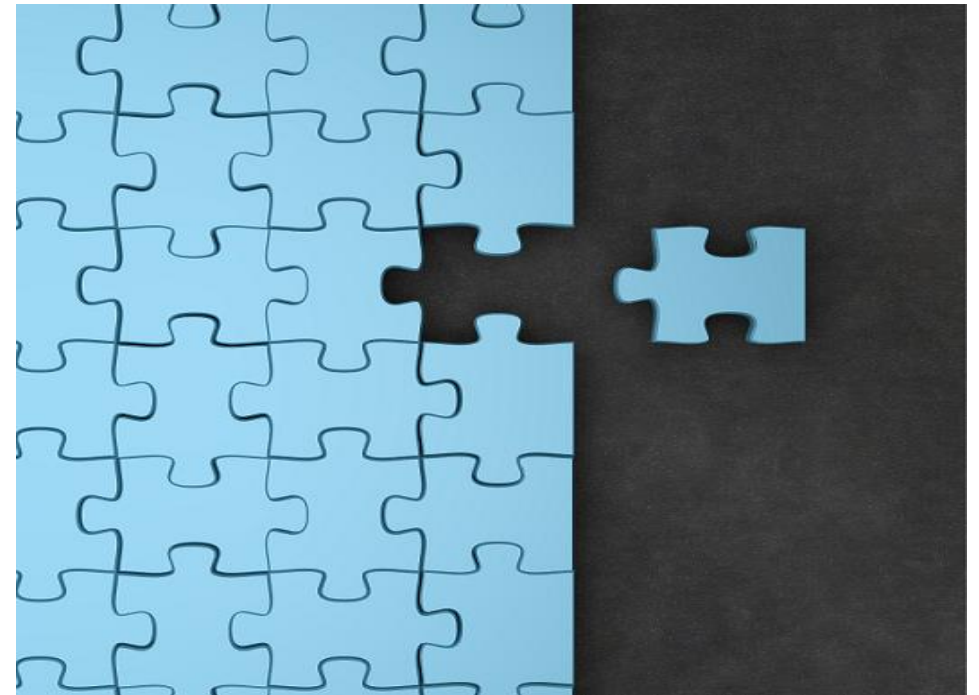
## The trial process

- The defendant's barrister opens their case and provides a similar summary to that of the plaintiff in defending the case
- The defendant barrister calls all witnesses and experts to give evidence, starting with the plaintiff themselves. Each of those witnesses are cross examined by the plaintiff's barrister
- The defendant's barrister closes their case
- The plaintiff's barrister closes their case
- If in VIC, the judge charges the jury
- The Judge reserves their decision and once a judgment is made, there is an argument on costs depending on what costs protection each party has put in or not.

# Resolution of the claim

## Settlement

- Deed of Settlement and Release
- Standard clauses including
  1. Non-admission of liability
  2. Confidentiality/ non-disparagement clauses
- Centrelink Clearance, Medicare Notice



# Questions?

# Your presenters



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