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TAC PROTOCOLS IN VICTORIA A PROGRESS REPORT

The Australian Lawyers Alliance, with the assistance of the Law Institute of Victoria, has entered into a landmark agreement with the Transport Accident Commission. The agreement establishes Protocols covering no fault disputes, impairment benefits and Common Law. Although the Protocols are voluntary in nature, there is an expectation that all ALA members will participate in the Protocols.

No Fault Dispute Resolution and Impairment Protocols

On 1 March 2005 two Protocols were introduced. The Protocols related to dispute resolution and the impairment benefit process.

No Fault Dispute Resolution Protocols

The Dispute Resolution Protocol has the primary objective of offering alternative dispute resolution prior to making an application to VCAT.¹ To encourage participation in the Protocols, the TAC has agreed to contribute to the costs of the applicant when a dispute is resolved in favour of the applicant. Prior to the introduction of the Protocols there was an Internal Review Process which did not allow for costs recovery. Costs generally were only recoverable following the favourable outcome of a VCAT application.

As part of the dispute resolution process, there is a requirement of early exchange of documentation. The Protocols detail the documentation to be exchanged for each type of dispute. The Protocols provide for a mediation or conference to take place between the parties for the purposes of resolving the dispute. The TAC pays for the cost of the mediator and venue.

There are two levels of costs payable in respect of those matters resolving prior to the conference/mediation and those matters which resolve at or shortly after the conference/mediation. The following table sets out the professional costs payable:-

	Pre-conference Resolution	Conference Resolution
▪ Medical Expense Dispute	\$3,150.00	\$3,680.00
▪ Eligibility or Loss of Income Rate Disputes	\$3,680.00	\$5,250.00
▪ Impairment or Loss of Income Duration Dispute	\$4,200.00	\$5,780.00
▪ Combined Issues	\$4,200.00	\$5,780.00

The TAC will also pay for a range of disbursements including medical records and interpreter fees.

If an applicant is ultimately unable to resolve the matter by way of the Protocol process, they still have the right to proceed with an application to VCAT. An application cannot be made to VCAT except by consent or until the Protocol process has been completed save for the circumstances where VCAT appeal rights need to be protected.²

¹ Clause 2.4 No Fault Dispute Resolution Protocols.

² Clause 4.3 No Fault Dispute Resolution Protocols.

Impairment Benefit Protocols

Under the Transport Accident Scheme, an impairment benefit is payable if a claimant is determined as having a level of impairment greater than 10% of the whole body as assessed in accordance with the American Medical Association's Guidelines for the Evaluation of Permanent Impairment (Fourth Edition). The impairment benefits payable range from \$4,600.00 for an 11% impairment through to a maximum of \$264,590.00 for a 100% impairment.

There has never been an application process in place in respect to impairment benefits. The TAC has relied upon its own internal processes to determine which person should be assessed for impairment. A claimant was not required to initiate the impairment process. Lawyers played varying roles in the impairment process with the most proactive lawyers arranging their own impairment assessments and submitting those assessments to the TAC. With no application process in place the TAC has relied solely on medical information from doctors to determine whether there is an impairment and the likely level of impairment. As a result the TAC sometimes determined that there was no entitlement to benefits and simply took no further action. At other times the TAC would make determinations with limited information which frequently became the subject of review at a Tribunal. There were also no legal costs payable by the TAC even when a benefit was paid. Legal costs were only recovered in a successful VCAT appeal.

The introduction of Impairment Protocols has a primary objective of providing quality information to the TAC to assist in the assessment of impairment. Under the Impairment Protocols, the claimant provides a statement identifying any ongoing impairment as well as details of the injuries and the treatment received. Lawyers provide a summary that includes details of any unrelated medical conditions, previous claims, the injuries that should be assessed and a summary of the impairments.

The Protocols provide for costs in the amount of \$2,100.00 to be paid to the claimant's legal representative for providing the information under the Protocols. A higher amount of \$2,890.00 is payable if a Release is signed. Medical record fees are also recoverable. Fees for medical reports are not recoverable under the Protocols but are reimbursed pursuant to a provision of the Act.³

An impairment determination is ultimately a reviewable decision. The Dispute Resolution Protocols therefore apply. If an agreement cannot be reached with the TAC in respect to the final determination of impairment, the right to make an application to VCAT remains.

Common Law Protocols

The Common Law Protocols were introduced on 1 April 2005. Since their introduction, there has been extensive dialogue with the TAC resulting in substantial changes to the Protocols. The new version of the Protocols is now operational and applies to all matters lodged under the Protocols from 1 April 2005. The Common Law Protocols have two objectives. The first objective is to create an application process for serious injury. The second objective of the Protocols is to create a pre-issue settlement process.

The Application for Serious Injury

There has never been a formal application process for a Serious Injury Certificate in place. The legal representative for the injured person could simply write a letter requesting TAC determine serious injury. There was no requirement to provide any particulars or any supporting documentation. Theoretically this process could even be bypassed with an application being made directly to a court to have serious injury determined.

The application process under the Common Law Protocols involves the early exchange of information with the TAC including the completion of an application form identifying which injury is the subject of a serious injury application. It also requires that either a statement or affidavit is

³ Section 60 *Transport Accident Act 1986*.

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provided by the applicant. The focus of that statement or affidavit is information that would ultimately persuade a court that a person has sustained a serious injury. Medical reports, medical records and income tax documentation are also provided in support of the application. Under the Protocols there is an expectation that all documentation in the possession of the applicant or their lawyer is exchanged at this early stage rather than being held back for court proceedings. The parties will be able to argue for the exclusion of material if not exchanged.

With the full and complete exchange of documentation, the hope has been that there will be better decision making on the part of the TAC and the early grant of a serious injury certificate. Consequently it is hoped that the number of applications being made to the County Court will be reduced. With the requirement of detailed information, it has also been anticipated that applications with little or no merit will no longer be made.

If the TAC ultimately declines to grant a serious injury certificate, the applicant has the right to apply to the County Court and have a judge determine the question of serious injury. With the early exchange of documentation with the TAC, it has been anticipated that the hearings before the court will be brought on far more quickly.

Pre Issue Settlement Conference

Once the TAC grants a serious injury certificate, there is a requirement under the Protocols to conduct a settlement conference before the institution of proceedings. Prior to the introduction of the Protocols there was no formal mechanism available for pre-issue settlement discussions.

A major feature of the process is the early exchange of material on the part of both parties. The TAC has adopted a "cards on the table" approach. This means that if liability is an issue the TAC are providing material that supports the defence of the claim including witness statements and investigation reports. The claimant has the responsibility of documenting their economic loss claim, providing all medical material in support of the claim and providing any liability material that may be in existence.

Under the Protocols, a settlement conference is to take place within 120 days of the grant of the serious injury certificate and legal proceedings cannot be undertaken until the conference is concluded.

If the case is resolved there is an agreed schedule of costs with two base amounts. A lower amount of \$8,400.00 is payable in a case where the injury has been deemed a serious injury. A higher amount of \$10,500.00 is payable where the claimant has had to satisfy the TAC that the injury is serious. Uplifts are paid as follows:-

▪ Affidavit in Support of Serious Injury Application	\$1,580.00
▪ Liability in issue	\$2,100.00
▪ Economic Loss claim	\$2,100.00
▪ Self employed economic loss claim	\$2,630.00
▪ Court Approval for infant/person under disability	\$2,630.00
▪ Solicitor attendance without Counsel	\$1,050.00

Counsel fees are payable in addition to the above amounts as are reasonable disbursements.

Interstate Insured Defendants – TAC Not on Risk

The need to obtain a Serious Injury Certificate applies even when TAC is not on risk, such as when the defendant driver is insured interstate. An accident occurring in Victoria requires that the TAC grant a certificate and determine impairment. If the injury is deemed serious in a protocol matter TAC will pay costs of \$1,050.00 in addition to costs payable pursuant to the impairment Protocols. If a Serious Injury Certificate is granted by way of the narrative definition by TAC, costs of \$3,150.00 are payable under the Protocols.⁴

⁴ Clause 12.4 Common Law Protocols

What is Good About the Protocols?

Prior to the introduction of the Protocols, many of the disputes involving the TAC were small in nature and would only be pursued by way of internal review. No legal costs were payable as part of the internal review process. The only other alternative was an application to VCAT which carried substantial costs risks as well as long delays. The introduction of the Dispute Resolution Protocols have represented a very substantial win for claimants with a structured and detailed dispute resolution process being created. With cost recovery the claimant can access a lawyer no matter what the nature or size of the dispute.

Lawyers have traditionally had an involvement in the impairment process. The payment of legal costs for assisting in that process has again provided a very substantial benefit to claimants. Lawyers are now more fairly remunerated. In the past, it has been difficult for lawyers to charge an appropriate level of costs with the small amount payable in many cases for an impairment benefit.

There are two positives to come from the Common Law Protocols. First up we have already seen improved decision making in outcomes in respect to the grant of serious injury certificates. Secondly the TAC have recognised the work involved in properly preparing a Common Law case and have made reasonable allowances for costs to encourage and ensure participation in the protocol process.

The positives for the TAC are better decision making and ultimately far fewer disputes. In relation to the impairment Protocols, a high percentage of matters have resulted in the signing of a release which creates far more certainty and has dramatically reduced the number of matters proceeding to VCAT. In respect to the Common Law Protocols, improved serious injury decision making should ultimately lead to a fewer number of applications before the court and lower the total costs payable under the scheme.

A key objective for the TAC is to deliver compensation far earlier. A pre-issue settlement process gives an injured person the best opportunity of receiving the compensation at the earliest possible date.

Overall the introduction of the Protocols appears to be facilitating the delivery of benefits to injured persons, gives proper recognition to plaintiff lawyers for the work undertaken and may result in improved decision making and a reduced number of appeals for the TAC.

The Protocols can be found on the TAC website www.tac.vic.gov.au.

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