



Transport Accident Act Supplementary Common Law Protocols – 1 January 2020

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1. INTRODUCTION

- 1.1 The TAC, Law Institute of Victoria (LIV) and Australian Lawyers Alliance (ALA) are signatories to the Transport Accident Act Common Law Protocols - 1 July 2016 (the 'Common Law Protocols').
- 1.2 The Transport Accident Act Supplementary Common Law Protocols (the 'Supplementary Common Law Protocols') are intended to be read in conjunction with the Common Law Protocols.
- 1.3 The Supplementary Common Law Protocols do not replace the Common Law Protocols. They are intended to provide a process for the following scenarios which are not covered by the Common Law Protocols:
 - 1.3.1 Proactive common law eligibility decisions;
 - 1.3.2 A 'fast track' process for serious injury applications;
 - 1.3.3 Partial common law settlements; and
 - 1.3.4 Interim common law payments.
- 1.4 The TAC recognises the role played by clients' lawyers in the serious injury/common law process. The TAC will only negotiate with and pay common law compensation to an entitled person where they are legally represented.
- 1.5 The Supplementary Common Law Protocols have been agreed between the TAC, LIV and ALA who agree that they and their membership will comply with them and promote their use as the preferred method for delivering common law damages and entitlements to clients.
- 1.6 The Supplementary Common Law Protocols will operate as a pilot commencing 1 January 2020. A review of the success of the Supplementary Common Law Protocols during this pilot will be concluded within 12 months of commencement.

2. OBJECTIVES

- 2.1 The Supplementary Common Law Protocols share the Introduction, Objectives and Guiding Principles of the Common Law Protocols.
- 2.2 Additional objectives of the Supplementary Common Law Protocols are:
 - 2.2.1 Restorative justice and timely benefit and compensation delivery to clients;
 - 2.2.2 Consistent management of common law compensation claims where processes are not covered by the Common Law Protocols; and
 - 2.2.3 Clarity about legal costs and disbursements associated with processes not covered by existing Protocols.

3. DEFINITIONS

3.1 The following definitions apply to key terms within the Supplementary Common Law Protocols:

3.2 Proactive Common Law Eligibility Decision

3.2.1 A 'Proactive Common Law Eligibility Decision' is where the TAC identifies that a client (whether legally represented or not) has a serious injury and proactively grants a serious injury certificate or determines their level of impairment at 30% or more.

3.2.2 Within the Supplementary Common Law Protocols the word 'proactive' refers to situations where the TAC is the initiating party.

3.3 Serious Injury Fast Track Application

3.3.1 A 'Serious Injury Fast Track Application' is where a client's legal representative applies to the TAC to expedite the serious injury process on the basis that their client has a clearly demonstrable serious injury.

3.3.2 To commence the fast track process, a 'Serious Injury Fast Track Application Form' pursuant to Chapter 5 of the Supplementary Common Law Protocols must be lodged.

3.3.3 A Serious Injury Application Form and an affidavit pursuant to Chapter 6 of the Common Law Protocols are not required and should not be lodged as part of the fast track process.

3.3.4 A Serious Injury Fast Track Application cannot be lodged where there is an existing serious injury application being considered by the TAC for the same transport accident.

3.4 Interim Common Law Payment

3.4.1 An 'Interim Common Law Payment' is:

- Where there is a partial payment of a client's pain and suffering head of damage;
- Subject to an Agreement (not a Release); and
- Where the client retains the right to pursue a final settlement of both heads of damage (pain and suffering and pecuniary loss) at a later stage.

3.4.2 An Interim Common Law Payment is potentially available to all clients who are entitled to common law damages and not just those who become eligible via the processes in the Supplementary Common Law Protocols.

3.5 Partial Common Law Settlement

3.5.1 A 'Partial Common Law Settlement' is:

- Where there is final settlement of a client's pain and suffering head of damage;
- Subject to a Release; and
- Where the client retains the right to pursue a pecuniary loss claim at a later stage.

3.5.2 A Partial Common Law Settlement is potentially available to all clients who are entitled to common law damages and not just those who become eligible via the processes in the Supplementary Common Law Protocols.

4. PROACTIVE COMMON LAW ELIGIBILITY DECISIONS AND COMMON LAW REQUESTS BY CLIENTS

CLIENTS WITH LEGAL REPRESENTATION

4.1 The TAC will write to a client's lawyer and provide the serious injury certificate or impairment determination letter where:

- the TAC proactively grants a serious injury certificate; or
- the TAC determines a client's impairment at 30% or more and the TAC considers there is common law potential.

4.2 Within 10 days of above the TAC must also provide:

4.2.1 Details of the TAC person responsible for the conduct of the common law protocols claim; and

4.2.2 A "without prejudice" preliminary view on liability and all information in accordance with Chapter 7 of the Common Law Protocols; and

4.2.3 All information listed in Clause 8.1 of the Common Law Protocols.

CLIENTS WITHOUT LEGAL REPRESENTATION

4.3 Where a client does not have legal representation and any of the following occur:

- the client requests that the TAC assess their common law entitlement; or
- the TAC proactively grants a serious injury certificate; or
- the TAC determines a client's impairment at 30% or more and the TAC considers that it would admit liability;

The TAC will:

4.3.1 Contact or attempt to contact the client by telephone to explain the TAC's position or decision and the next steps in the common law process. The TAC may offer the client an opportunity for a face to face meeting. The content of any conversation will be limited to an overview of the general process. The TAC representative will not discuss any details of liability or quantum specific to the client's circumstances; and/or

4.3.2 Send a letter and where applicable a fact sheet(s) to the client explaining the TAC's decision along with a serious injury certificate (if applicable). The TAC will advise the client that they need to engage a personal injury lawyer to progress their common law entitlement.

4.4 Where a client without legal representation requests that the TAC assess their common law entitlement and the TAC believes that liability or satisfying the serious injury threshold may be in issue, the TAC will recommend that the client obtain legal advice from a personal injury lawyer.

4.4.1 When advising the client to engage a personal injury lawyer, the TAC will recommend and encourage that the client engages a legal firm that participates in the Protocols and has expertise in Plaintiff Personal Injury Law.

4.4.2 If the client subsequently instructs a lawyer to pursue common law compensation a Serious Injury Application must be lodged pursuant to Chapter 6 of the Common Law Protocols.

WHEN AN ELIGIBLE CLIENT SUBSEQUENTLY ENGAGES A LAWYER

4.5 A lawyer engaged by a client who has become eligible to pursue common law damages via a process described in Chapter 4 of the Supplementary Common Law Protocols should within 14 days of receiving instructions contact the Manager, Common Law, Transport Accident Commission, confirming they act on behalf of the client and seek the details of the TAC person responsible for the conduct of the common law protocols claim.

4.6 Within 10 days of being contacted by the lawyer the TAC must provide:

4.6.1 Details of the TAC person responsible for the conduct of the common law protocols claim; and

4.6.2 A “without prejudice” preliminary view on liability and all information in accordance with Chapter 7 of the Common Law Protocols; and

4.6.3 All information listed in Clause 8.1 of the Common Law Protocols.

BYPASS OR SUSPENSION OF IMPAIRMENT PROCESS

4.7 The parties agree that, subject to a client’s instructions, where the TAC has proactively made a decision that a client has a serious injury and admitted liability, the preferred approach is to bypass the impairment process pursuant to Chapter 5 of the Common Law Protocols or suspend the impairment process if it has already commenced.

5. SERIOUS INJURY FAST TRACK APPLICATIONS

OPERATION

5.1 Serious Injury Fast Track Applications:

5.1.1 Are not intended to replace the serious injury application process in the Common Law Protocols.

5.1.2 Should be used for clearly demonstrable serious injuries only. Examples may include amputations, joint replacements, significant spinal injuries, moderate or severe acquired brain injuries or gross scarring.

5.1.3 Can only occur if an Impairment Assessment Application Form pursuant to Chapter 7 of the Impairment Assessment Protocols - 1 July 2016 has not been lodged.

5.1.4 Will only be available to legal firms that participate in the Protocols.

5.1.6 Are not available for accidents arising in the course of employment.

PROCESS

- 5.2 To commence the fast track process, a client's lawyer must submit a 'Serious Injury Fast Track Application Form' together with supporting documentation via email to protocols@tac.vic.gov.au.
- 5.2.1 The email title must include the words 'Serious Injury Fast Track Application', the client's TAC claim number and the lawyer's reference.
- 5.3 A Serious Injury Fast Track Application Form must include sufficient supporting information about the client's injury and consequences for the TAC to make a decision.
- 5.3.1 Affidavits are not required to be submitted in the fast track process.
- 5.4 Within 14 days of receipt, the TAC will advise the client's lawyer whether:
- 5.4.1 A serious injury certificate is granted; or
- 5.4.2 The TAC requires a Serious Injury Application pursuant to Chapter 6 of the Common Law Protocols to be lodged.
- 5.5 The TAC's response pursuant to Clause 5.4.2 or failure to meet the timeframe pursuant to Clause 5.4 of the Supplementary Common Law Protocols does not:
- Require reasons; and
 - Does not constitute a decision to deny the client a Serious Injury Certificate.
- 5.5.1 As the TAC's response or lack of response does not constitute a Serious Injury denial, the parties agree that an Originating Motion will not be issued unless in accordance with the Common Law Protocols.
- 5.6 Within 10 days of a determination pursuant to Clause 5.4.1 of the Supplementary Common Law Protocols the TAC must provide:
- 5.6.1 Details of the TAC person responsible for the conduct of the common law protocols claim; and
- 5.6.2 A preliminary view on liability and all information in accordance with Chapter 7 of the Common Law Protocols; and
- 5.6.3 All information listed in Clause 8.1 of the Common Law Protocols.

6. DISCUSSION TO FACILITATE PROGRESS OF COMMON LAW CLAIM

- 6.1 Within 28 days of receipt of the TAC's correspondence in Clauses 4.2, 4.6 or 5.6 of the Supplementary Common Law Protocols, a client's lawyer must contact the TAC person responsible for the common law protocols claim to discuss future progress of the claim based on the client's individual circumstances.
- 6.2 The topics to discuss may include, but are not limited to:
- 6.2.1 Whether it is appropriate to schedule a common law conference and the timing of a conference;
- 6.2.2 Confirmation that the impairment process will be bypassed or suspended;
- 6.2.3 The need for additional treating practitioner material;

- 6.2.4 The need for any Joint Medical Examinations or Independent Medical Examinations to assist with the assessment of common law damages;
 - 6.2.5 Whether the client's claim is limited to pain and suffering damages only or whether a pecuniary loss claim will be pursued. If a pecuniary loss claim will be pursued, the financial documentation required in support;
 - 6.2.6 Whether affidavits (from the client and/or lay affidavits) would assist the parties;
 - 6.2.7 Whether an Interim Common Law Payment or a Partial Common Law Settlement is appropriate in the client's circumstances;
 - 6.2.7.1 The parties may not need to convene a protocols conference to facilitate an Interim Common Law Payment or a Partial Common Law Settlement;
 - 6.2.8 The expected timeframe for the lodgement of the Common Law Application Form (Chapter 7 of the Supplementary Common Law Protocols).
- 6.3 Alternatively, the client's lawyer may send a letter to the TAC outlining the above information.

MATTERS REQUIRING COURT APPROVAL

- 6.4 Where a client's claim requires Court approval, the parties will still endeavor to ensure Interim Common Law Payments and/or Partial Common Law Settlements are made where appropriate in the client's circumstances (subject to the approval of the Court).

7. LODGEMENT OF COMMON LAW APPLICATION FORM

- 7.1 Prior to any common law protocol conference, the client's lawyer must lodge a Common Law Application Form (in the prescribed form) within the timeframe agreed within Clause 6.2.8 of the Supplementary Common Law Protocols via email to protocols@tac.vic.gov.au.
 - 7.1.1 The email title must include the words 'Common Law Application Form', the client's TAC claim number and the lawyer's reference.
- 7.2 The Common Law Application Form must include all relevant information, including:
 - 7.2.1 Information listed in Chapter 15 of the Common Law Protocols; and
 - 7.2.2 Any additional information identified by the parties as part of the discussion pursuant to Chapter 6 of the Supplementary Common Law Protocols.
- 7.3 A common law damages conference pursuant to Chapter 16 of the Common Law Protocols will then be conducted.
- 7.4 Within 30 days of receipt of the Common Law Application Form, the TAC must provide all additional information and documents listed in Clause 15.3 of the Common Law Protocols, unless otherwise agreed by the parties.

8. INTERIM COMMON LAW PAYMENTS

- 8.1 The TAC may offer a client an Interim Common Law Payment where the parties agree it is appropriate in the client's circumstances.
- 8.2 An Interim Common Law Payment can be requested by the client's lawyer at any time. The parties do not need to convene a protocols conference to initiate or facilitate this payment.
- 8.3 The decision to make an Interim Common Law Payment is at the sole discretion of the TAC, including the amount of the payment.
- 8.4 In determining whether to make an Interim Common Law Payment the TAC will have regard to the Model Litigant Guidelines and the circumstances of the case.
- 8.5 An Interim Common Law Payment will be limited to pain and suffering damages only.
- 8.6 Where an Interim Common Law Payment is offered and accepted, the TAC will forward an Agreement to the client's lawyer for signing by the client.
- 8.6.1 The TAC's Agreement document will stipulate that where the parties have acted in good faith, and specifically in the absence of fraud or misrepresentation, the TAC will not separately seek to recover any interim payment made or offset an interim payment against any other entitlement the client may have under Part 3 of the Transport Accident Act 1986 with respect to the subject claim or any other claim.
- 8.7 Unless otherwise agreed by the parties, the client's signed Agreement will be returned to the TAC within 28 days. The client's interim payment will then be made to their lawyer in accordance with the terms of the Agreement.

9. PARTIAL COMMON LAW SETTLEMENT

- 9.1 Where it is appropriate, the parties may agree to settle a client's pain and suffering head of damage in full. Where a Partial Common Law Settlement occurs, the client will retain the right to pursue a pecuniary loss claim at a later stage.
- 9.2 A Partial Common Law Settlement can be requested by the client's lawyer at any time. The parties do not need to convene a protocols conference to initiate or facilitate this payment.
- 9.3 In determining whether to agree to a Partial Common Law Settlement the TAC will have regard to the Model Litigant Guidelines and the circumstances of the case.
- 9.4 Where a Partial Common Law Settlement occurs, the TAC will forward a Release to the client's lawyer for signing by the client.
- 9.4.1 The TAC's Release document will stipulate that where the parties have acted in good faith, and specifically in the absence of fraud or misrepresentation, the TAC will not separately seek to recover any partial payment made or offset a partial payment against any other entitlement the client may have under Part 3 of the Transport Accident Act 1986 with respect to the subject claim or any other claim.
- 9.5 Unless otherwise agreed by the parties, the client's signed Release will be returned to the TAC within 28 days. The client's settlement monies will then be paid to their lawyer in accordance with the terms of the Release.

10. LEGAL COSTS AND DISBURSEMENTS

- 10.1 The legal costs and disbursements outlined in Chapter 21 of the Common Law Protocols also apply where a client has become eligible to pursue common law damages via the processes outlined in the Supplementary Common Law Protocols.
- 10.2 Clauses 21.3 (Indexation of amounts) and 21.4 (Common Law price point schedule) of the Common Law Protocols continue to apply.
- 10.3 The applicable price points and counsel's fees payable will be as per the date of the final common law settlement.
- 10.4 Legal costs and disbursements will be paid at the final settlement of the common law claim in all circumstances save for matters requiring Court approval in which case Clauses 10.13 to 10.16 of the Supplementary Common Law Protocols apply.

PRICE POINTS, UPLIFTS AND DISBURSEMENTS TO BE PAID AT COMMON LAW RESOLUTION

- 10.5 The 'Narrative Gateway' price point pursuant to Clause 21.9 of the Common Law Protocols will apply and will be paid at common law resolution where:
- 10.5.1 A client has become eligible to pursue common law damages under Chapter 4 of the Supplementary Common Law Protocols ('Proactive Common Law Eligibility Decisions and Common Law Requests By Clients'); and
- 10.5.2 A client has become eligible to pursue common law damages under Chapter 5 of the Supplementary Common Law Protocols ('Serious Injury Fast Track Applications').
- 10.6 The TAC will also pay any uplifts and disbursements in accordance with Chapter 21 of the Common Law Protocols.
- 10.7 Where a serious injury certificate is granted as a result of a Serious Injury Fast Track Application (Chapter 5 of the Supplementary Common Law Protocols) the impairment process is deemed to be bypassed and an **Impairment Bypass Uplift** is payable pursuant to Clause 21.16 of the Common Law Protocols.
- 10.8 Clauses 21.24 to 21.27 of the Common Law Protocols (**Concurrent Applications**) apply where the impairment process has commenced but the parties agree to suspend the impairment process due to a Proactive Common Law Eligibility decision (Chapter 4 of the Supplementary Common Law Protocols).
- 10.9 No additional legal costs are claimable if a secondary common law conference pursuant to Clause 16.5 of the Common Law Protocols is conducted save for the uplift payable pursuant to Clause 21.14.4 of the Common Law Protocols where a solicitor attends the common law conference without counsel.
- 10.9.1 The TAC will pay counsel's fee as a disbursement to attend a second common law conference in accordance with the fee schedule applicable to counsel's fees.

ADDITIONAL UPLIFT PAYABLE FOR INTERIM COMMON LAW PAYMENT AND/OR PARTIAL COMMON LAW SETTLEMENT

- 10.10 The TAC will, in addition to the costs payable in accordance with Chapter 21 of the Common Law Protocols, pay an uplift fee of \$2,450 where:
- 10.10.1 An Interim Common Law Payment is made; or
- 10.10.2 A Partial Common Law Settlement is reached.
- 10.11 This additional uplift is only payable once per claim regardless of how many Interim Common Law Payments and/or Partial Common Law Settlements are made.
- 10.12 This additional uplift is only payable at the final settlement of the common law claim.

MATTERS REQUIRING COURT APPROVAL

- 10.13 Despite Clause 10.4 of the Supplementary Common Law Protocols, where an Interim Common Law Payment and/or Partial Common Law Settlement requires Court approval the TAC will pay (subject to the approval of the Court):
- \$10,000 as partial payment towards any applicable Protocol price points plus;
 - Disbursements incurred during the Court approval process plus;
 - The Court approval uplift in Clause 21.14.5 of the Common Law Protocols.
- 10.14 The Court approval uplift in Clause 21.14.5 of the Common Law Protocols is payable each time a matter requires approval of the Court.
- 10.15 The partial payment towards any applicable Protocol price points (i.e. \$10,000) referred to in Clause 10.13 of the Supplementary Common Law Protocols is only payable for the initial Court approval and not any subsequent applications for Court approval.
- 10.16 Any partial payment of costs and disbursements pursuant to Clause 10.13 of the Supplementary Common Law Protocols will be reconciled at final settlement pursuant to the costs and disbursements payable under the Common Law Protocols or deducted from any costs and disbursements ordered in litigation. The date of final common law settlement will determine the applicable price points payable.