

TRANSPORT ACCIDENT COMMISSION

PROTOCOLS in Victoria



By Tim Connor

BACKGROUND TO THE SCHEME

The current compensation scheme for motor vehicle accidents in Victoria commenced on 1 January 1987 with the introduction of the *Transport Accident Act 1986 (TAA)*. The scheme, which is administered by a single insurer, the Transport Accident Commission (TAC), encompasses both no-fault benefits and the common law. The no-fault benefits include the payment of medical and related expenses, loss of income and impairment benefits. The Victorian Civil and Administrative Tribunal (VCAT) has exclusive jurisdiction over appeals related to no-fault disputes.

The legislative scheme restricts access to common law damages by requiring that an injured person first establish that they have a 'serious injury'. 'Serious injury' is deemed if the impairment is 30%¹ or more, or alternatively is granted if a narrative definition can be satisfied.²

The TAC has responsibility to determine impairment and to grant a serious injury certificate if it is satisfied that the narrative definition is met. If serious injury is not established by these means, there is a right of review to VCAT in respect of the level of impairment, and to apply to a court to determine whether the narrative definition of serious injury is satisfied.

Common law damages are restricted to general damages for pain and suffering and pecuniary loss. Medical and related expenses are not

recoverable and continue to be paid as part of the no-fault scheme.³

NO-FAULT DISPUTE RESOLUTION AND IMPAIRMENT PROTOCOLS

On 1 March 2005 two protocols were introduced, relating to dispute resolution and the impairment benefit process.

No-fault dispute resolution protocols

The Dispute Resolution Protocol is intended to offer alternative dispute resolution prior to making an application to VCAT.⁴ To encourage participation in the protocols, the TAC has agreed to contribute to an applicant's costs when a dispute is resolved in his or her favour. Prior to the introduction of the protocols, there was an internal review process that did not allow for costs recovery. Costs were generally recoverable only following the favourable outcome of a VCAT application.

The dispute resolution process requires early exchange of documentation. The protocols detail the documentation to be exchanged for each type of dispute, and provide for a mediation or conference to take place between the parties for the purpose of resolving the dispute. The TAC pays for the cost of the mediator and the venue.

Two levels of costs are payable depending on whether the dispute is

resolved before or after the conference/mediation. The professional costs payable are as follows:

	Pre-conference resolution	Conference resolution
Medical expense dispute	\$3,069	\$3,581
Eligibility or loss of income rate disputes	\$3,581	\$5,115
Impairment or loss of income duration dispute	\$4,092	\$5,627
Combined issues	\$4,092	\$5,627

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

Applicants who are ultimately unable to resolve matters by way of the protocol process can still proceed with an application to VCAT. An application cannot be made to VCAT without consent, or until the protocol process has been exhausted, except where VCAT appeal rights need to be protected.⁵

Impairment Benefit Protocols

Under the Transport Accident Scheme, an impairment benefit is payable if a claimant is determined to have a level of impairment greater than 10% of whole-body impairment (WPI).⁶ The impairment benefits payable range from \$4,720 for an 11% impairment through to a maximum of \$264,590 for a 100% impairment.⁷

There has never been an application process in place with respect to

impairment benefits. The TAC has relied upon its own internal processes to determine who should be assessed for impairment; claimants were not required to initiate the impairment benefit process themselves. Lawyers played varying roles in the 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 relied solely on medical information from doctors to determine the existence and 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 on the basis of limited information, which frequently became the subject of review at a tribunal. The TAC would not be liable for legal costs even when a benefit was paid.

Legal costs were recovered only in a successful VCAT appeal.

The introduction of impairment protocols is primarily intended to provide quality information to the TAC to assist in assessing 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 up to \$2,046 to be paid to the claimant's legal representative for providing information. A higher amount of \$2,813 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.⁸

An impairment determination is ultimately a reviewable decision, with the right to utilise the Dispute Resolution Protocols. If an agreement cannot be reached with the TAC as to the level 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, extensive dialogue with the TAC has resulted in substantial amendments to them. 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 is to create an application process for serious injury. The second 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. The legal representative for the injured person could simply write a letter requesting that the TAC determine serious injury. There was no requirement to provide any particulars or any supporting documentation. Theoretically, this process could even be bypassed by asking a court to determine serious injury.

The serious injury application process under the common law protocols involves the early exchange of information with the TAC, including completing an application form identifying which injury is the subject of the application. It also requires that the applicant provide either a statement or affidavit. The content of that statement or affidavit is information that would persuade a court that the person has sustained a serious injury. Medical reports, medical records and income tax documentation should also be 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 will be exchanged at this early stage, rather than being reserved for court proceedings. The parties can argue for the material to be excluded if it is not exchanged at this stage.

The hope is that the full exchange of documentation will lead to better decision-making by the TAC and the early granting of serious injury certificates. It is also hoped that, as a consequence, the number of applications being made to the County Court will reduce and that the requirement for detailed information may deter applications with little or no merit. >>

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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. It has also been anticipated that the early exchange of documentation with the TAC will bring applications before the court far more quickly.

Pre-issue settlement conference

Once the TAC grants a serious injury certificate, the protocols require that a settlement conference be conducted before proceedings can be instituted. Prior to the introduction of the protocols, there was no formal mechanism available for pre-issue settlement discussions.

A major feature of this new 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 will provide material that supports the defence of the claim, including witness statements and investigation reports. The claimant is responsible for documenting their economic loss claim, providing all medical material in support of the claim, and providing any liability material that may be available.

Under the protocols, a settlement conference must 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 \$8,814 is payable in a case where the injury has been deemed a serious injury. A higher amount of \$10,230 is payable where the claimant has had to rely on the narrative definition to satisfy the TAC that the injury is serious. Uplifts are paid as follows:

Affidavit in support of serious injury application	\$1,535
Liability in issue	\$2,046
Economic loss claim	\$2,046
Self-employed economic loss claim	\$2,558
Court approval for infant/person under disability	\$2,558
Solicitor attendance without counsel	\$1,023

Counsel fees and reasonable expenses are payable in addition to the above amounts.

INTERSTATE INSURED DEFENDANTS – TAC NOT ON RISK

The need to obtain a serious injury certificate applies even when the 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, the TAC will pay costs of \$1,023 in addition to costs payable under the impairment protocols. If a serious injury certificate is granted by way of the narrative definition by the TAC, costs of \$3,069 are payable under the protocols.⁹

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 were pursued only 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 the risk of substantial costs as well as long delays. The Dispute Resolution Protocols represent a very substantial win for claimants, creating a structured and detailed dispute resolution process. With cost recovery, the claimant can access a lawyer no matter what the nature or size of the dispute.

Lawyers have traditionally been involved with the impairment benefit process. The payment of legal costs has also provided a very substantial benefit to claimants. In the past, it has been difficult for lawyers to charge the necessary costs due to the small amount payable, in many cases, for an impairment benefit. Lawyers are now more fairly remunerated.

The common law protocols offer two main positives. First, the decision-making process when granting serious injury certificates has improved. Secondly, the TAC has recognised the work involved in properly preparing a common law case and 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, many more matters have resulted in the signing of a release, which creates far more certainty and dramatically reduces the number of matters proceeding to VCAT. With respect to the common law protocols, improved serious injury decision-making should ultimately lead to fewer applications before the court and lower costs payable under the scheme.

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

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

Notes: **1** Assessed in accordance with the *American Medical Association's Guidelines for the Evaluation of Permanent Impairment*, fourth edition (AMA4). **2** The narrative definition of 'serious injury' is satisfied if the injury is a: (i) serious long-term impairment or loss of body function; (ii) permanent serious disfigurement; (iii) severe long-term mental or severe long-term behavioural disturbance or disorder; or (iv) loss of a foetus. **3** Section 93 *Transport Accident Act 1986*. **4** Clause 2.4 No-Fault Dispute Resolution Protocols. **5** Clause 4.3 No-Fault Dispute Resolution Protocols. **6** Assessed in accordance with AMA4. **7** These rates apply to injuries on or after 16 December 2004. A lower level of benefits applies to injuries prior to 16 December 2006. **8** Section 60 *Transport Accident Act 1986*. **9** Clause 12.4 Common Law Protocols.

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