

SAPS Injury Management Practice Note

Common Law

Objectives, Targets & Performance Indicators

Objective	Target	Performance Indicator
That Common Law damages are appropriately assessed and paid	All SAPS agencies	That all Common Law actions are addressed and defended in the appropriate manner.

Purpose

To ensure consistent application of the provisions of the Return to Work Act 2014 (the Act), with regard to the payment of Common Law damages by South Australian Public Sector (SAPS) agencies.

Context

“Common Law damages” are the monetary remedy for injury or loss sustained by a worker arising from the negligence or other tort of their employer (or other party who is vicariously liable or a person for whose acts the employer is vicariously liable), assessed and awarded by a court to the harmed party.

The RTW Act 2014 provides that Common Law damages are potentially payable;

Where a worker suffers a compensable work injury or death, resulting from the negligence or other tort (including breach of statutory duty) of the worker’s employer and arising from employment	Section 70, 71, 72
In the case of a compensable physical injury, where 30% or greater WPI is assessed, having no regard to impairment that results from psychiatric injury or consequential mental harm	Section 70, 71, 72
In the case of a compensable psychiatric injury, only where 30% or greater WPI is assessed and results primarily from the negligence or other tort of the worker’s employer and not from any consequential mental harm	Section 70, 71, 72

Common Law action is subject to the following;

Any injury(ies) are compensable, have stabilised and have resulted in WPI of 30% or greater	Section 72
Common law damages are restricted to damages for economic loss, not non-economic loss	Section 73
A worker is not entitled to an action against an employer to recover damages in respect of any treatment, care or support services	Section 73(2)
A worker is not entitled to both a redemption and common law damages for future economic loss	Section 73(2)

If after being assessed at 30% WPI or greater, a worker seeks to pursue common law damages, the worker must officially elect to pursue damages for future economic loss and thereafter cannot pursue a redemption of a liability to make weekly payments	Section 73 and Regulation 39
The worker cannot commence an action for common law damages or enter into a redemption agreement until the worker has made an election - section 73(5)	
Any election to pursue Common Law damages must be commenced within three years of the injury date	
Prior to electing to pursue Common Law damages, a worker must obtain advice from a practising legal practitioner and is entitled to legal costs arising from obtaining such advice	Section 73(6) and 73(7)

SAPS Practice

Upon initial receipt of a workers compensation claim, particularly in the case of death or serious injury, if it appears that there is any possibility of negligence, breach of statutory duty or other tort, the Agency should;

- Commence or commission factual investigations into the circumstances of the matter, which may include obtaining witness statements, photographs, documentary and/or physical evidence, paying particular attention to any possible negligence. Consideration to be given to any HR/ WHS investigations through liaison with the relevant team in the agency, prior to commencing the investigation
- Prior to commencing such factual investigations, refer conduct of the investigations to the Crown Solicitor's Office (or other legal provider in the case of Treasurer's Instruction 10 exemption) and obtain recommendations regarding any investigation, thereby providing the Agency with the benefit of claiming legal professional privilege in respect to any later order of disclosure regarding documents or materials arising from those investigations
- Whereupon a worker elects to pursue Common Law damages, refer conduct of the matter to the Crown Solicitor's Office