

Motor Accidents Compensation Act (NSW) 1999

Gateway to non-economic loss

BY TOM GOUDKAMP, SYDNEY

.....



Tom Goudkamp is a partner at Stacks the Law Firm with Goudkamp Mahony. **PHONE** (02) 9223 6155, **FAX** (02) 9223 6323, **EMAIL** goudtom@ozemail.com.au

The tragedy of the new Motor Accidents scheme, which applies to accidents after the 4th October 1999, is the elimination of damages for non-economic loss for many seriously injured accident victims.

This is because the *Motor Accidents Compensation Act 1999* ("the Act") has a non-economic loss gateway which will remain closed for the majority of accident victims.

The Gateway

No damages will be awarded for non-economic loss unless the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident is greater than 10% (s.131).

This in itself doesn't sound too bad until it is realised that the permanent impairment is to be assessed along the lines of the rigid and mechanical American Medical Associations' *Guides to the Evaluation of Permanent Impairment*, 4th Edition [s.133(2)]. These guides ignore individual circumstances, pain and suffering, loss of enjoyment of life, dislocation of normal lifestyle etc.

The key words are "permanent impairment".

"Impairment" and "Permanent Impairment"

The AMA Guides offer the following interpretations:

"Impairment" is defined as "Loss, loss of use, or derangement of any body part, system or function".

"Permanent Impairment" is defined as "Impairment that has become static or well stabilised with or without medical treatment and is not likely to remit despite medical treatment. A permanent impairment is considered to be unlikely to change substantially and by more than 3% in the next year with or without medical treatment. If an impairment is not permanent, it is inappropriate to categorise it as such and evaluate it according to the guides criteria."

Thus little or no account will be taken of disabilities, pain and individual circumstances.

It should be remembered that "non-economic loss" is defined in s.3 of the Act as:

- (a) Pain and suffering; and
- (b) Loss of amenities of life; and
- (c) Loss of expectation of life; and
- (d) Disfigurement

This criteria will only become relevant if the permanent impairment is agreed or found to be greater than 10% whereupon normal Common Law principles apply (subject to a cap of \$260,000.00). There will be no proportionality of "a most extreme case" and no deductible.

Psychiatric and psychological injuries

The original Bill sought to exclude psychological or psychiatric injuries altogether, thus abolishing damages for nervous shock.

The Act has been slightly modified to allow for some damages for psychological or psychiatric injuries but only in a very limited way.

In assessing the degree of permanent impairment regard must not be had to any psychiatric or psychological injury, impairment or symptoms, unless the assessment of the degree of permanent impairment is made solely with respect to the result of a psychiatric or psychological injury [s.133 (3)]

In other words the psychological or psychiatric injuries cannot be added to physical injuries to take the permanent impairment through the 10% gateway. The injuries must stand alone.

Who decides the degree of permanent impairment?

Certainly not the Courts.

Where there is dispute between the parties as to the degree of permanent impairment the dispute will be determined by a single medical assessor who will carry out the assessment pursuant to the Guidelines and provide the parties with a Certificate where the degree of permanent impairment is greater than 10%. This Certificate forms conclusive evidence in Court proceedings or by a Claims Assessor.

The avenues for review are narrow and limited. A dissatisfied claimant can ask for a dispute to be sent for further assessment if his/her condition has deteriorated or if there is additional relevant information about the injury.

A claimant may also have a dispute referred to a "Review Panel" on the basis that the assessment was incorrect in a material respect. Whether or not a case goes to a Review Panel will depend on whether a proper officer of the Motor Accidents Authority determines that a review is warranted. A Review Panel of at least 3 Medical Assessors will either confirm the original Certificate or issue a new one.

There is also a limited right to question the process leading to the issue of the Certificate. s.61(4) allows a Court to reject the Certificate as to the degree of permanent impairment:

"On the grounds of denial of procedural fairness to a party to the proceedings in connection with the issue of the Certificate, but only if the Court is satisfied that the admission of the Certificate would cause substantial injustice to that party".

A Court cannot however substitute its own assessment. If the Certificate is rejected the medical assessment procedure is repeated.


s.61(6) of the *Motor Accidents Compensation Bill* gave the Court the power to substitute its own findings on permanent impairment. That is the only section in the Bill which has not been proclaimed. It is doubtful whether the Courts will ever have the power to substitute its own findings.

Anticipated issues

1. Whether a single Medical Assessor will be able to assess multiple injuries, some of which may not have been properly diagnosed during the acute phase following the trauma

(e.g. frontal lobe damage, which requires the acquisition of histories from relatives, employees, employers, friends etc and generally the results of psychometric testing and MRI studies).

2. What information the Medical Assessor will have to assist in the evaluation process.
3. Who will provide the Assessor with the material information.
4. Whether the Assessor will be able to take proper account of probable future deterioration (e.g. osteoarthritis, epilepsy, growth plate problems and syringomyelia which often don't manifest themselves until years after the trauma and in many cases beyond the limitation periods).
5. Whether the Assessor will be able to deal with causation issues e.g. aggravations of pre-existing conditions such as degenerative diseases, and/or acceleration of latent diseases e.g. multiple sclerosis, pre-accident injuries, intervening accidents, further injuries which may have been caused or assisted by weaknesses caused by the original injuries etc.
6. The likelihood that assessments will be delayed until such time as the long term consequences are known and can be taken into account. The assessment by the MAA appointed Assessors or by a Court will generally be delayed until the degree of permanent impairment has been assessed. ►



**BUILDING
REPORTS &
COSTINGS
FOR THE
DISABLED**

Compensation for sufferers of lifelong and long-term disabilities involve a variety of special domestic and workplace building requirements. These range from minor modifications to complete purpose-built housing.

Jim Bryant offers:

- Extensive architectural qualifications reflected in a national portfolio of important buildings.
- 23 years specialist experience gained in over 350 cases reporting and costing the building requirements of disabled claimants, for Court evidence purposes.
- A lateral-thinking approach to solving new and difficult problems.

J.H. BRYANT CHARTERED ARCHITECT

374 Joalah Rd., Duffy's Forest NSW 2084
Tel.: (02) 9450 0368 Fax: (02) 9450 0389
Mobile: 041 820 3773 • Email: jhbryant@mpx.com.au

This could cause problems with limitation periods and almost certainly delay the resolution of many cases.

Claims cannot be referred to a Claims Assessor or be litigated until entitlement to damages for non-economic loss is confirmed.

- Whether the issuing of a Permanent Impairment Certificate will be conclusive evidence of causation thus depriving the Court from deciding this issue.

What is at stake?

It is an "all or nothing" situation. If permanent impairment is assessed as not being greater than 10% there will be no damages for non-economic loss. If greater than 10% the damages are likely to be substantial, probably at least \$80,000.00.

Conclusion

One of the stated objectives of the Act is; "To keep premiums affordable, in particular by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injuries, while preserving principles of full compensation for those with severe injuries involving ongoing impairment and disabilities" [s.5 (1)(e)].

"psychological or psychiatric injuries cannot be added to physical injuries to take the permanent impairment through the 10% gateway"

Far from preserving the principles of full compensation for those with severe injuries involving ongoing impairment and disabilities, the new scheme will eliminate damages for non-economic loss for all but the very seriously and catastrophically injured because little or no account will be taken of disabilities as opposed to permanent impairment.

Thus many seriously injured accident victims who have hobbled around on crutches for months, who have suffered unsightly scarring, who are depressed and anxious, who have suffered personality changes, who have suffered loss of fitness and vitality, whose loss of confidence and self esteem have plummeted, whose home life is in tatters, whose personal relationships have broken down, who face the grim prospect of increasing and unremitting pain will be surprised, disappointed and angry when informed that they are actually much worse off under the new scheme. **PL**

Smoking kills, tobacco giant admits

BELINDA HICKMAN
SARAH STOCK
STEPHEN ROMEI

Huffing and puffing

The Australian yesterday approached Nick Greiner, former NSW premier and now chairman of British American Tobacco Australasia in the lobby of 139 Macquarie Street, Sydney. **Reporter:** Mr Greiner, I was wondering if you would care to comment on Philip Morris's new Web site and the implications it

has for your company. **Greiner:** Look, act like an adult. **Reporter:** So you have no comment? **Greiner:** No, no comment. **Reporter:** As chair of the company you will not comment? **Greiner:** Look, if you want a quote from the company go to the company, now grow up.

THE world's biggest cigarette company has admitted for the first time that smoking is addictive, unsafe and causes cancer—but campaigners fear the move may be nothing more than window-dressing.

Anti-smoking groups and lawyers involved in a class action by 3000 Australian smokers welcomed the admission on a Web site by US-based Philip Morris, maker of Marlboro cigarettes, but they said it came 50 years too late.

They said the statement would mean nothing if the tobacco companies did not increase action to help people give up nicotine and prevent children from taking up the habit. The company's corporate Web site states "there is no safe cigarette" and admits: "There is an overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers."

Philip Morris Australia said it supported the statement. "There should be a single consistent health message," Melbourne-based spokesman Eric Windholz said.

"It is not about legal liability but communicating more broadly with the public and employees. We wanted to give the public a variety of perspectives on these issues."

Slater & Gordon lawyer Ken Fowle, whose company is running a Federal Court class action for smokers with related diseases, said no other tobacco

company had made such an admission voluntarily, and that the Philip Morris statement was likely to help the legal case.

The statement may also assist a class action of 65 health care organisations, being run by the Tobacco Control Coalition, said convenor Andrew Penman, the NSW Cancer Council chief executive.

The campaigners challenged British American Tobacco Australasia and Imperial Tobacco to follow suit. BAT senior manager Stuart Silver said his company was considering a similar move, but argued that the Philip Morris site merely said there was "overwhelming evidence" of smoking's harmful effects. "It does not say we agree with it."

Philip Morris's comments are part of a \$US100 million (\$150 million) campaign to lift its image in the face of lawsuits brought against the tobacco industry by the US Justice Department and some states.

In Canberra, federal Health Minister Michael Woodridge was delighted, a spokeswoman said. "The Government will wait to see what impact, if any, this has on negotiations with the tobacco industry over listing cigarette ingredients."

The Australian Council on Smoking and Health's Ron Edwards challenged former NSW premier Nick Greiner, now BAT Australasia chairman. "Mr Greiner was strong on transparency and honesty in public life. He now has permission to follow suit with tobacco."

The Australian 15/10 1999. Reproduction with permission.

Cigarette Smoking: Health Issues for Smokers

<p>Health Smoking Prevention</p> <p>Cigarette Marketing Practices</p> <p>Health Issues for Smokers</p> <p>Quitting Smoking</p> <p>Responsibility to Cigarettes</p> <p>Understanding the and Marketing Business</p> <p>Secondhand Smoke</p>	<p>Cigarette Smoking and Disease in Smokers. There is an overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers. Smokers are far more likely to develop serious diseases, like lung cancer, than non-smokers. There is no "safe" cigarette. These are and have been the messages of public health authorities worldwide. Smokers and potential smokers should rely on these messages in making all smoking-related decisions.</p> <p>For more detailed information from public health authorities on cigarette smoking and disease in smokers:</p> <p>Click on the year indicated for highlights and conclusions from the following U.S. Surgeon General's reports: 1964, 1979, 1980, 1983, 1984 and 1994.</p>
--	--

Owning up: A section of the Philip Morris Web site