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The measure of everything, the value of nothing

The use of the AMA Guides in Australia has generated much criticism and discussion. The major issues arising from this discussion are summarised here.

"Impairment assessment" based on the AMA Guides is now being used in more and more Australian statutory compensation systems. Editions of the Guides or various modifications of the Guides are used to determine access to weekly benefits, as a method of assessing entitlements to lump sum compensation for permanent impairment, and as a gateway to determine access to common law damages.

Although criticised by plaintiff lawyers and some in the medical profession, the adoption of the Guides in recent "reforms" of statutory compensation schemes has, by and large, proceeded without any detailed scrutiny of the Guides and their claims of validity.

Legislative reform was prompted by "costs blowouts" identified by auditors and emphasised by insurers. The story is a familiar one in workers' compensation and motor accident schemes in many jurisdictions. With the problem identified as the number and expense of disputes, the Guides have been adopted as part of the solution. They have often been accompanied by greater restrictions on the access to common law damages or the removal of rights altogether, and the shifting of dispute resolution from the legal arena to medical panels.

Criticisms of these developments can be classified under two heads. Firstly, that the Guides themselves are flawed, unscientific and not the objective document they purport to be. Secondly, that whatever the merit of the Guides, their usefulness is compromised by the manner of their adoption in Australian statutory compensation schemes.

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The Guides are not scientific or objective

It is very easy to be misled into thinking that the Guides are the result of rigorous scientific analysis and empirical research. They contain page after page of tables, charts and diagrams, complex terminology and lots of footnotes to published articles. In reality the impairment rating system is simply the result of the consensus of various committees of the American Medical Association.

The Preface to the fourth edition of the Guides states that:

> If the Guides' contributors have been unable to identify objective

data on the normal functioning of an organ system, they have estimated the extent of impairments on the basis of clinical experience, judgement and consensus.

Quite apart from the issues this statement raises about how "normal functioning" is identified, anyone with experience of the medico-legal process knows that "clinical experience, judgement and consensus" are slippery concepts. People of even the greatest integrity and professionalism can be swayed by a variety of factors.

There is no doubt that interests outside the purely medical play a very prominent part in the development of the Guides. The decreasing relativities between neck and back impairments and other impairments over successive editions is often cited as an example of these interests at play.

An article published in the *Journal of the American Medical Association* earlier this year, the authors of which were involved in the AMA Steering Committee for the preparation of the 5th edition of the Guides, called for:

> clear boundaries between scientific and medical issues and questions that are of an economic or policy nature. At no time should the Guides' rating system disregard functional limitations because of concern that the ratings will generate excessive costs in a social insurance system that chooses to use the Guides

That such comments are even necessary should be of great concern in Australia where the Guides have been uncritically adopted and implemented. There has been no opportunity for wider involvement in the debates surrounding the adoption of successive editions.

Another concern arises with the concepts of 'impairment' and 'disability'. The concept of 'impairment' lacks clarity. Practitioners who have to grapple with the practical application of the Guides, and in particular attempt to explain it to their clients, rapidly reach the conclusion that the concept is fuzzy and unsatisfactory.

A distinction between impairment on the one hand, and disability on the other, seems clear cut and rational in the preface to the Guides. This clarity quickly breaks down in the practical application of the concept. Some organ systems are evaluated by reference to relatively objective criteria, independent of the history provided by the examinee and insulated from judgements by the examiner. Other organ systems are evaluated by reference to the functional limitations caused by the impairments. This is circular and unscientific, inviting inconsistencies in its application depending upon the particular perspective of the assessor.

The blurry distinction between impairment and disability infects the Guides throughout. However, it is only in the chapter dealing with mental and behavioural disorders that the authors acknowledge the futility of attempting to reduce injury and disease to a number:

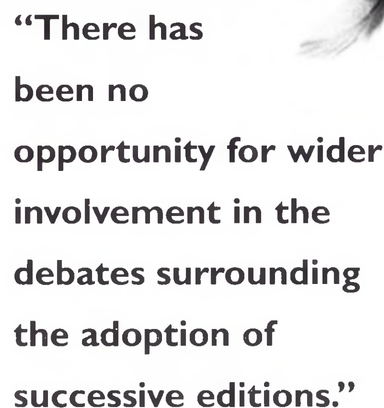
> The use of percentages implies a certainty that does not exist, and the percentages are likely to be used inflexibly by adjudicators, who are then less likely to take into account the many factors that influence mental and behavioural impairment.

The use of the Guides is rationalised by its authors and supporters on the basis that they are widely used. Despite this widespread use, there seems to be very little evidence that the Guides are accurate or valid. While there are some studies of the replicability of impairment assessments in accordance with Guides criteria, replicability of itself is not a sufficient basis for the validity of the Guides as a comprehensive system of rating impairment.

An article in the *Journal of the American Medical Association* earlier this year responded to this criticism as follows:

> All who use the Guides need to commit the necessary time, personnel and research funds to advance the discipline of impairment evaluations. Only with such multi-disciplinary efforts will an accurate assessment and quantification of impairments be achieved, enabling those with impairments to be fairly compensated and appropriately assisted in achieving optimal functions.

The fact that this plea is necessary after more than 30 years of extensive use of the Guides in the United States and elsewhere, indicates that the goal of "accurate assessment and quantification of impairment" is illusory and reinforces the view that the Guides are constructed on shaky scientific foundations.



"There has been no opportunity for wider involvement in the debates surrounding the adoption of successive editions."

The inappropriate use of the Guides

The manner of the adoption of the Guides by statutory compensation schemes in Australia amplifies their inherent limitations. The preface to the Guides contains the following warning:

> It should be emphasised and clearly understood that impairment percentages derived in accordance to Guides' criteria should not be used to make directly financial awards or direct estimates of disabilities.

Contrary to this warning, statutory compensation schemes in Australia typically require the use of impairment percentages in a crude and direct fashion. Access to damages is determined by direct reference to percentage whole person impairment and financial awards are made by direct reference to impairment percentages.

I am most familiar with the Victorian workers' compensation scheme, the *Accident Compensation Act* 1985 (the ACA), the Victorian transport accident scheme, the *Transport Accident Act* 1988 (the TAA) and the New South Wales motor accident scheme, the *Motor Accidents Compensation Act* 1999 (the MACA). There are some common themes ▶

regarding the manner in which impairment assessment is used in these schemes.

Firstly, compensation is often determined by direct reference to the level of whole person impairment assessed in accordance with the Guides. For example, compensation for 'non-economic loss' under both the ACA and the TAA is determined by direct reference to the level of impairment assessed in accordance with the Guides.

Both schemes also require an injured motorist or worker to have an impairment of greater than 10% whole person impairment (WPI) before any compensation is payable. The ACA superimposes a sliding scale of benefits for prescribed ranges of impairments. While the maximum amount of compensation available under the ACA is relatively generous, it is only available for extreme physical impairments in excess of 80%. At the lower end of the scale, workers with impairments in the range of 11% to 30% (probably the majority of recipients) have their benefits assessed with reference to a principal sum that is less than 50% of the maximum in New South Wales.

The second theme that emerges in the legislative "reforms" is the inappropriate use of the Guides and "whole person impairment" as a gateway or threshold for access to benefits intended to compensate disability. For example, under the scheme introduced by the *Motor Accidents Compensation Act* 1999, a person injured in a motor vehicle accident in New South Wales must have a permanent impairment of 11% or more before any damages will be awarded for "pain and suffering" or non-economic loss. Damages are assessed by taking "disability" into account in accordance with the objects of the legislation. However, access to those damages in the first place is determined with reference to 'impairment', a process in which the actual disability suffered by the injured individual concerned is supposed to be ignored.

Thirdly, perhaps the most disturbing feature of the Victorian and New South Wales legislation is the differential treatment of psychiatric injuries. Contrary to the concept of *whole* person impairment central to the Guides, the ACA, TAA and the MACA all prohibit the combining of physical and psychiatric impairments.

Access to statutory compensation for psychiatric non-economic loss under the ACA requires an injured worker to demonstrate that they have a permanent psychiatric impairment of greater than 30%. Physical and psychiatric impairments cannot be combined.

In a contortion that defies logic, medical science and fairness, the principal test for access to common law damages under the Victorian transport, accident and work accident schemes requires an examiner to "disregard any psychiatric or psychological injury, impairment or symptoms arising as a consequence of or secondary to a physical injury".

"the most disturbing feature is the removal of the right of claimants and their representatives to scrutinise and challenge impairment determinations."

The New South Wales motor accidents scheme is more cruel in its differential treatment of psychiatric injuries but at least has the benefit of simplicity. Under that scheme, a claimant is not entitled to combine his or her physical and psychiatric impairments to reach the magic 11% WPI required for access to damages for non-economic loss. A person assessed as suffering from a 10% physical and 10% psychiatric impairment will not be entitled to claim damages but a person with an 11% physical or psychiatric impairment will.

The fourth and probably the most disturbing feature is the removal of the right of claimants and their representatives to scrutinise and challenge impairment determinations.

It was not always this way. In the early 1990s when the AMA Guides were first introduced in the ACA, the determination as to the final level of impairment was, in the absence of an agreement or compromise between the parties, left to the determination of a Court. Difficult issues of causation, the interpretation of investigations, the accuracy of histories taken by doctors, the reliability of the history provided, the comprehensiveness of the assessment and the interpretation of the Guides, could be the subject of scrutiny and submissions through the normal adversarial process.

Disputes about the level of impairment are now determined by a medical panel. The open adversarial process has been replaced by adjudication by doctors, with only limited rights of review.

In New South Wales, the MACA arrives at this position in one fell swoop. Assessment of the level of impairment for the purpose of determining access to common law damages is solely the province of medical assessors appointed by the Motor Accidents Authority. There are very limited and circumscribed rights to review assessors' determinations. It seems that the Motor Accidents Authority envisages that the respective parties will have little input into the process apart from the collection of treating doctors' reports and investigative material.

Under the MACA, a claimant whose impairment exceeds the threshold of 10% will be entitled to substantial damages. Even with the greatest integrity and clinical experience on the part of assessors well versed in the Guides, the level of precision expected of such a system is bound to create a strain, giving rise to unfair results. The difference between 10% and 11% may be in excess of $100,000.

Medical panels and the like are, of course, not a necessary companion to impairment assessment using the Guides. However the fact that the "ultimate issue" in an impairment based scheme is a percentage whole person impairment certainly gives rise to the temptation to completely remove the matter from judicial determination.

The use of impairment thresholds, and the lack of opportunity for meaningful involvement in the assessment process, has forced claimants and their lawyers to focus on the legality of the decision-making process. Several Supreme Court cases in Victoria have demonstrated that decisions of medical panels may be open to scrutiny. This scrutiny is, of course, limited to narrow administrative grounds and the merits of the decision-making cannot be directly addressed.

Conclusion

The medical profession and medico-legal experts, with a few exceptions, seem content to remain silent about these issues. Governments claim that the use of the Guides is an objective means of determining medical disputes. The medical profession, aware of the limitations of the Guides, professes to merely implement what is prescribed by the legislature. The beginnings of an impairment assessment industry are already evident, responding to the newly created need to develop training programs and guidelines to accommodate the use of the Guides.

The adoption of the Guides and associated changes to statutory compensation schemes in Australian jurisdictions has seen some significant encroachments into the method of assessment of compensation, the role of lawyers in dispute resolution, and the "common law" notion that compensation should be proportionate to the effect of the injury on the particular individual. Recent experience would suggest that this trend will continue. There have even been suggestions from the insurance industry that impairment based thresholds should be introduced into currently "unfettered" areas, such as medical negligence claims and claims against public authorities.

Since the AMA Guides appear to be here to stay, it is important that the legal and medical professions become well versed in their use. Criticisms of the Guides and the method of their adoption is likely to be of little interest, and certainly of small comfort, to compensation claimants. However, in the face of their ever-widening usage, it is also important to raise the level of knowledge about what the Guides are and, perhaps more importantly, what they are not. PL

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