# How the *AMA Guides* are used in Australia

By Geoffrey Coates

**The American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the *Guides*) have been incorporated into Australian compensation systems for many years now, and their use is continuing to spread.**

Photo: © Bill Madden

The reason given by governments for introducing the Guides has often been the assertion that they will provide an objective assessment of injury and therefore reduce inconsistency, dispute and litigation. Many lawyers will be familiar with cases where a seemingly endless stream of medical practitioners provides conflicting assessments of work contribution, diagnosis and extent of a claimant's condition.

The *Guides* say that they provide 'a standard framework and method of analysis through which physicians can evaluate, and report on, and communicate information about the impairments of any human organ system'.[1]

The ambition of the *Guides*' authors is therefore to set out a standard *method* by which a consistent *evaluation* can be obtained and *reported* to other practitioners. But little or no research has been conducted as to how effectively the *Guides* have achieved this objective, or their impact on compensation or litigation.

## SURVEY

I conducted a brief survey into the use of the *Guides* in Australia and thank Alliance members for their information and observations. The result is a snapshot of the use of the *Guides* rather than an authoritative critique, and I would welcome any other comments from members on the legislation.

### Victoria

The 2nd edition of the *Guides* (AMA2) made its first appearance in Victoria for limited purposes in relation to the *Accident Compensation Act* in 1989, for work-related injuries.

Currently, the 4th edition of the *Guides* (AMA4) is used to calculate no-fault lump-sum benefits for both transport accident and workers' comp claims. It is also used as a threshold for common-law claims under both schemes (30% whole-person impairment [WPI]). The schemes also allow common law claims to proceed where the injuries satisfy the 'narrative' test of being 'serious injuries'. Almost all such claims under these two schemes proceed by way of the 'narrative' test. The 30% AMA threshold is a very serious hurdle.

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Since 2003, legislation affecting public liability claims requires a potential claimant to establish a greater than 5% physical impairment and a greater than 10% psychiatric impairment before proceedings for general damage can be commenced – so it is a threshold issue. It is perhaps a little early to say what the impact of this legislation will be, but it will certainly bar claims for even quite serious injury if there is good recovery – for example, broken bones and broken skin.

### Queensland

Jodie Willey from Shine Lawyers tells me that, for injuries arising after 1 December 2002, the 5th edition of the *Guides* (AMA5) applies to the assessment of common-law general damages in public liability, medical negligence and motor vehicle claims by reason of the *Civil Liability Act* 2003 and *Civil Liability Regulation* 2003.

Sections 61 and 62 of the Act introduced a scale of damages for assessing general damages. A table providing a range of injury-scale values is included in the regulation. In determining where a particular injury falls within the table, reference is often made to WPI.

Section 11 of the regulation provides that if a medical report states a WPI percentage, it must state how that percentage has been calculated. If the percentage is based on AMA5, the report must identify the provisions and criteria of AMA5 relied upon and the reasons for assessing an injury at a selected point within the range. Further, s12 of the regulation provides that (aside from assessments for scarring and mental disorder), a court *must* give greater weight to an AMA5 assessment. Accordingly, AMA5 is now fundamental to the assessment of general damages, although s10 of the regulation provides that while WPI is an important consideration in the assessment of general damages, it is not the only consideration.

Jodie also says that workers' compensation matters are currently governed by the *Workers' Compensation and Rehabilitation Act* 2003 and the *Workers' Compensation and Rehabilitation Regulation* 2003. Assessments for statutory lump-sum payments are based on the scheme's own table, contained in the regulation. There is provision for the interaction between the tables and the *Guides*, which suggests that where an injury does not fall within the injuries listed in the table, the degree of permanent impairment must be assessed under the *Guides* (defined as AMA4). There is no provision requiring the use of the *Guides* in the assessment of common law damages for workers' compensation matters.

### New South Wales

Anthony Scarcella of Anthony Scarcella Lawyers tells me that AMA4 is used in motor-vehicle claims in conjunction with the *MAA Guidelines* for calculating non-economic loss. The use of the *Guides* commenced on 3 October 1999. Anecdotally, 90% of those who might previously have recovered non-economic loss damages no longer qualify.

For workers' compensation, AMA5 is used to calculate lump sums and to assess the 15% threshold before a common law claim may be brought. The *Guides* were introduced from 1 January 2002.

### Australian Capital Territory

Richard Faulks of Snedden Hall & Gallop says that AMA4 was introduced into the workers' compensation legislation from 2002 to replace the table of maims for no-fault lump-sum benefits, but has had negligible effect.

### Tasmania

Sandra Taglieri of Phillips Taglieri says that a modified version of AMA4 was introduced into the workers' compensation legislation in 2001 to assess impairment benefit for injuries greater than 5% and as a threshold for common-law claims (30%). Unlike Victoria, there is no alternative 'narrative' test. This application of the *Guides* has resulted in an almost complete abolition of common-law claims. To date, there have been only six successful applications since 2001. As a result, the Alliance's Tasmanian branch is campaigning for change.

### Northern Territory

Information provided by Nicole Dunn of Ward Keller is that AMA4 was introduced into the work-health legislation in 1993 for no-fault compensation. In May 2003, the *Guides* were applied to all personal-injury claims (excluding work and motor accidents) for non-pecuniary loss. There is a 5% threshold and the *Guides* are also used to calculate damages. It is too early to say what the overall impact will be.

### South Australia

According to Ruth Carter of Ruth Carter and Associates, the 3rd edition of the *Guides* (AMA3) has applied to the calculation of lump sums for physical injury since 1987. They are also routinely used in medical practitioner reports in other areas, even where not required by legislation.

### Western Australia

The *Guides* had only a relatively limited role in workers' compensation matters until 14 November 2005, when a 15% impairment threshold for common-law claims was introduced. Phillip Gleeson of Slater & Gordon says that although it is too early to tell what impact this will have, the feeling is that it will significantly reduce access to restitutionary compensation.[2]

## JUDICIAL COMMENT ON THE *GUIDES*

Another important influence on the *Guides*' impact is their interpretation by the courts.

My views on the courts' responses to the *Guides* are drawn principally from the Victorian experience. This is partly because Victoria is my home state and I am therefore more familiar with Victorian judgments, but also because Victoria has seen quite a few significant cases featuring the application of the *Guides*. I would welcome information about significant decisions in other jurisdictions.

A recent paper delivered by Dr Peter Lowthian, Deputy Convenor of the Medical Panels (Victoria) at a conference run by Lexis Nexis entitled 'Personal Injury Victoria 2005' contained the following observation: 'It should be remembered that the *Guides* is a medical document and was

not prepared as a legal document.'

Robyn Gorton QC put an almost completely contradictory point of view to an APLA conference some years ago: namely, that the *Guides*, having been adopted in legislation, should be read as if they are themselves legislation.

Somewhat predictably, the courts in Victoria have moved from one end of the spectrum defined by these two views to the other, and ended up somewhere in the middle.

In one of the first cases to deal with the *Guides*, *Masters v McCubbery*,[3] Ormiston J said that the 'proper interpretation of the *Guides* is a question of law and not a question of medical opinion'.

In *Lake v TAC*,[4] Phillips JA said that '[t]heir efforts will not be helped if the *Guides* become overlaid with a lawyer's precise interpretation ... in too short a time the *Guides* would become a legal "minefield", and be of much less help to doctors and lawyers alike, although for different reasons.'

In the more recent case of *Martinez v Dynamic Engineering Construction Co Pty Ltd & Ors*,[5] Harper J remarked on assessment in accordance with the *Guides*: '[t]his is a question of law. But it does not necessarily mean slavish adherence to every jot and tittle which is to be found in the *Guides*, which by their title indicate that they are not to be interpreted as if they were a statute.'

Nathan J remarked, 'Of course, the construction of the *Guides* is a question of law but when the application of the *Guides* to the factual circumstances as presented by the worker and the medical material produces an assessment in line with the *Guides*, that is a finding of fact.'[6]

So it would seem that, in Victoria, the courts regard the statutory requirement to assess in accordance with the *Guides* as a legal obligation to follow the methods set out in the *Guides*. The interpretation of the *Guides* to determine the nature of that method is a question of law; however, it is clear that the courts are not going to bring to the task of interpreting the *Guides* the same close reading to which statutes are subject.

The *Guides* allow assessors a good deal of discretion and exhort them to exercise clinical judgement. Therefore, 'slavish adherence' is unlikely.

In *Linfox Transport (Aust) Pty Ltd & Anor v Toohey*,[7] the Court of Appeal considered whether sexual dysfunction and radiating leg pain secondary to spinal injury were separate and distinct injuries from the primary back injury. The Victorian WorkCover legislation provides coverage for sequelae to accepted primary injuries. The Court was asked whether these sequelae are injuries in their own right and should therefore be assessed separately.

The Court decided that 'injury in s98C is to be understood in its traditional meaning as an identifiable physiological change to the body part. It is not sufficient that there be simply a loss or diminution of its function.' The section referred to is in the *Accident Compensation Act* 1985 (Vic).

For the type of conditions discussed in *Toohey*, the point may be moot. In the diagnosis-related estimates (DRE) assessment of spinal injury, neurological consequences of back injury are to be assessed as differentiators in the DRE categories. There may be cases, however, where this is not so.

## CONCLUSION

While this is a very brief snapshot of the impact of the *Guides* in compensation regimes, it can be seen that they have the potential to change the landscape significantly.

It is useful in this regard to compare the experiences of Tasmania and Victoria in work-related claims. Both states have a threshold requirement of 30% impairment before common-law claims can be undertaken. This has resulted in the almost complete loss of the right to claim damages in Tasmania. The right survives in Victoria only because judges have discretion to allow claims under a narrative 'serious injury' test.

It is therefore not so much that the *Guides* are used in legislation that is a concern, but *how* they are used. Perhaps it is not too farfetched to compare the *Guides* with radioisotopes; useful, benign or harmful, depending on their application. ■

**Notes:** **1** Page 1/1, 4th edition. **2** I also acknowledge the contribution from Tiffany Laslett. **3** [1996] 1 VR 635. **4** [1998] 1 VR 616. **5** [2005] VSC 204. **6** *Akyildiz v Nisselle and Ors* (unreported, Supreme Court of Victoria, 23 January 2004). **7** [2004] VSCA 233 (16 December 2004).

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