

Art or science?

Transport Accident Commission v Lincoln [2003] VSCA 67

LEGISLATIVE BACKGROUND

The Victorian Court of Appeal has overturned an emerging body of case law allowing for the liberal measurement of physical impairment under the *Transport Accident Act* 1986 (Vic) and by analogy the *Accident Compensation Act* (Vic) 1985.

The case has opened the gate for greater confusion and debate on levels of physical impairment. The schemes under both Acts were amended during the 1990s to prevent what was perceived as the double counting of psychiatric injuries. 'In determining a degree of (physical)¹ impairment, regard must not be had to any psychiatric or psychological injury, impairment or symptoms.'²

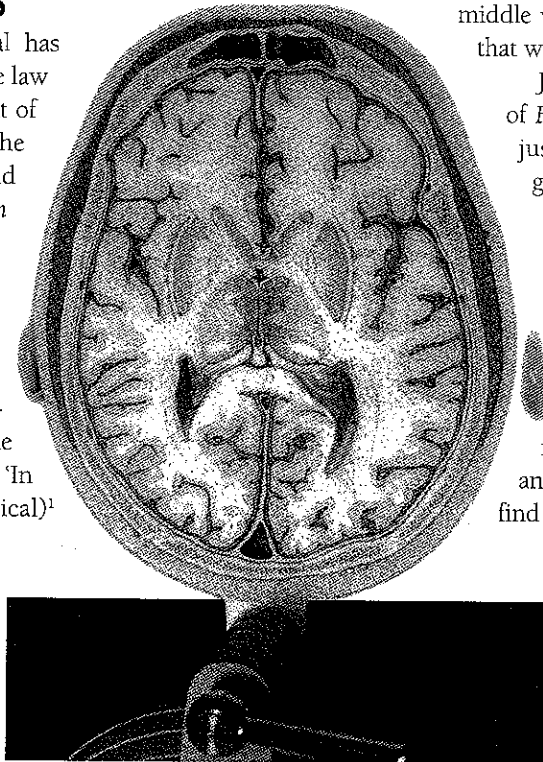
For example, a plaintiff could not have a 20% restriction in the movement of a limb, which included an unstated percentage component for restriction derived from depression.

However, uncertainty remained in the calculation of physical impairment where the impairment measured was considered by a medical expert to be greater than that normally associated with the injury and its circumstances.

It fell to experts to commonly conclude that the impairment was either genuine or exaggerated, but neither the Act nor the practice of experts provided a process for a



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middle way to discount a measured impairment that was partly genuine and partly exaggerated.

Judge Strong recognised this in the cases of *Forno*³ and *Lovison*.⁴ 'There is no need or justification for differentiating between genuine organically driven physical impairment and genuine functionally driven impairment...so long as the impairment is real [that is, not feigned] and is causally connected to the [accident]. Deliberate exaggeration is an altogether different category because "symptoms" which are the result of wilful exaggeration do not in any sense represent impairment... I can find nothing in Chapter 1 which requires adjustment of anatomic and physiological factors to reflect psychological contribution.'⁵

FACTS IN LINCOLN

The Transport Accident Commission's (TAC's) determination of 0% impairment was set aside and

a determination in lieu thereof was made of 49%.

Although the transport accident in 1998 was quite serious and the plaintiff had been reduced from a woman of some vigour to an invalid, medical tests, including CAT and MRT scans, provided little objective evidence of continuing injury.

The TAC relied on an expert medical assessment that characterised the plaintiff's symptoms as chronic pain syndrome. While in *Lovison* Judge Strong had blurred the distinction between restrictions of movement caused by pain and restrictions of movement caused by psychological factors, his decision in *Lincoln* reaffirmed his view that functional overlay, a term already established as referring to psychological factors, was not to be subtracted from goniometer measured impairment. ▶

THE DECISION

The Court of Appeal accepted the TAC's submissions that Chapter 1 of the AMA Guides requires assessments of permanent impairment flowing from restrictions of movement due to anatomical or physiological factors and not functional factors as functional overlay is defined as 'an emotional aspect of an organic disease'.⁶

Further, the court held that the AMA Guides require differentiation between organically driven physical impairment and functionally driven physical impairment.

This case has opened the gate for greater confusion.

WIDE-RANGING CONSEQUENCES

As Judge Strong noted in *Forno*, there appeared to be only two medical experts who routinely and specifically subtracted from the measured physical impairment. That is, they allocated 15% and concluded the actual impairment was 5% due to functional overlay.

It must now be anticipated that medical experts will routinely be asked to specifically quantify any functional component in their assessment. They may be asked to translate psychiatric conclusions into physical consequences.

It must also be expected that examination of experts will now focus extensively on the following concepts:

- What is the common extent of physical impairment from the injury in the circumstances and, therefore, the likely impairment from the objectively proved injury?
- What is the normal rate of healing or resolution of the injury and symptoms?
- What is the non-organically based impairment measure?
- In the absence of objective evidence do you have any basis to conclude that the impairment measure is not attributable to functional overlay?

In view of the likelihood that experts regularly used by these statutory authorities will now be asked to quantify functional impairment, it will be incumbent on practitioners acting for plaintiffs to ask their own doctors to consider how they would respond to the questions listed above.



Uncertainty lies in the unresolved question of whether pain is physiological or psychiatric.

LET THE UNCERTAINTY BEGIN

There is no common or average impairment for a given physical injury because no person is the same and healing rates are governed by a myriad of factors, including age, level of fitness and so on.

There are many physical injuries, particularly soft tissue wounds, which are not always evident on x-rays, CAT scans or MRIs.

It has been said on several occasions that the AMA Guides and their methodology are an art rather than a science, and that technical or legal interpretations must be avoided lest the standardised method of assessing physical impairment intended by parliament is lost.⁷

It remains to be seen whether a new methodology will emerge from this decision, whereby physical experts are asked to differentiate between likely levels of functional overlay according to the psychiatric background of plaintiffs. It may be suggested that functional overlay is less pronounced where the background is depression, and more so where the background is chronic pain syndrome.

Any such method will involve experts in physiological matters applying psychiatry to their assessments, thereby moving outside their fields of expertise.

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In any event, experts will be hard pressed to provide the same level of certainty upon which tribunals have relied when reviewing the impairment calculations of statutory authorities.

WHAT ABOUT PAIN?

Further uncertainty lies in the unresolved question of whether pain is physiological or psychiatric. What happens if an expert opines that measured impairment of a body part should be 10% as opposed to the actual measurement of 20% restriction because the expert believes that under anaesthetic the plaintiff would have freer movement?⁸

Is pain anatomical or psychiatric? Judge Strong posed a question in *Lovison* as to what measurement would be made by reference to the reaction of the stoic?⁹

Because his Honour was clear that the plaintiff in *Lincoln* had psychiatrically-based components in her restriction of movement, the Court of Appeal did not need to consider the distinct pain question.

The test of whether pain is real or feigned appears simple, but in fact it is not. The physiology of pain is enormously complex as stoicism is influenced by a myriad of factors.¹⁰

Previously, tribunals might have chosen a rough median point between experts. The potential for widely variant opinions is enormous, as Dr Starke, a neurologist who frequently appears at VCAT remarked in *Lincoln*: 'The range of movement may be greater than pain allows.'

ARESTI ROLLED BACK

In *Aresti v Transport Accident Commission*,¹¹ Kellam J decided that migraines were a brain dysfunction, even though they might be triggered by a neck injury.

The Court of Appeal in *Lincoln* has effectively overturned *Aresti*, stating that headaches can only be relevant for Chapter 2 assessment if they result from brain disorder.

BENEFICIAL LEGISLATION?

It is trite law that legislation intended to be beneficial should be interpreted in the interests of the intended beneficiaries. The *Transport Accident Act 1986*¹² and the *Accident Compensation Act 1985* are beneficial legislation, but the Court of Appeal has cast doubt over this characterisation.

In relation to beneficial compensation statutes, Winneke P said: 'In this state those words are achieving a "hollow ring" because one of the primary objects of the present legislation is "to reduce the cost to the Victorian community of compensation for transport accidents".'¹³

Unfortunately for claimants under the *Transport Accident Act 1986*, and by analogy the *Accident Compensation Act 1985*, the conclusion that those Acts are beneficial in only

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a superficial way invites the authorities managing the associated schemes to be more aggressive in every aspect of their defence of the consolidated revenue.

Similar or identical provisions exist in the transport and workplace accident compensation schemes in many other states.¹⁴ It remains to be seen whether defendants in those jurisdictions will take a more aggressive approach to measurement of impairment.

It is certainly open to experts retained by defendants to be asked the same questions as those outlined above. The Victorian experience may result in some

early and clear resistance by tribunals to attempts to render complex what was relatively simple. ■

Endnotes: 1 Impairment is measured by degrees with a goniometer. 2 s 46B(1) Transport Accident Act, s 91(2) Accident Compensation Act. 3 *Forno v Cantire Investments Pty Ltd* VCAT 21 December 1999. 4 *Lovison v Transport Accident Commission* VCAT 22 June 2001. 5 para 66. 6 *Mosby's Medical Nursing and Allied Health Dictionary* (5th Ed), 665. 7 *Lake v Transport Accident Commission* [1998] 1 VR 616 at 626. 8 One expert so opined in *Lincoln*. 9 *Lovison* at para 70. 10 See P Wall (1999) *Pain: The Science of Suffering*, Weidenfeld and Nicolson. 11 VCAT 29 October 1999. 12 *Transport Accident Commission v Bausch* [1998] VICSC 20. 13 para 20. 14 eg s 72(2)(a) *Workers Rehabilitation and Compensation Act 1988* (Tas); s 133(3) *Motor Accidents Compensation Act 1999* (NSW).

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Mark is a professional engineer, a qualified ergonomist and has been an APLA member for several years. His consulting group has advised about 2000 enterprises since 1977 in safety, engineering and ergonomics. He also assists many Australian law firms in their personal injuries matters, and has prepared over 5000 reports on public and workplace accidents. Mark appears regularly in court in several States, giving independent expert opinion, most commonly on **back and upper limb, strains; machinery incidents; slips and falls; RSI; and vehicle accidents.** Fee options for plaintiffs include deferred payment, with special arrangements for regular clients. Details, a brief CV and a searchable list of cases can be found at www.ergonomics.com.au

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