**Disentangling physical and mental consequences of an injury**

**(July2019)Judicial College of Victoria** <https://www.judicialcollege.vic.edu.au/eManuals/SIM/54359.htm>

1. The issue of "disentangling" arises where there is medical evidence that the consequences to the worker of a physical injury, or a mental or behavioural disturbance or disorder, is partly physical and partly psychological.
2. *WIRCA* s 325(2)(h) and (i), and *ACA* s 134AB(38)(h) and (i), state:

(h) the psychological or psychiatric consequences of a physical injury are to be taken into account only for the purposes of paragraph (c) of the definition of serious injury and not otherwise;

(i) the physical consequences of a mental or behavioural disturbance or disorder are to be taken into account only for the purposes of paragraph (c) of the definition of serious injury and not otherwise

1. When these provisions were first introduced into worker’s compensation law, the Minister explained:

The code introduces a number of other modifications to the common law and seeks to remove issues in respect of which there has been ambiguity of interpretation or doubt. The psychological or psychiatric consequences of a physical injury and a physical injury are not to be combined. The former fall under paragraph (c) and the latter under paragraph (a) of the definition. In Humphries v. Poljak, the court said it would be anomalous to regard the consequences of mental disturbance or disorder to fall under paragraph (a) when the disturbance or disorder itself fell to be judged by whether they satisfied the criteria of paragraph (c). The government considers this distinction to be proper and should be maintained (Parliamentary Debates, Legislative Assembly, *Accident Compensation (Common Law and Benefits) Bill 2000*, Mr Bob Cameron, 1004).

1. This rule ensures that the different language used in limbs (a) and (c) of the definition of serious injury is properly applied. The court must give effect to the legislative choice that, to justify a grant of leave, a permanent impairment or loss of body function must be "serious" whereas a permanent mental or behavioural disturbance or disorder must be "severe" (see *Richards v Wylie* (2000) 1 VR 79; [[2000] VSCA 50](http://www.austlii.edu.au/au/cases/vic/VSCA/2000/50.html); *Humphries v Poljak* [1992] 2 VR 129; [[1992] VicRp 58](http://www.austlii.edu.au/au/cases/vic/VicRp/1992/58.html)).
2. When assessing whether the physical component of the injury is a serious injury, the court must exclude from consideration pain and suffering consequences that do not have an organic basis. The onus is on the plaintiff to establish an organic (rather than psychological) basis for an impairment on the balance of probabilities (*Mutual Cleaning and Maintenance Pty Ltd v Stamboulakis* (2007) 15 VR 649, [9]; [[2007] VSCA 46](http://www.austlii.edu.au/au/cases/vic/VSCA/2007/46.html)).
3. This rule operates despite the difficulties posed by the exercise and the fact that the experience of pain and suffering is necessarily subjective. The Act requires the court to separate out and, for the purpose of assessing a physical impairment, disregard any component of the pain which is caused by a psychological condition (*Mutual Cleaning and Maintenance Pty Ltd v Stamboulakis* (2007) 15 VR 649, [45], [47]; [[2007] VSCA 46](http://www.austlii.edu.au/au/cases/vic/VSCA/2007/46.html)).
4. The rule has been criticised by numerous judges as artificial and impossible. In *Fokas v Staff Australia Pty Ltd*, Nettle JA stated:

From time to time, this court has struggled to formulate a principled approach to the process of allocation. Unsurprisingly, our success has been limited. Given that all pain is ultimately cerebral, and in that sense psychological, who is to say which part of it is physical for the purpose of the legislation and which part is not? Any test which we may formulate is bound to be no less artificial than the distinction on which it is premised (*Fokas v Staff Australia Pty Ltd* [[2013] VSCA 230](http://www.austlii.edu.au/au/cases/vic/VSCA/2013/230.html), [4]).

1. Terms commonly associated with psychological conditions which exacerbate (or produce) a physical impairment are:
   * chronic pain syndrome;
   * chronic pain disorder;
   * chronic pain adjustment disorder;
   * chronic illness behaviour;
   * learned pain behaviour
   * psychological embellishment;
   * somatic symptom disorder;
   * functional overlay (*Mutual Cleaning and Maintenance Pty Ltd v Stamboulakis* (2007) 15 VR 649, [4]; [[2007] VSCA 46](http://www.austlii.edu.au/au/cases/vic/VSCA/2007/46.html). See also *Barwon Spinners v Podolak* (2005) 14 VR 622; [[2005] VSCA 33](http://www.austlii.edu.au/au/cases/vic/VSCA/2005/33.html); *Noori v Topaz Fine Foods Pty Ltd* [[2018] VSCA 323](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2018/323.html), [19]).
2. "Functional overlay", one of the more commonly used terms to describe this condition, has been defined as:

"an emotional aspect of an organic disease". It may appear as "an over-reaction to an illness, and is characterised by symptoms that continue long after clinical signs of the disease have ended" (*TAC v Lincoln* (2003) 6 VR 199, [18]; [[2003] VSCA 67](http://www.austlii.edu.au/au/cases/vic/VSCA/2003/67.html)).

1. Judges must be careful about how they treat discussions of “functional overlay” or other terminology from other cases. Subject to the law concerning judicial notice, a judge must, in each case, decide the case on the basis of evidence tendered in that case. Discussions of medical conditions or medical knowledge in one case cannot be used as an authority about those conditions or that knowledge in another case where evidence explaining medical terminology is not admitted (*Jovceva v TAC* [[2019] VSCA 105](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2019/105.html), [107]-[109]. See also *Evidence Act 2008* s 144).
2. At the time of introducing *ACA* s 134AB (on which *WIRCA* ss 325-347 is modelled) the responsible Minister argued that "functional overlay should never be sufficient to satisfy the serious injury test" (Victoria, Parliamentary Debates, Legislative Assembly, 13 April 2000, 1004, (Mr Cameron)).
3. This does not accurately state the effect of the legislation. In *Noori v Topaz Fine Foods Pty Ltd*, the Court of Appeal upheld an appeal and granted leave on the basis of a permanent severe mental disturbance or disorder, in a case where the plaintiff’s pain condition had no organic basis (*Noori v Topaz Fine Foods Pty Ltd* [[2018] VSCA 323](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2018/323.html)).
4. In *Zhang v Joy Foods Australia Pty Ltd* [[2016] VSCA 199](https://jade.io/article/487719), the trial judge rejected the argument that if the applicant’s presentation was genuine and was not organically based, then it must be a severe psychological injury. The judge noted that evidence of a psychological injury was essential and that rejecting a primary case of organic injury did not provide the necessary evidence. This approach was upheld on appeal ([5], [46]).
5. Medical witnesses who believe that pain and suffering consequences have both an organic and a psychological component should be asked to quantify, as best they are able, the respective contributions. Without that evidence, it will be difficult for the judge to determine how the evidence would differ if the injuries were properly disentangled (*Mutual Cleaning and Maintenance Pty Ltd v Stamboulakis* (2007) 15 VR 649, [9]; [[2007] VSCA 46](http://www.austlii.edu.au/au/cases/vic/VSCA/2007/46.html); *Zivolic v Hella Australia Pty Ltd* [[2007] VSCA 142](http://www.austlii.edu.au/au/cases/vic/VSCA/2007/142.html), [5], [14]).
6. However, it is rare that medical evidence can separate out the physical and psychological components of the injury. This reflects the clinically difficulty of such an exercise (*Mutual Cleaning and Maintenance Pty Ltd v Stamboulakis* (2007) 15 VR 649, [3]; [[2007] VSCA 46](http://www.austlii.edu.au/au/cases/vic/VSCA/2007/46.html)).
7. Judges should usually adopt a two-step process to disentangle the physical and psychological injuries:
   * first, the judge determines whether there is a substantial organic basis for the injury. If there is, then subject to the degree of impairment, the judge may find that there is a serious injury without needing to undertake the disentangling exercise (see, for example, *VWA v Nguyen* [[2016] VSCA 284](https://jade.io/j/#!/article/506396), [36], where the VSCA upheld the trial judge’s giving of a positive answer to this first step and so did not need to proceed to the second step of ‘disentangling’);
   * if the judge is not satisfied that there is a substantial organic basis, or cannot be satisfied, then the judge must proceed to disentangle the physical and psychological components of the pain and suffering consequences to determine whether the pain and suffering consequences of the physical injury meet the serious injury test (*Meadows v Lichmore Pty Ltd* [[2013] VSCA 201](http://www.austlii.edu.au/au/cases/vic/VSCA/2013/201.html), [21]-[22]; *Fokas v Staff Australia Pty Ltd* [[2013] VSCA 230](http://www.austlii.edu.au/au/cases/vic/VSCA/2013/230.html), [5]; *Jayatilake v Toyota Motor Corporation Australia Ltd* (2008) 20 VR 605; [[2008] VSCA 167](http://www.austlii.edu.au/au/cases/vic/VSCA/2008/167.html)).
8. Disentangling is not necessary in all cases where an injury contains both physical and psychiatric components. In some cases, the medical evidence may be enough to prove that the physical component of the injury is a serious injury, without the judge undertaking the task of "stripping away" the psychological or psychiatric components from the overall impairment (*Zivolic v Hella Australia Pty Ltd* [[2007] VSCA 142](http://www.austlii.edu.au/au/cases/vic/VSCA/2007/142.html), [19]-[20] per Redlich JA; *Smorgon Steel Tube Mills Pty Ltd v Majkic* (2008) 21 VR 193, [25]-[26]; [[2008] VSCA 230](http://www.austlii.edu.au/au/cases/vic/VSCA/2008/230.html)).
9. For example, in *Smorgon Steel Tube Mills Pty Ltd v Majkic*, the plaintiff established that he suffered from a "complex regional pain syndrome" as a result of a crushing injury to his foot. The issue in the case was whether the plaintiff had suffered from that condition, and it was accepted that this was an "organic or physical problem". Once that condition was established, and that this was the primary cause of the plaintiff’s loss of earning capacity, then the court could find that the plaintiff had a serious injury, without needing to make disentanglement findings (see *Smorgon Steel Tube Mills Pty Ltd v Majkic* (2008) 21 VR 193, [25]-[26]; [[2008] VSCA 230](http://www.austlii.edu.au/au/cases/vic/VSCA/2008/230.html)).
10. In contrast, there are other cases where the physical and psychological symptoms are so intertwined that it is impossible to conduct the necessary disentangling. In such cases, it will be very difficult for the plaintiff to establish that his or her condition meets the serious injury test (*TAC v Zepic* [[2013] VSCA 232](http://www.austlii.edu.au/au/cases/vic/VSCA/2013/232.html), [111]; *Barwon Spinners v Podolak* (2005) 14 VR 622, [116]; [[2005] VSCA 33](http://www.austlii.edu.au/au/cases/vic/VSCA/2005/33.html)).
11. Psychological impairment can arise both as a direct function of a compensable event, or can arise as a consequence of a physical injury sustained in a compensable event. Both sources of impairment can support an application for compensation.
12. This means that where a plaintiff develops a permanent severe chronic pain condition following a physical injury sustained in compensable circumstances, the court must consider whether the physical injury caused the pain condition or whether the pain condition arose independently (see *Veljanovska v Socobell OEM Pty Ltd* [[2005] VSCA 227](http://www.austlii.edu.au/au/cases/vic/VSCA/2005/227.html)).
13. Where the medical evidence is that there is no physical basis for the plaintiff’s pain symptoms, no disentangling is required. Instead, the court must assess the plaintiff’s symptoms by reference to the test of permanent and severe which applies under paragraph (c) of the definition of serious injury (*Noori v Topaz Fine Foods Pty Ltd* [[2018] VSCA 323](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2018/323.html), [5]-[7]).

Disentangling and the *Transport Accident Act*

1. While there is no equivalent to *WIRCA* s 325(2)(h) and (i) (or *ACA* s 134AB(38)(h) and (i)) in the *TAA*, s 93(17) nevertheless distinguishes between injuries with physical consequences and injuries with mental consequences. In a case concerning paragraph (a) of the definition, *TAC v Kamel*, Kyrou AJA (Warren CJ and Ashley JA concurring) explained that:

The definition of "serious injury" in s 93(17) of the Act intends to maintain a division between injuries with physical consequences, which fall within para (a) of the definition, and injuries with mental consequences, which fall within para (c) of the definition. The inquiry that must be made under para (a) focuses attention on whether the injury has produced an organic impairment or loss of a body function and whether, having regard to its consequences, that impairment or loss is serious and long-term. Where an impairment or loss of a body function is produced as a consequence of a mental disturbance or disorder, that impairment must be considered under para (c) rather than under para (a). Where the impairment of a body function is the product of both organic and mental conditions, it will not fall within para (a) unless it is predominantly the product of the organic condition.

The "textual distinction" between the physical and mental consequences of an injury that is maintained by the definition of "serious injury" in s 93(17) of the Act does not preclude a mental or behavioural disturbance or disorder from being taken into account in determining the seriousness of an impairment or loss of a body function that is held to fall within para (a) of the definition (*TAC v Kamel* [[2011] VSCA 110](http://www.austlii.edu.au/au/cases/vic/VSCA/2011/110.html), [65]-[66]).

1. Just as seriousness under paragraph (a) can be measured in part by a mental response to the physical impairment, a psychological consequence of permanent disfigurement may also be taken into account when assessing seriousness in a paragraph (b) case (*TAC v Garcia* [[2015] VSC 225](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2015/225.html), [27]).
2. The process of taking a mental disturbance or disorder into account when assessing the seriousness of a physical injury does not stray into using the mental injury as a component of the physical injury. Instead, it is a guide to the overall seriousness of the physical injury, as secondary mental injuries can show how the physical injury has affected the plaintiff (see *De Agostino v Leatch* [[2011] VSCA 249](http://www.austlii.edu.au/au/cases/vic/VSCA/2011/249.html), [54]; *Richards v Wylie* (2000) 1 VR 79 at [17], [28]; [[2000] VSCA 50](http://www.austlii.edu.au/au/cases/vic/VSCA/2000/50.html); *Rodda v TAC* [[2008] VSCA 276](http://www.austlii.edu.au/au/cases/vic/VSCA/2008/276.html), [103]; *TAC v Kamel* [[2011] VSCA 110](http://www.austlii.edu.au/au/cases/vic/VSCA/2011/110.html), [61]-[66], [81]).
3. Furthermore, where an impairment is the result of both physical and mental conditions, the injury will be considered a physical injury under the *TAA* if it is predominantly the product of an organic condition (*TAC v Kamel* [[2011] VSCA 110](http://www.austlii.edu.au/au/cases/vic/VSCA/2011/110.html), [65]; *Richards v Wylie* (2000) 1 VR 79; [[2000] VSCA 50](http://www.austlii.edu.au/au/cases/vic/VSCA/2000/50.html)).

Last updated: 30 July 2019