Annotations for Determining Non-Secondary Psychiatric Impairment

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December 2005

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These annotations are intended to assist psychiatrists and others required to determine whether or not a psychiatric injury is secondary to or has occurred as a consequence of a physical injury. This requirement has arisen as a result of changes to the WorkCover and Transport Accident schemes in 1996 and the Public Liability jurisdiction in 2003. The annotations have been developed by experienced psychiatrists in consultation with the Victorian WorkCover Authority and the Transport Accident Commission.

The annotations are intended to be advisory in nature, and has not been given any particular status under either the Accident Compensation Act 1985 ("the ACA"), or the Transport Accident Act 1986 ("the TAA"). It does not have the status of an Advisory Practice Note pursuant to Section 20D of the ACA, is not an 'operational guideline' for the purpose of section 91 of the ACA or section 46A of the TAA, and has not been adopted by Regulation for the purpose of section 46AA of the TAA.

The need for these annotations has been present for some time. There has been confusion amongst examiners, plaintiffs, insurers and the courts regarding interpretation of the legislation. The recommendations in these annotations have derived from clinical experience in the application of the relevant legislation and judicial interpretations.

These annotations are intended to provide a framework in which to decide which category of psychiatric injuries are secondary and non-secondary, and so reduce disputation and improve agreement between medical examiners.

The Legislation

Section 46B(1) Transport Accident Act 1996:

In determining a degree of impairment of a person, regard must not be had to any psychiatric or psychological injury, impairment or symptoms arising as a consequence of, or secondary to, a physical injury.

Section 91(2) Accident Compensation Act 1985:

In assessing a degree of impairment under sub-section (1), regard must not be had to any psychiatric or psychological injury, impairment or symptoms arising as a consequence of, or secondary to, a physical injury.

Section 28LJ Wrongs Act 1958:

In assessing a degree of impairment of a person under this Part, regard must not be had to any psychiatric or psychological injury, impairment or symptoms arising as a consequence of, or secondary to, a physical injury.

The legislative history

In 1996, legislative changes were made to both the *Transport Accident Act* 1986 ("*TAA*") and the *Accident Compensation Act* 1985 ("*ACA*"). There was a concern that people were being assessed twice for the same injury and that implicit in any assessment of an injury, say a back injury, is a component for emotional distress. The purpose of these changes was to ensure claimants were paid their correct entitlements. The legislation established a distinction between psychiatric impairment from secondary psychiatric injury and psychiatric impairment from non-secondary psychiatric injury.

These original changes related to impairment assessments made using the Second Edition of American Medical Association's *Guides to the Evaluation of Permanent Impairment* ("*AMA2"*).

Further changes to the ACA and the TAA were made in 1997 and 1998 respectively, wherein Impairment based benefits replaced the Table of Maims and access to common law damages was removed in ACA (to be restored in 1999). The changes introduced the Fourth Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* ("*AMA4*") but, for psychiatric injuries, introduced instead the *Clinical Guidelines to the Rating of Psychiatric Impairment* ("*Clinical Guidelines*"). These describe the method by which psychiatric impairments are to be rated.

Under the ACA, the use of AMA2 was used for psychiatric impairment assessments relating to workers whose date of psychiatric injury was between 31 August 1985 and 11 November 1997. For psychiatric injuries sustained from 12 November 1997 the *Clinical Guidelines*, or its subsequent successor the *Guide to the Evaluation of Psychiatric Impairment for Clinicians* ("*GEPIC*"), apply.

The *Clinical Guidelines* and the *GEPIC* are also used for psychiatric impairment assessment of transport accident related psychiatric injuries arising after 19 May 1998.

What does the legislation mean?

The provisions in Section 91(2) of the ACA and Section 46B(1) of the TAA are often misinterpreted as implying that only an impairment from a psychiatric injury occurring at the time of injury counts, commonly called "primary psychiatric impairment". In fact all psychiatric impairment from a psychiatric injury counts apart from that which arises "as a consequence of, or secondary to" a physical injury. The term "non-secondary" although clumsy is used to highlight that distinction. The term "primary psychiatric impairment" does not appear in the legislation.

In contexts other than impairment, a secondary psychiatric injury is still relevant, for example when determining the assessment of damages at common law or when questions arise as to capacity for work.

The *Clinical Guidelines* and the *GEPIC* provide a definition of impairment "in the context of health experience, and impairment is any loss or abnormality of psychological, physiological, or anatomical structure of function."

The *documents* say further that "Permanent Impairment is impairment that has become static or well stabilised with or without medical treatment and is not likely to remit despite future medical treatment".

For the purpose of assessing impairment under both the ACA and the TAA, a number of criteria must be met:

1. There has to be a diagnosable psychiatric disorder.

2. The disorder must lead to impairment which continues to be present at the time of the assessment and the assessing psychiatrist considers it a permanent disorder.

3. There has to be a clearly established link between the circumstances of injury and the psychiatric disorder.

4. The psychiatric disorder cannot be explained as secondary or a consequence of physical injury.

The role of the expert witness

The role of the expert witness is described in Practice Note Number: 2 of 1999 issued by Judge Kellam of the Victorian Civil and Administrative Tribunal ("*VCAT*") to which readers are referred.

This Practice Note states:

- An expert witness has a paramount duty to the Tribunal and not to the party retaining the expert.

- Expert witness has an over-riding duty to assist the Tribunal on matters relevant to the expert's expertise.

- An expert witness is not an advocate for a party to a proceeding.

In determining whether a psychiatric impairment is secondary or non-secondary, psychiatrists ought apply these principles. Although impairment assessments under the ACA are not subject to VCAT, the principles are equally applicable.

These annotations have ten categories which encompass most clinical situations in which the question of psychiatric impairment is an issue, arising from transport or work accidents or incidents. Each category describes clinical situations which may (with the exception of category 9) lead to psychiatric impairment being 'non-secondary'. Where appropriate, examples are given. The aim of the authors of these annotations is to establish a means of determining what is a secondary and/or a non-secondary psychiatric injury and to assess a psychiatric impairment which is consistent with the legislation and which is reproduceable in the event that different persons are undertaking the assessment of psychiatric impairment.

Methods for scoring non-secondary impairment

There are three means by which this process has been done.

1. Determining total psychiatric impairment and subtracting secondary psychiatric impairment from that, the residue is then regarded as the non-secondary psychiatric impairment.

2. Determining total psychiatric impairment and also separately determining the non-secondary psychiatric impairment.

3. Determining psychiatric impairment by scoring only those symptoms which derive from a non-secondary psychiatric injury or disorder.

There have been different views as to whether non-secondary and secondary psychiatric impairments are additive or should be combined in determining a total psychiatric impairment.

These annotations recommends that option two be used. The Legislation states that in determining compensable impairment regard must not be had:

> *To any psychiatric or psychological injury or symptoms arising as a consequence of, or secondary to, a physical injury.*

The authors consider that the best way this can be implemented is to determine the total psychiatric impairment and to also determine the non-secondary psychiatric impairment. It will be sufficient to provide a total psychiatric impairment and to state which part of that is to be regarded as non-secondary and to indicate which symptoms have been used in coming to that view.

These annotations also recommend that secondary and non-secondary psychiatric impairments be added together to form the total psychiatric impairment. There are arguments for a combined approach but there are precedents for regarding these subsidiary psychiatric impairments as additive. An additive approach is also more tangible. This means that if a person has a total psychiatric impairment of 20% and the non-secondary psychiatric impairment is 10%, the secondary psychiatric impairment must also be 10%.

Where both secondary and non-secondary impairment are found, it is essential that the assessing psychiatrist provides a report which includes sufficient analysis and explanation, so that the patient and any others affected by the decision can understand how the apportionment has been arrived at.

Category 1: Psychiatric Impairment from a psychiatric injury which is secondary to a physical injury does not count.

A person who has experienced physical disability of whatever form and who subsequently develops what was formerly known as a *reactive depression* has a

psychiatric injury or disorder which will lead to a secondary psychiatric impairment. Any psychiatric impairment arising from this does not count.
Some workers develop what has become known as "process injuries", these are injuries, usually musculoskeletal which have gradually developed over time with no clear cut precipitant. These injuries are often associated with disability and a level of psychological distress. The Minister in a Second Reading speech [1] referred to these type of injuries specifically.

> *Example 1: A worker suffers a back injury following the lifting of an object at work and the worker's condition means that some activities of daily living are affected so that he or she can no longer perform ordinary household duties, such as mowing the lawn. The worker becomes depressed as a result of his or her inability to perform such usual tasks. In such an instance any impairment due to depression would not be included in the overall impairment assessment.*

There are some problem areas. Scarring is always a consequence of physical injury and distress arising from scarring per se is a secondary psychiatric injury for the reasons given above. If the injury was associated with a psychiatric response to the circumstances of injury, then the scarring may exacerbate this psychiatric response and, to that extent contribute to the level of psychiatric impairment in a non-secondary way.

Category 2: Psychiatric impairment from a psychiatric injury or disorder which has arisen from a previous non-secondary psychiatric disorder or injury does count.

A psychiatric injury or disorder that develops secondary to a non-secondary psychiatric injury or disorder should be included in determining non-secondary psychiatric impairment. A person with a *post traumatic stress disorder* may subsequently develop *panic disorder with agoraphobia.* The assessor may need to decide if the *panic disorder* is secondary to the *post traumatic stress disorder* or to physical injury (it may also be a delayed non secondary impairment).

A psychiatric injury or disorder may lead to physical symptoms which in turn either exacerbate the symptoms of the psychiatric injury or disorder or contribute to the development of another psychiatric injury or disorder.

For example, a person with a *post traumatic stress disorder* may develop tension headaches and muscle spasms induced by anxiety. The severe headaches and muscle spasms in turn may contribute to a *depressive disorder.* The *depressive disorder* is secondary to physical symptoms but the physical symptoms arise from a psychiatric disorder which has led to a non-secondary psychiatric impairment.

The rule of thumb must be; what is the initial injury according to the Act? If it is a psychiatric injury then a further psychiatric reaction and consequent impairment to a physical sequelae of that initial psychiatric injury does count.

Category 3: Psychiatric impairment from a "pain disorder" may count as arising from a non-secondary psychiatric injury.

It is not uncommon for plaintiffs to complain of pain in the absence of physical injury or when the physical injury is not sufficient to explain the pain. Each craft group has a different term for this situation including fibromyalgia, functional pain, myalgic encephalopathy. If the *pain disorder* (which meets DSM IV criteria) can be shown to have developed at the time of the incident it may be regarded as non-secondary if there was no physical injury. If, however, there was a physical injury at the time of the incident, no matter how minor, any psychiatric impairment arising from the pain disorder is secondary.

Category 4: A psychiatric impairment from a delayed psychiatric disorder or injury arising from an accident may count as a non-secondary psychiatric impairment.

The commonest situation in which this category applies is the one where a person experiences a traumatic accident, which may or may not involve physical injury and psychiatric symptoms develop days, weeks or even months after the traumatic event.

> *Example 2: A woman was involved in a serious transport accident with her husband who suffered major injuries. Her energies were devoted to him until his condition had stabilised after six weeks. She had no time until then for her own concerns. She was exhausted and at that time began developing symptoms of a post traumatic stress disorder arising from the accident.*

In this category there may be people who have experienced a transport or work accident associated with loss of consciousness and/or post traumatic amnesia and have no memory of the accident or surrounding circumstances.

The subsequent development of a psychiatric injury or disorder may lead to a non-secondary or secondary psychiatric impairment (or both). The important issue is whether or not the psychiatric injury or disorder can be linked to the traumatic accident itself or whether it is more properly linked to physical injury. Such links may include symptoms such as phobic anxiety about car travels or distress with reminders of car accidents.

There had been debate about whether the diagnosis of *post traumatic stress disorder* can be made in the absence of any memory of the trauma. The DSM IV criteria for this diagnosis appeared to be met in the absence of memory of the trauma. The critical issue is not whether or not there is a memory of the traumatic event, rather whether there is awareness of the trauma. This awareness may be gained at a later date. It is important for the non-psychiatrist to bear in mind the trauma can cause a number of mental disorders, not only post traumatic stress disorder.

The failure to meet the criteria for *post traumatic stress disorder* does not mean there is no non-secondary psychiatric impairment.

Category 5: Psychiatric impairment from a psychiatric injury or disorder arising directly from trauma, whether or not there is a physical injury, may count as a non-secondary psychiatric impairment.

An incident which involves obvious trauma whether or not any physical injury has occurred, for example a transport accident, a work accident involving threat to life and

limb or a hold-up, may lead to a psychiatric injury or disorder. Any psychiatric impairment related to this psychiatric injury or disorder may be non-secondary.

Category 6: Psychiatric impairment from a psychiatric injury or disorder, which has arisen within twelve hours of an accident or acute injury, counts as a non-secondary psychiatric impairment.

This category is intended to overcome disputes and apparent inequities which have arisen when accidents have been dissected out on a second-by-second basis to determine which came first, the physical injury or the psychiatric injury.

It is proposed that a psychiatric injury which occurs within twelve hours of an accident or acute injury be regarded as non -secondary. The twelve hours is to allow for the usual timeframe within which occurs rescue, retrieval and emergency treatment in the immediate aftermath of the accident or acute injury. The accident or injury being of a type which may lead to a psychiatric disorder independently of the existence or extent of physical injury. It should be recognized there will be exceptional circumstances where this process is delayed beyond twelve hours.

A psychiatric injury or disorder arising after this timeframe may also lead to a secondary or non-secondary psychiatric impairment, but there needs to be an established link between the accident experience and the psychiatric symptoms. This is an inclusive rather than an exclusive category.

Category 7: Psychiatric impairment from a psychiatric injury or disorder arising directly from an acquired brain injury may count as a non-secondary psychiatric impairment.

A person suffering a brain injury often experiences a psychiatric injury or disorder, which can arise in one or more of three ways:

1. The psychiatric injury or disorder may come from the brain injury directly, eg an organically caused mood disorder or an organically caused personality disorder (ICD 10);
2. It may arise as a consequence of the brain injury (an adjustment disorder with depressed mood); or
3. It may arise directly from the circumstances of the incident which led to the brain injury (a post-traumatic stress disorder).

In the second example, the psychiatric injury or disorder is secondary and any psychiatric impairment does not count. In the third example, the psychiatric injury is non-secondary and any psychiatric impairment does count.

The first example has always been accepted as a non-secondary psychiatric injury when assessed by a neurologist using Chapter 4 of AMA4. More recently it has been accepted that this type of psychiatric injury can also be assessed using the *Clinical Guideline and its successor*. It has been accepted that this type of psychiatric injury is not secondary or consequential to physical injury, rather it is a manifestation of physical injury. If applicable, psychiatrists may include in their report an opinion concerning the proportion of emotional or behavioural impairment and mental status impairment relating to the organic brain injury as part of the impairment assessment conducted in accordance with the *Clinical Guidelines*.

The task for the psychiatrist is to determine the total psychiatric impairment and to allot a psychiatric impairment for each of the three types of psychiatric injuries described above.

Chapter 4 of AMA4 allows for combining of different neurological variables including behavioural change. Table 3 in Chapter 4 is used by the assessor (normally a neurologist) to assess impairment from behavioural disturbance. Table 3 was derived from Chapter 14.

Section 46A (6)(TAA)states that

> *For the purposes of determining the degree of psychiatric impairment, the AMA guides apply as if for Chapter 14 there were substituted the Clinical Guidelines to the Rating of Psychiatric Impairment prepared by the Medical Panel (Psychiatry) Melbourne, Victoria October 1997 and published in the Government Gazette.*

Section 91(6)(ACA) also states that

> *For the purposes of determining the degree of psychiatric impairment, the AMA guides apply, subject to any regulations made for the purposes of this section, as if for Chapter 14 there were substituted the Clinical Guidelines to the Rating of Psychiatric Impairment prepared by the Medical Panel (Psychiatry) Melbourne, Victoria October 1997 and published in the Government Gazette.*

In effect, the *Clinical Guidelines* replace Chapter 14 of the AMA Guides.

A problem arises when a person is separately assessed for the same injury using Chapter 4 and the *Clinical Guidelines*. There is not only the problem of overlap between Table 3 and the *Clinical Guidelines*, but these measures operate in quite different ways which may lead to the same injury receiving a different impairment measure for Behavioural Disorder using Table 3 and for a psychiatric disorder using the *Clinical Guidelines*. One or other impairment assessment must be discarded to prevent overlap.

A more equitable way of determining the impairment of a person with an *acquired brain injury* is to use a two-person panel chaired by a neurologist and including a psychiatrist (whether or not the person is assessed jointly by the panel or by each doctor separately). The psychiatrist determines psychiatric impairment using the *Clinical Guidelines* and that impairment arising from the brain injury itself is combined with other values determined by the neurologist to arrive at a whole person impairment (physical). The psychiatric impairment arising from the brain injury itself is, for the purpose of calculating whole person impairment, deemed to have emanated from Chapter 4, Table 2 or 3 of the AMA4 Guides and is subject to the Chapter 4 combining algorithm.

The psychiatrist is also able to determine the level of psychiatric impairment which is secondary or a consequence of physical injuries, not overlapping with psychiatric impairment from the acquired brain injury.

Category 8: A psychiatric impairment from a psychiatric injury or disorder arising from work place response occasioned by a physical injury can count as a non-secondary psychiatric impairment, but it is usually a separate injury.

Workers who experience work place harassment, at the time of or subsequent to physical injury, which leads to a psychiatric injury or disorder may have a non-secondary psychiatric impairment. The question is whether it is has become a new and separate injury. Psychiatrists may be placed in a difficult position, they are obliged to regard the psychiatric injury as secondary with regard to the original physical injury and yet cannot give advice as to how to pursue the matter further as a new and separate injury, which would make it a non-secondary psychiatric injury.

> *Example 3: A worker had been employed in a factory for twelve years. The worker suffered a back injury and had months off work and improved with appropriate treatment. The worker was pleased to return to work and at that stage had no psychiatric symptoms. The employer did not want a disabled worker and made that very clear. He was given inappropriate jobs and was verbally abused. Other workers began to ostracise him, he developed a depressive disorder and ceased work.*

This psychiatric injury is secondary with regard to the original physical injury.

Category 9: A psychiatric impairment from a psychiatric injury or disorder arising from a complication of treatment for a physical injury does not count under section 91(2) (ACA) and section 46B (TAA).

A complication of treatment for a physical injury may lead to a psychiatric disorder. Any psychiatric impairment arising from this psychiatric injury or disorder is secondary under the above sections of the Accident Compensation Act and the Transport Accident Act.

> *Example 4: A woman with rib pain following a transport accident was injected into the rib. The needle penetrated her pleura and she sustained a pneumothorax. She though she was going to die and suffered a severe panic attack. She has continued to suffer an anxiety disorder from that time.*

While the injury is secondary under these two sections of the Acts, other remedies may be available. For example under section 83 (1)(d) (ACA), an injury occurring in the context of medical treatment constitutes a distinct injury (a new injury).

Category 10: A psychiatric impairment from an acute psychiatric injury or disorder which has arisen from an acute exacerbation of a previous physical injury may count as a non-secondary psychiatric impairment.

A person who has had one or a number of serious physical injuries in the past which was associated with significant pain, discomfort and disability and from which the person has recovered, either wholly or in part, may experience a subsequent traumatic incident in which the person has a reasonable fear of further physical injury. If the person has sustained a psychiatric injury in these circumstances, the psychiatric impairment arising from this may be non-secondary if there has been immediate and continuing distress which has been noted by others. However, if there is an initial upset because of pain which later settles and subsequently a depressive disorder

develops because the pain has not resolved over a period of weeks, any psychiatric impairment is likely to be regarded as secondary to physical injury unless the depressive disorder can be shown to have its origins at the time of injury.

Summary

Category 1: Psychiatric Impairment from a psychiatric injury which is secondary to a physical injury does not count.

Category 2: Psychiatric impairment from a psychiatric injury or disorder which has arisen from a previous non-secondary psychiatric disorder or injury does count.

Category 3: Psychiatric impairment from a "pain disorder" may count as arising from a non-secondary psychiatric injury.

Category 4: A psychiatric impairment from a delayed psychiatric disorder or injury arising from an accident may count as a non-secondary psychiatric impairment.

Category 5: Psychiatric impairment from a psychiatric injury or disorder arising directly from trauma, whether or not there is a physical injury, may count as a non-secondary psychiatric impairment.

Category 6: Psychiatric impairment from a psychiatric injury or disorder, which has arisen within twelve hours of an accident or acute injury, counts as a non-secondary psychiatric impairment.

Category 7: Psychiatric impairment from a psychiatric injury or disorder arising directly from an acquired brain injury may count as a non-secondary psychiatric impairment.

Category 8: A psychiatric impairment from a psychiatric injury or disorder arising from work place response occasioned by a physical injury can count as a non-secondary psychiatric impairment, but it is usually a separate injury.

Category 9: A psychiatric impairment from a psychiatric injury or disorder arising from a complication of treatment for a physical injury does not count under section 91(2) (ACA) and section 46B (TAA).

Category 10: A psychiatric impairment from an acute psychiatric injury or disorder which has arisen from an acute exacerbation of a previous physical injury may count as a non-secondary psychiatric impairment.

Endnotes

1 Accident Compensation (Amendment) Act 1996, No. 7/1996