

The great debate: Impairment v Disability

Darren Moore, Brisbane

On 14 May 1999 His Honour District Court Judge O'Brien handed down his decision in the matter of *Gunduz v Queensland Corrective Services Commission* (Plaint No 958 of 1995).

In that case Mr Gunduz, a resident of New South Wales, sued the Defendant for negligence and breach of duty.

Mr Gunduz received an injury to his neck and back when he fell 10 metres during an abseiling exercise conducted by the Defendant.

Liability was admitted the week before the trial but the issue of quantum was hotly disputed.

In that regard the Defendant had Mr Gunduz examined by Dr Graham Anderson, a well known Orthopaedic

Surgeon of Brisbane.

In his initial report Dr Anderson stated:- "If there is any residuum of organic nature attributable to this accident I would think it is likely to be small in degree"

Dr Anderson in a later report concluded:-

"It would be my opinion that if one gives him the benefit of the doubt in the matter, that he is suffering from a 5% impairment of his spine, or if you wish his total body function, and if there is a residual impairment in his neck it would equal a loss of no more than 1% or 2% of its function. Again it would be giving him the benefit of the doubt to say that these changes are permanent."

In providing his report, and in giving his oral evidence, Dr Anderson stated that he followed the American Medical Association (AMA) standards, which is the general, if not invariable, practice of Orthopaedic Surgeons in Queensland.

Conversely, Mr Gunduz was examined by two Orthopaedic Surgeons from Sydney for medico-legal purposes.

Dr David Roebuck, Orthopaedic Surgeon, concluded:-

"This has given him significant impairment of his neck at 15% and a permanent impairment of his back at 35%"

During the course of the trial both Sydney Orthopaedic Surgeons stated that they did not use the American Medical

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Association guidelines with one Orthopaedic Surgeon stating that he had never heard of them.

In a final report Dr Giblin stated:-

"My impairments do not follow the American standards but rather as an assessment on my personal experience as a treating orthopaedic specialist in the area of spinal damage. The percentage disability I have given for his lumbar spine is taken from a pro forma questionnaire which is standardised and gives a reasonable assessment of a person's disabilities. Percentages are assessed on this questionnaire."

Accordingly, at the trial, His Honour had to contend with two Orthopaedic Surgeons giving an extremely high percentage disability and Dr Anderson questioning whether anything was in fact wrong with Mr Gunduz and if there was, his permanent impairment based on the AMA guidelines was extremely low.

His Honour was therefore asked to decide between a disability percentage of the whole body as opposed to an impairment percentage of the whole body.

The Orthopaedic Surgeons also differed in their view of Mr Gunduz's injuries with Dr Roebuck and Dr Giblin stating that the Plaintiff suffered a lumbo-sacral lesion in the incident with Dr Anderson stating that the problem with the lumbo-sacral disc was as a result of degeneration rather than any rupture. This led to great debate between the Orthopaedic surgeons as to whether a disc could rupture in any event.

When looking at the Orthopaedic Surgeons His Honour stated:-

"Although both are very experienced Orthopaedic Surgeons, in the circumstances of this case, I accept the evidence of Dr Roebuck in preference to that given by Dr Anderson. Dr Roebuck has the advantage of seeing

the Plaintiff on a number of occasions and is better placed in my view to make a reliable assessment of the true extent of the Plaintiff's injuries."

His Honour then awarded the Plaintiff \$152,121.25, a significant increase on the Defendant's submission to His Honour of \$30,000.00 for damages in their entirety.

Accordingly, this case highlights the extreme differences in assessing a person's injury in relation to permanent impairment as opposed to permanent disability. As Dr Roebuck said in evidence, "One cannot say that a 65 year old retired person has the same impairment through the same injury as an 18 year old ballerina when their disabilities are completely different." ■

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Litigation explosion

Johnson Tiles & ORS v Esso

Lisa Nicholls, Melbourne

As every Victorian will recall, on 25 September last year an explosion and fire occurred at Esso's gas production and processing facilities at Longford, near Sale in Victoria. As a result of that explosion two workers were killed, a number of others injured and the gas supply to the State of Victoria was interrupted for about ten days. As a result of the interruption to supply many businesses, particularly manufacturers solely dependent upon gas for production, sustained heavy financial losses.

Royal Commission

A Royal Commission was proclaimed to investigate the causes of the Longford incident and Sir Daryl Dawson was appointed Chair. The Commission sat for

four months and received some 600 exhibits. Thirteen parties appeared, including four onsite unions, represented by Slater & Gordon and Maurice Blackburn & Co. Despite Esso's attempt to shift blame to its workers (and in particular, Jim Ward, an employee of 19 years and the panel operator on shift at the time of the incident), the recently published Report of the Commission was strongly critical of Esso's operation of the Longford Plant. It found that the ultimate cause of the incident was the failure of Esso to properly equip and train its employees. The report also identified other causes including inappropriate plant design, a failure by Esso management to monitor and supervise opera-

tions and non-compliance with the *Occupational Health and Safety Act*. In short, the report identified in the clearest terms, systemic failure by Esso in the implementation of basic procedures required within a hazardous industry. Esso has not responded publicly to the Commission's findings.

Federal Court Proceedings

In late September 1998 proceedings were issued against Esso in the Federal Court on behalf of consumers who had suffered financial loss as a result of the interruption to the gas supply. Slater & Gordon and Maurice Blackburn Cashman are acting jointly on behalf of the class, which is the largest in