



## Précis Paper

### Evidence of Pre-Existing Impairments in Personal Injury Claims

This presentation is an interesting discussion of personal injury claims under the *Wrongs Act 1958* (Vic) and the circumstances in which a Medical Panel must take into account a pre-existing impairment.

#### **Discussion Includes**

- Statutory framework for personal injury claims under the *Wrongs Act 1958* (Vic)
- Recovery of damages for non-pecuniary loss
- Accounting for pre-existing impairments
- Tips for practitioners
- Distinction between injuries and impairments

## Précis Paper

### Evidence of Pre-Existing Impairments in Personal Injury Claims

1. In this edition of BenchTV, David Seeman (Barrister, Owen Dixon Chambers West – Melbourne) and Peter Matthews (Assistant Producer, Benchmark TV, Sydney) discuss the Victorian Supreme Court case *Central Gippsland Health Service v Cooper* [2016] VSC 658.

#### Background and Legislative Framework

2. The claimant was a young boy in 2012 and while playing football, he sustained a serious injury to his fibula and ankle. After the football injury, the claimant received medical treatment at the Central Gippsland Health Service, including a plaster cast. After several months of non-invasive treatment at the Health Service, he went on to have plates and screws inserted on two separate occasions. Overall, the outcome of his medical treatment was poor.
3. The claimant commenced personal injury proceedings against several parties including the Central Gippsland Health Service for negligence, primarily based on a failure to conduct timely surgical intervention to fix the fracture.
4. The *Wrongs Act 1958* (Vic) is the principal statute governing claims arising from personal injury and death in Victoria. Under Part VBA of the *Wrongs Act*, damages for non-pecuniary loss (such as pain and suffering, loss of amenities of life, or loss of enjoyment of life) can only be recovered where it is established that the injury was a "significant injury": s 28LE.
5. "Significant injury" is assessed by reference to the American Medical Association Guides to the Evaluation of Permanent Impairment. A claimant is not entitled to recover damages for non-economic loss unless the degree of permanent impairment is greater than five percent.
6. Pursuant to the Victorian scheme, an approved medical practitioner can make an assessment of the degree of permanent impairment flowing from an injury. The respondent can either accept that assessment, or refer a medical question in relation to the assessment to a Medical Panel for determination.
7. Here, the claimant obtained a medical opinion from an orthopaedic surgeon that he was suffering from a significant injury. The Health Service sought to challenge this opinion and sent the matter to a Medical Panel, who determined that the level of whole person impairment resulting from the injury did satisfy the five percent threshold. The plaintiff then sought to challenge this finding in the Supreme Court.

8. The Reasons of the Medical Panel included a summary of the injuries: first, it defined the football injury, and then it turned to the injury sustained as a result of the medical care. The Medical Panel discussed the fact that there was no pre-existing impairment, namely no impairment prior to the football injury. On this basis, there was no need for a discount to the impairment as at the date of the assessment.

#### Supreme Court Review of the Decision of the Medical Panel

9. The plaintiff argued that the doctor, and then the Medical Panel, failed to take into account a pre-existing injury, namely the football injury. The central issue in the case was the extent to which the Panel should have considered this injury as an unrelated or pre-existing impairment.
10. Pursuant to s 28LL of the *Wrongs Act*, injuries and impairments from the same incident can be aggregated. Conversely, prior injuries must not be taken into account in assessing the impairment from an injury.
11. In this case, there was no evidence that the claimant would have suffered the impairment even if the medical care was conducted properly, and the question was therefore purely speculative. However, in its Reasons, the Medical Panel had failed to explicitly state that it had considered the football injury and found that there was no permanent impairment arising as a result of it. In the absence of that remark, it was unclear whether or not the Panel had directed its mind to that question.
12. Ultimately, Emerton J found that it could be inferred from a reading of the Panel's Reasons that they came to an opinion that there was no permanent impairment flowing from the football injury. Her Honour stated at [51]:

*[...] the Panel identified and described the pre-treatment injury – the football injury – separately from the treatment injury. It then moved to consider whether there was evidence of impairment prior to the football injury, noting that there was no prior history of right ankle injury before 24 March 2012 and therefore no pre-existing impairment prior to this date. The plaintiff contends that this shows that the Panel did not consider and disregard any impairment from the football injury. In my view, the fact that the Panel stated that there was no pre-existing ankle impairment prior to the date of the football injury does not mean that it neglected to consider whether there was any impairment resulting from the football injury. It can be inferred that the Panel found no evidence of permanent impairment resulting from the football injury, as distinct from impairment resulting from its treatment. This is unsurprising, given the eminently treatable nature of the football injury and the fact that, optimally treated, it should not result in any permanent impairment.*

13. In future cases, therefore, it is important for practitioners to note that if there is an allegation that a claimant suffers from a permanent impairment that is pre-existing or unrelated to the claimed injury, there must be clear and specific evidence on that point put to the Medical Panel. The Panel will not speculate as to pre-existing conditions.
14. The case also made clear the distinction between the concept of "injury" and "impairment". The authorities show that while a person can suffer an injury, they will not necessarily suffer a permanent impairment flowing from the injury. It would have been a mistake to assume in this case that because the claimant suffered a serious injury to the fibula, that necessarily meant that he was suffering from a permanent pre-existing impairment.
15. The case of *Chua v Lothian* [2011] VSC 468 was discussed by Emerton J. In that case, a claimant brought proceedings against a medical practitioner, alleging that a delayed referral was negligent. The claimant had a pre-existing condition to her ankle, and the Supreme Court's review related to whether the pre-existing condition should be disregarded in assessing her permanent impairment. The trial judge similarly emphasised the distinction between injury and impairment; although the claimant had a pre-existing injury to her ankle, there was no evidence of permanent impairment of the ankle, and therefore there was no error by the Panel in failing to disregard a pre-existing permanent impairment.
16. *Central Gippsland Health Service v Cooper* ultimately makes clear that a Medical Panel does not need to hypothesise about what a claimant might have suffered by way of impairment prior to an injury, but needs firm evidence of a pre-existing impairment in order to take that into account.

## **BIOGRAPHY**

### David Seeman

Barrister, Owen Dixon Chambers West, Melbourne

David was admitted as a solicitor in 2009 and called to the Victorian Bar in 2011. His practice includes workers compensation, public liability, sexual abuse, coronial, and professional and medical negligence matters. Prior to being called to the Bar, David worked as a judge's associate and a solicitor at Norton Rose in the insurance team.

### Peter Matthews

Assistant Producer, Benchmark TV, Sydney

## **BIBLIOGRAPHY**

### Focus Case

*Central Gippsland Health Service v Cooper* [2016] VSC 658

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/insurance/benchmark\\_10-11-2016\\_insurance.pdf](https://benchmarkinc.com.au/benchmark/insurance/benchmark_10-11-2016_insurance.pdf)

### Judgment Link

<http://www.austlii.edu.au/au/cases/vic/VSC/2016/658.html>

### Cases

*Chua v Lothian* [2011] VSC 468

### Legislation

*Wrongs Act 1958* (Vic)