Précis Paper

Total and Permanent Disability in Superannuation

A discussion of the issues involved in a claim for total and permanent disability in superannuation, and advice for practitioners preparing such a claim

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Précis Paper

Total and Permanent Disability in Superannuation

1. In this edition of BenchTV, Nawaar Hassan (Barrister – Hayden Starke Chambers, Victoria) and Ian Benson (Solicitor – AR Conolly and Company Lawyers, Sydney) discuss the issues

involved in a claim for total and permanent disability in superannuation, and provide advice for practitioners in preparing such a claim.

Definition of Total and Permanent Disability (TPD)

2. A claim in total and permanent disability in superannuation is a benefit that is provided by most superannuation funds to their members if they are totally and permanently disabled.

3. Most superannuation funds will take out a group insurance policy with an insurer, which will cover all of their members. This group insurance policy usually provides a default level of cover for all members unless the member chooses to opt out of it. If a member does not opt out, the premiums for the policy are then automatically deducted from the member's superannuation account.

4. Most trust deeds state that the definition of "total and permanent disability" is whatever the definition happens to be in the applicable insurance policy at the time. While definitions of "total and permanent disability" vary slightly from policy to policy, and it is important to look at the exact words that apply in each case, they do tend to follow a similar kind of pattern.

5. A typical example of a definition of "total and permanent disability" can be found in the recent case of *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233:

> Total and Permanent Disablement in respect of an Insured Person who was gainfully employed within the six months prior to the Date of Disablement is where … the Insured Person is unable to follow their usual occupation by reason of accident or illness for six consecutive months and in our opinion, after consideration of medical evidence satisfactory to us, is unlikely ever to be able to engage in any Regular Remunerative Work for which the Insured Person is reasonably fitted by education, training or experience …

6. There are two limbs to the definition of "total and permanent disablement":
   i. the inability to work for the first six months – this is called the "waiting period"; and
   ii. the unlikelihood of being able to work in the future.

7. It is important to note that the definition of "total and permanent disablement" refers to the insurer's opinion.

Difference between a TPD claim and a Personal Injury claim

8. A TPD claim is not a claim for personal injury. It is essentially a claim for breach of contract and for breach of trust. As such, the approach that must be taken when preparing a TPD claim is fundamentally different to that taken when preparing a claim for personal injury.

9. In a personal injury claim, the plaintiff needs to convince the court that they have been injured and that they have suffered loss as a result of that injury. However, in a TPD claim, it is not enough to only prove that the plaintiff has been seriously injured or has suffered loss; what must be proven is that the insurer and trustee have breached one of the duties they owe to the plaintiff.

10. The reason for this is because the insurer's liability to pay under the insurance policy is not triggered by the plaintiff's injury itself, but by the insurer's opinion that the plaintiff is unable to work in the future.

11. This means that when, eventually, the plaintiff goes to court, the court's task is not just to look at the evidence objectively and decide whether or not the plaintiff has been injured; rather, the court engages in a two-step process:

    (i) the court must ask itself whether or not the insurer or trustee have breached one of the duties that they owe to the plaintiff; and
    (ii) if it finds that there has been a breach, the court can then proceed to the second step of the process, by objectively looking at the evidence and reaching a conclusion as to whether or not the plaintiff meets the definition of being totally and permanently disabled.

<u>How to best prepare a TPD claim</u>

12. When a plaintiff approaches their lawyer about a TPD claim, they will often be in financial difficulty as they are not working, and so they will push their lawyer to make the claim quickly, and if their claim is rejected, to bring court proceedings quickly. However, rushing to make a claim is a mistake, as it will often result in a weak claim.

13. Putting in a strong claim from the beginning avoids the insurer forming an entrenched view that the plaintiff is not entitled to the TPD benefit. The stronger the claim is from the beginning, the more likely it is to be approved from the beginning. If a weak claim, unsupported by good evidence, is made, it will be harder in the future to convince the insurer to change their mind as to the plaintiff's entitlement to the benefit. Further, starting proceedings quickly, before the evidence is truly ready, means that the claim is likely to have poor prospects of success in court.

14. The reason for this is connected to the court's two-stage reasoning process; if the evidence is equivocal or insufficient, it will be very difficult to satisfy the court that the insurer breached

its duty. If this first limb cannot be satisfied, the plaintiff will not be able to proceed to the second limb and present the strong evidence that they might have later gathered to satisfy the court that they really are totally and permanently disabled.

Duties of trustees

15. Trustees and insurers generally have different duties. A trustee's duties are the duties that every trustee generally owes, regardless of whether they are a superannuation trustee or otherwise. These duties are:
    i. to act in good faith;
    ii. to give real and genuine consideration to the claim - this also includes the duty to make inquiries to gather relevant evidence, particularly if there are conflicting bodies of material;
    iii. to act upon sound reasons, where they have given reasons for their decision;
    iv. to exercise their duties for a proper purpose; and
    v. to act reasonably.

16. Beyond these general duties owed by all trustees, the *Superannuation Industry (Supervision) Act 1993* (Cth) imposes further duties that are particular to superannuation trustees. These include:
    i. the duty to act in the best interests of the members;
    ii. the duty to exercise due care, skill, and diligence in performing their functions;
    iii. the duty to act honestly in all matters concerning the fund;
    iv. the duty to take all reasonable steps to pursue an insurance claim on behalf of a member if the claim has reasonable prospects of success.

17. It is important that the trustee and the member are on the same side, as it is the trustee's duty to pursue the insurance claim on behalf of the member, although unfortunately that is often not the case in practice, as the trustee doesn't really take an active role in pursuing the proceedings, often having shared representation with the insurer once the proceedings are commenced.

18. The trustee's duties arise by virtue of the trustee being a trustee in equity, and also by virtue of the Superannuation Industry (Supervision) Act 1993 (Cth). The trustee cannot evade these duties by wording its trust deed in a particular way or by entering into a particular deal with the insurer.

Duties of insurers

19. Insurers' duties have their origin in s 13 of the *Insurance Contracts Act 1984* (Cth). This Act imposes on the insurer a duty to act in utmost good faith in all matters relating to the policy. There are many aspects to this duty of utmost good faith, and the particular manifestations of it depend on the way that the claim has been handled. The duty of utmost good faith on insurers can include:

i. A duty to act reasonably;
ii. A duty to give the insured an opportunity to comment on adverse material that has been gathered, such as surveillance material;
iii. A duty to act with due regard for the interests of the insured as well as the interests of the insurer themselves;
iv. A duty to adopt a fair claims handling procedure.

Comparison of the duties of trustees and insurers

20. Although the duties of trustees and the duties of insurers are different in origin and wording, the manifestation of them in most cases will be the same. In most cases, both trustee and insurer will have a duty to:

i. consider the correct question;
ii. make a decision that is reasonable on the evidence;
iii. adopt a fair procedure in relation to the member who has made the claim.

21. The main difference between trustees' and insurers' duties is in the onus of proof. In relation to trustees, the member does not have an onus to convince the trustee that they are entitled to the benefit. Once the member has put on enough evidence to show the trustee that their claim is more than frivolous, then the trustee's duty to investigate the claim is enlivened. In contrast, when a claim is made to an insurer, the insured does have an onus of proof to demonstrate that they are entitled to the benefit under the policy.

22. In relation to their duty to investigate, some trustees have really engaged in the process and it is evident from the claim file that they have actively chased up the insurer, have actively pursued the evidence, and have questioned some of the calls that the insurer has made. However, in other cases, it is evident from the claim file that nothing much has been done by the trustee, other than the trustee receiving the materials from one side and passing them onto the other.

What should practitioners do upon first receiving a TPD claim?

23. Upon first receiving a TPD claim, the most important thing for practitioners to do first, which is often overlooked, is to check that the client actually has cover. Many clients assume that

they have insurance cover just because their superannuation statement shows that they have it. However, when further research is done on the policy, that may not actually be the case. For example, many policies only extend cover to Australian citizens and permanent residents, however, often the trustee of the superannuation fund has not asked the member whether they are an Australian citizen or permanent resident, so they have been deducting premiums by default. As such, it may unfortunately be the case that a client who has come from overseas may not be entitled to any cover at all.

24. The TPD cover, as opposed to the life cover that often comes with it, is usually dependent on the member having been in active employment, either at the time they joined the fund, or at the time that the policy commenced. If a practitioner has a client who has had a long-term injury and has been on modified duties or very restricted hours for a very long time, it is important to check that at the time that their cover would have commenced, they were not already injured nor already unable to perform their duties.

25. Take, for example, a client with a long-term mental illness, who for a long time has been working about 10-20 hours a week, and has only ever been able to work that much, who has a car accident and suffers a catastrophic physical injury which stops them from working at all. Although the client's mental illness had nothing at all to do with the cause of their injury, the fact that they have never been able to work more than 10-20 hours a week due to their mental illness might mean that they have no cover, because active employment might be defined as working, or at least the ability to work, 30 hours a week.

26. It is important to note that some policies will cut off cover a few weeks after a person stops working. For example, a university student who works during the holidays but stops work during the semester in order to study, will lose their cover 60 days after they stop working. For example, a university student who works during the holidays but stops work during the semester in order to study, will lose their cover 60 days after they stop working. Therefore, if the student is injured during the semester and is totally disabled in that time, they will not be covered.

27. It is very important for practitioners to ask the fund to provide them with the full insurance policy before beginning to gather evidence for the claim, in order to avoid wasting enormous costs and often years of work before realising that there was never any cover to start with.

<u>The first limb of the TPD test</u>

28. The first limb of the TPD test is often called the "waiting period". This requires the claimant to have been unable to follow their usual occupation for a certain period of time. However,

some policies are more restrictive, and require the claimant to have been unable to work at all during that period. This not only means that they have been unable to work in their own occupation, but that they have been unable to work in any occupation at all.

29. Although it is quite obvious that a person hasn't been able to work where there has been an accident or a sudden injury, in less clear cut cases (eg, outside a TAC or Work Cover context, where there are no certificates of capacity proving inability to work), it is very important that appropriate evidence be gathered to satisfy the first limb. For example, a practitioner should check their client's GP records to ensure that around the time the client ceased work, they were actually seeking medical treatment and advice.

30. This is imperative because an insurer might argue that the client was not unable to work because of their injury, but rather because they lost their job, and that it was only after they could not find another job that they decided to make a claim.

31. So if a practitioner has no records that a client was seeking medical treatment around the time they ceased work, it will be very difficult to prove that the reason for the client's inability to work was their injury, and not that they were unable to find a job. Therefore, it will be important to prove why the client ceased employment.

32. Most definitions of "total and permanent disability" require a causative link between the client's injury and their inability to work. Therefore, it is important, in many cases, to gather evidence about why the client ceased work, particularly if, on the face of the evidence, there is no obvious direct link between the injury and the inability to work.

33. An example is where a person is on modified work duties for a lengthy period of time and then their employment is terminated. This was seen in the case of *Jeffrey Guy Baker v Local Government Superannuation Scheme* [2007] NSWSC 1173, where a council gardener who was injured and no longer able to work as a gardener was instead given clerical duties. However, at some point, the council was no longer willing to offer those clerical duties and his employment was terminated.

34. The insurer argued that the reason the man was unable to work was not because of his injury, but because he had been fired. However, the Court rejected this argument, holding that his injury was the real and substantial reason he was not able to work, his injury being the very reason why the council was no longer willing to offer him any work.

35. Where a practitioner has a client who has been on workers' compensation for a long time, who has had a job but has been doing severely modified duties, and who, as part of a settlement of their workers' compensation claim, agrees to resign, evidence of this

resignation must be obtained, whether it be from the client's employer, from the client themselves, or from the solicitor who ran the Work Cover claim, in order to show the link between the resignation and the disability.

36. In cases where a client has taken a voluntary redundancy, it can be quite difficult to prove the causal link between resignation and disability. In these cases, evidence must be obtained showing that the reason the client took the redundancy was because they could no longer cope with their duties. This evidence might come from the client themselves, their employer, or their colleagues, who may be able to give a statement to this effect.

The second limb of the TPD test

37. The second limb of the TPD test is the part of the definition of TPD that looks to the future. It is concerned with the question of whether, in the future, the person injured is unlikely ever to be able to work.

38. The first part of the second limb requires that the client be unlikely ever to be able to engage in an occupation. "Unlikely ever" is a lower standard than "unable ever", in that the client does not have to show an absolute incapacity, but rather that there is no real chance that they will be able to engage in the workforce in the future. A mere theoretical or speculative possibility that one day, maybe, the client might find somebody who will give them a job is not enough to take them outside the definition of "unlikely ever"; for them to fall outside the definition, there must be a real chance that they will get a job in the future.

39. Insurers often reject claims on the basis that while the client may require special accommodations to be able to do a particular job, it is likely that they will find an employer who will give them those special accommodations. The courts have looked very closely at these kinds of assertions and thought about the realistic prospect of whether the person will be able to find a job accommodating those needs.

40. The cases of *Lazarevic v United Super Pty Ltd* [2014] NSWSC 96 and *Alcoa of Australia Retirement Plan Pty Ltd v Frost* [2012] VSCA 238show that the courts take a common sense approach to analysing this question.

41. In those cases, it was argued that the claimants, who had back injuries, could work as forklift drivers as long as their prospective employers accommodated their special needs, namely, that they could not drive over rough terrain, not be in a confined space, not bend or lift, and not turn around. The Court in each case held that in the real world, looking at the matter with common sense, it was difficult to imagine any job as a forklift driver where these restrictions were realistic.

42. Another important point that has been made by the courts is that the job that the insurer proposes the claimant can do must be a real job recognised in the community, not a made-up job that has been invented for the worker. In the case of *Hannover Life Re of Australia Ltd v Colella* [2014] VSCA 205, the Victorian Court of Appeal made the distinction between "work" and a "work task".

43. The Court held that a person is not able to "work" unless they are able to do a job that is recognised in the community. Although the claimant could not perform the vast majority of his job, but could still do the filing in the warehouse, the Court held that doing some filing is not a job as it was not an occupation recognised in the community. The upshot of what the courts have said is that an insurer is not entitled to reject a claim on the basis that there is some speculative possibility that the claimant may be employed to do not very much at all.

<u>What issues must be addressed in a TPD claim that do not need to be addressed in a personal injury or workers' compensation claim?</u>

44. Most of the medical reports in workers' compensation or personal injury claims are geared towards finding the cause of the injury. However, in a TPD claim, the cause of the injury is generally not relevant, as the question is not about the claimant's personal capacity to perform certain tasks or functions, but about the realistic or commonsense likelihood that they will be able to gain employment in the real world.

45. When preparing a TPD claim, a practitioner must think about evidence (not just medical evidence, but other evidence) that establishes why, in the real world, the claimant is unlikely ever to get a job. An example of such evidence is vocational assessment reports, which will often by commissioned by insurers, or obtained from a workers' compensation or personal injury claim file sourced from another insurer. The vocational assessment report will suggest a number of roles that the assessor believes are suitable for the claimant in question.

46. The practitioner will need to consider the report carefully and gather evidence as to why the suggested roles are not suitable for the claimant - for example, has the claimant's treating medical practitioner had an opportunity to consider whether or not the claimant is actually capable of performing all of the duties of the suggested role(s)? The practitioner must consider whether the claimant is capable of performing all of the duties of the suggested role(s), or whether the assessor has only focused on some of the duties and ignored the fact that other of the duties cannot be performed.

47. An example is the case of *Carney v Australian Super*, where the claimant, who had disabilities, was employed by a garment manufacturer who was a very benevolent employer. The claimant worked as a garment inspector, checking that all the garments that had been manufactured were up to scratch, however, she did not perform her job at a normal, reasonable pace.

48. Although the trustee rejected the claim, holding that "garment inspector" is a real job, and the claimant is able to do a real job, the Court accepted the claimant's argument that although the job itself was a real job, the circumstances under which the claimant was performing it were not realistic. Once the claimant's benevolent employer was taken over by another owner who did not allow the claimant to work at her own pace, she was no longer able to perform that job.

49. Another thing practitioners must consider when looking at a vocational assessment report is whether the assessor has considered the combination of all of the claimant's disabilities and symptoms of their illness, instead of just focusing on the main aspects.

50. For example, in the case of *Hellesley*, where a police officer had post-traumatic stress disorder after being threatened with a firearm, the vocational assessor accepted that the police officer could not work in any situation involving firearms, such as a security guard, however, suggested that she could work in other roles, such as customer service. The Court held that the assessor had only focused on the police officer's fear of firearms, but failed to take into account other aspects of her illness, such as her anxiety in dealing with strangers, which made the other roles suggested by the assessor unrealistic.

51. Practitioners must also consider whether the vocational assessor has taken into account the effect of the claimant's psychological state. For example, in the case of *Jones v United Super Pty Ltd* [2016] NSWSC 1551, where the claimant, a roof plumber, suffered a back injury, the vocational assessment suggested that he could be a courier driver. Even though he had the physical capacity to become a courier driver, the claimant had developed "fear avoidance syndrome", meaning he was afraid of doing anything he feared might exacerbate his back. The Court held that in assessing whether or not he could be a courier driver, that fear avoidance syndrome had to be taken into account, as, due to the fact that he was afraid of picking up parcels and driving the truck, that psychological element prevented him from performing that role.

52. Further, practitioners must consider how a claimant's medications might affect their ability to perform the suggested role(s) in the vocational assessment report. This is something often overlooked by vocational assessors. For example, if a vocational assessment report has suggested that the claimant could be a courier driver or a taxi driver, however, the

claimant is on strong medication that makes them drowsy and affects their ability to drive, those roles will not be a realistic option for them. Therefore, when obtaining medical reports from treating practitioners, it is important to ask them specifically what will be the effects of the claimant's medication on their ability to perform the roles suggested in the vocational assessment report.

53. In some cases, the insurer might suggest that a claimant is capable of doing a role part time, for example, where the medical evidence suggests that they can only work limited hours or certain hours a week. In these cases, practitioners must consider whether part-time work or limited duties are realistic.

54. For example, if, in relation to a claimant working as a restaurant manager, the insurer says that even though the claimant does not have the physical capacity to work in the restaurant, they could carry out administrative duties three days a week, it must be considered whether this is realistic in that industry. Therefore, in such a case, practitioners are advised to obtain a report from a recruiter in that industry to advise whether or not it is realistic for a restaurant manager to work only three days a week and to not have them help out with the physical aspects of managing a restaurant.

"Reasonably fitted by education, training or experience"

55. "Reasonably fitted by education, training or experience" does not refer to any job that one could physically do without further education, training or experience; it refers to a role for which a person has been shaped through their vocational history, past, and experience. Often insurers will suggest that a claimant can do an entry-level role that effectively anybody could do. However, the Court in *Jones v United Super Pty Ltd* [2016] NSWSC 1551 held that the role must be one for which the claimant has been shaped by their vocational history and training.

56. Further, having some of the skills that are relevant to a particular role does not mean that the claimant is fitted for that role by virtue of their education, training, and experience. Vocational assessors will often compile a list of transferable skills possessed by a particular claimant, however, these tend to be expressed at a high level of abstraction, so practitioners must consider whether these skills have a sufficient connection to the claimant's vocational past, or whether they are so generic that anybody who has ever had any job would have them.

57. It must also be noted that a person's education, training, or experience is usually assessed at the time of the disability and not at the time of the insurance claim, particularly where the relevant policy does not refer to retraining. This effectively means that a person can be

considered totally and permanently disabled within the meaning of the policy even though they are still working.

58. For example, in the case of *Shamas*, the injured claimant, a mechanic, did a 3-year course in administration after his injury and became a contracts administrator. Even though he was now working full time in a different role and earning more money than he was at the time he became disabled, the Court found that he still met the definition of "totally and permanently disabled", because at the time of his disability, the new role he was now performing was not one he was reasonably fitted for by his education, training, and experience.

59. *Shamas* may be compared with *Hannover Life Re of Australasia Ltd v Dargan* [2013] NSWCA 57, where the NSW Court of Appeal held that the claimant's new role was sufficiently connected to his old role such that he was taken out of the definition of being "totally and permanently disabled".

Other things to consider when preparing a TPD claim

60. Practitioners should consider the following when preparing a TPD claim:
    i. whether the new role really is within the claimant's education, training, and experience, especially where the vocational assessment has been obtained in a workers' compensation context;
    ii. whether the skills and qualifications that the claimant has on paper actually reflect their skills and experience;
    iii. whether the assessor has made inaccurate assumptions about what the claimant's previous role involved;
    iv. whether the suggested role is something that the person has been shaped for by their vocational history (see *Jones v United Super Pty Ltd* [2016] NSWSC 1551); and
    v. whether the claimant's so-called transferable skills are really transferable to the new job.

61. Practitioners are advised to ask their clients why they may think they are unsuitable to perform roles suggested by the vocational assessor, as the best evidence in this regard will often come from the client.

Gathering evidence

62. It is essential to gather evidence addressing each aspect of the definition of TPD.

63. Although workers' compensation and personal injury reports can be useful in showing the extent of the claimant's injuries and their treatment history, they are usually focused on determining the cause of the injury, which is not generally relevant in a TPD claim. As such, these reports will often not be sufficient evidence in such a claim.

64. Workers' compensation reports may also be useful in showing whether a worker can perform certain modified duties. However, as this is in a context where an employer is obliged to give the worker those modified duties, the suggested role will usually be spoken about in a very limited sense not reflective of the scope of the role in the open labour market.

65. As the severity of the claimant's injury is not usually in dispute in a TPD claim, practitioners are advised to not gather large amounts of evidence in an attempt to prove severity of injury.

66. When gathering medical evidence for a TPD claim, practitioners should explain to the doctor the definition of TPD and ask the doctor to address each aspect of the definition. This will help in establishing the claimant's potential competitiveness on the open labour market and the likelihood that they will be able to find a job.

67. With medical reports, practitioners must consider:
    i. how old is the report;
    ii. whether the doctor making the report was predicting improvement or merely expressing a hope of improvement;
    iii. whether the doctor has suggested certain treatment, and, if that treatment has been tried and the claimant has not improved, the practitioner must seek clarification from the doctor as to whether their opinion is still the same as originally expressed in the report.

68. Other sources of evidence relevant to establishing the claimant's realistic chance of obtaining employment are:
    i. the claimant themselves and, potentially, their family;
    ii. recruiters or industry specialists;
    iii. the claimant's former colleagues or employers, who can provide evidence about the claimant's ability to perform their work duties immediately before they ceased work.

69. Practitioners should also consider obtaining a second vocational assessment report that might point out the weaknesses in the insurer's one, and also a report from the job seeking agency or vocational helper who has tried to get the claimant

a job. These reports can be the most valuable evidence in the claimant's TPD claim as they provide a record of the claimant's real-world inability to find work, even though they are actively looking for it with assistance.

Final takeaways for practitioners preparing a TPD claim

70. Practitioners are advised to be mindful of the following when preparing a TPD claim:

i. gather evidence early;
ii. submit a strong claim from the beginning;
iii. if there is new evidence in the claim, ensure that it addresses every point relied on by the insurer in their rejection;
iv. ensure that there is evidence to satisfy each limb of the TPD definition;
v. once a claim has been issued, evidence is fixed, so if there is uncertainty as to sufficiency of evidence, seek a second opinion from counsel before issuing claim.

BIOGRAPHY

Nawaar Hassan

Barrister, Hayden Starke Chambers, Victoria

Nawaar came to the Victorian Bar in 2012. Prior to this, she worked as the Associate to Justice Cavanough of the Supreme Court of Victoria and to Judge Taft of the County Court of Victoria. Nawaar practices in commercial and administrative law with a particular focus in insurance and superannuation matters. She previously worked at DLA Phillips Fox in professional indemnity, insurance and administrative law. She is a nationally accredited mediator.

Ian Benson

Solicitor, AR Conolly and Company Lawyers, Sydney

Ian Benson is a solicitor at AR Conolly and Company Lawyers and holds a First Class Honours degree in law and a Bachelor of Science. He also has a Graduate Diploma in Mathematical Studies.

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