



## Précis Paper

### Workers Compensation : Criteria and Thresholds

A discussion of the case of *Elsworthy v Forgacs Engineering Pty Ltd*, which concerned the criteria referred to by an approved medical specialist during a work place injury assessment.

#### Discussion Includes

- Facts in the case of *Elsworthy v Forgacs Engineering*
- The question of impairment
- Parties in the litigation
- Grounds in the review
- How Justice Fagan dealt with the grounds for review
- Gauging success in a judicial review claim
- Take-aways from this decision

## Précis Paper

### Workers Compensation : Criteria and Thresholds

1. In this edition of BenchTV, Lachlan Robison (Barrister, State Chambers) and Stephen Hodges (Partner, Barker Henley) discuss the case of *Elsworthy v Forgacs Engineering Pty Ltd* which raised issues about the criteria referred to by an approved medical specialist during a work place injury assessment.

#### Facts in the case of *Elsworthy v Forgacs*

2. In 2011, Mr Elsworthy, aged 59, suffered an injury whilst he was at work. He fell over with his left arm outstretched, suffering an injury to his left wrist and elbow, and also to his left knee. The workers compensation insurer accepted liability for that claim, but unfortunately Mr. Elsworthy started to develop a chronic regional pain syndrome (CRPS), as it was termed in the medical diagnosis. Initially this was in his left arm, subsequently developing to all parts of his body, most significantly his right arm and both lower extremities.
3. Mr. Elsworthy then submitted this claim to the workers compensation insurer for further benefits. He obtained a medico-legal report from a doctor who assessed him at 81% whole person impairment. The insurer declined to accept that claim, as well as the CRPS claim. Mr Elsworthy then commenced proceedings in the Workers Compensation Commission. The initial arbitrator determined that he has a chronic pain condition, and he was referred to an improved medical specialist for determination of his whole person impairment claim. The initial claim of 81% was looked at by Dr. David Lewington, who was the approved medical specialist. Dr. Lewington accepted that he has a chronic pain condition but declined to assess any whole person impairment, simply because he did not meet the diagnostic criteria for CRPS under the workers compensation guidelines for the assessment of permanent impairment.
4. Mr. Elsworthy was dissatisfied with the opinion of Dr. Lewington and commenced an appeal in the Workers Compensation Commission. This was subsequently heard by a medical appeal panel who looked at the assessment and determined that there was no incorrect criteria or demonstrable error in the medical assessment certificate, therefore Mr. Elsworthy failed in that appeal. The matter was then taken to the Supreme Court.

#### The question of impairment

5. In 2012 there were some substantive amendments to the workers compensation legislation. Importantly, a threshold was introduced in relation to whole person impairment. Prior to 2012, if a person was assessed with 1% whole person impairment

they would get a prescribed amount, but after 2012 it was required to reach at least 11% before there would be any compensation.

6. The entitlement to weekly compensation was also affected. In 2012 a 20% threshold was introduced, and a person had to get above 20% in order to continue receiving weekly compensation beyond a five year cap.
7. If a person is over 30%, that would be an important assessment as they would be classified as a worker with the highest needs, with entitlement to a weekly compensation until retirement age along with medical expenses, without being subject to capacity assessments. This threshold has been around since 2002
8. There is also a 15% threshold which allows a worker to sue their employer for negligence and commence a claim for work injury damages. 15% is also the threshold for domestic assistance on a long term basis.
9. This is a proposition unique to workers compensation legislation as compared to some of the other personal injury jurisdictions. For example, in motor accidents there is only one particular threshold, of 10%, in order to commence a claim for non-economic loss. There is also the difference that motor accidents are assessed under American Medical Association (AMA) Guidelines 4, and workers compensation under AMA Guidelines 5. The AMA 4 guidelines are more restrictive than AMA 5, even though there is a considerable overlap. For instance, in Civil Liability Act claims they are determined with reference to a most extreme case, rather than a whole person impairment threshold.

#### Parties to the Litigation

10. The substantive party which the presenters acted for was the employer. The Workers Compensation Commission, the medical appeal panel and the approved medical specialists were all named in the proceedings, however they played no active role.

#### Grounds in the review

11. There were several grounds relied on by Mr. Elsworthy in his review:
  - A. Dr. Lewington, the approved medical specialist, applied incorrect criteria. This did not specify any particular error.
  - B. The phrase 'better explains' in the guidelines dealing with CRPS. It says that you cannot have a diagnosis of CPRS if something 'better explains' the symptoms.
  - C. The appeal panel and the specialist erred in considering with each of the separate symptoms whether something else better explained them, rather than simply seeing if the symptoms were there, and then at the end deciding if something else better explained their presence.

- D. The appeal panel and the specialist didn't take into account the Budapest Criteria, which was a document created by a conference of specialists in pain medicine in 2004 - not part of the legal criteria for these claims.
- E. The AMS and the appeal panel misapplied the fibromyalgia criteria which was set down by the American College of Rheumatology - also not referred to in the guidelines.
- F. There was an error in finding that the symptoms were consistent with fibromyalgia.
- G. The appeal panel failed to re-examine the worker.
- H. Incorrect criteria was relied upon in relation to fibromyalgia.
- I. Failure to give adequate reasons.

#### How Justice Fagan dealt with the grounds for review

#### **12. A summary of Fagan J's response to each of the arguments:**

- A. This did not contain any specific legal argument
- B. This was dismissed as being too rigid and constrictive, because if one goes through the criteria in the guidelines it doesn't actually specify whether or not consideration of an alternative (in this case, fibromyalgia) should be considered at each stage of the assessment, or at the end.
- C. It's really a matter for the specialist to determine the order in which the criteria and guidelines is applied.
- D. The Budapest Criteria is much less onerous in its diagnostic criteria for this particular condition, so whilst it may be legitimate for a clinician to refer to this document in advising their patients about whether they suffer from CPRS, it is simply not a document which is incorporated into the guidelines. Both parties in the Supreme Court agreed that those guidelines had the force of law, and so one has to be very careful in going beyond them to argue that approved medical specialist fell into legal error by not looking at some other document, particularly when the whole policy behind the guidelines is to make it more difficult for pain related conditions to attract an impairment rating.
- E. The documents produced by the America College of Rheumatology are simply not part of the guidelines either, and they weren't put before the approved medical specialist in any event, and therefore didn't form part of the decision maker's record.
- F. There are a number of symptoms which need to be present for a diagnosis of CPRS. Within the guidelines, there is a table which sets out the criteria. Part 4 of this table is that 'no other diagnosis better explains the signs and symptoms'. In this case, the approved medical specialist found that certain signs and symptoms were better explained by fibromyalgia, whereas the plaintiff argued unsuccessfully that the table is effectively a sequence, that one has to look at the signs and symptoms first and then conclude by looking at the 'better explains' question, but in the judge's

view this can be done in any order and that's a matter for the critical judgement of the approved medical specialist.

- G. It is unusual for an appeal panel to actually examine somebody, even though they do have the power to do so. In the judge's view, the appeal panel, much in the same way as the court, could simply look at the material and determine that the approved medical specialist had not fallen into any kind of error because of the way he dealt with the table of criteria.
- H. Both the approved medical specialist and the appeal panel had been found to have gone through the table correctly, and therefore there was no error made in a diagnosis of fibromyalgia.
- I. This point of 'reasons' was not really pressed at trial and was rejected also.

#### Gauging success in a judicial review claim

- 13. The best way for a party to gauge its prospects of success in these circumstances is to look at the SIRA guidelines as legislation, rather than simply look at the medical opinion about diagnostic criteria, because there is not always a neat overlap between various approaches. They might be legitimate in the medical world, but the only approach which is acceptable in the legal world is the one set out in the guidelines.
- 14. You have got to look at whether the approved medical specialist went through each criteria set out, for whatever condition it might be, in a very strict and technical way, and to ignore any other medical evidence that might be floating around.

#### Take-aways from this decision

- 15. This case shows that there can be a real disconnect between medical reality and accepted clinical practice, and what the legislation actually requires a worker to demonstrate to an approved medical specialist to receive a work place injury assessment.

## **BIOGRAPHY**

### **Lachlan Robison**

**Barrister, State Chambers - Sydney**

Lachlan was admitted as a lawyer in 2007 and was called to the NSW Bar in 2010. He generally practises in most areas of law, with a particular interest in insurance-related disputes and commercial litigation. Lachlan mostly appears in the NSW Supreme Court and District Court, and occasionally appears in the Federal Court and various State and Federal tribunals.

### **Stephen Hodges**

**Partner, Barker Henley - Sydney**

Stephen is a partner at Barker Henley Lawyers, practising predominantly in insurance and employment litigation. He has been recognised as a leading defendant lawyer in insurance law in Doyle's Guide and is a Law Society accredited specialist in personal injury law.

## **BIBLIOGRAPHY**

### **Focus Case**

***Elsworthy v Forgacs Engineering PTY LTD [2018] NSWSC 1638***

### **Benchmark Link**

**[https://benchmarkinc.com.au/benchmark/construction/benchmark\\_02-11-2018\\_construction.pdf](https://benchmarkinc.com.au/benchmark/construction/benchmark_02-11-2018_construction.pdf)**

### **Judgment Link**

**<https://www.caselaw.nsw.gov.au/decision/5bd79367e4b0a8a74af0a856>**

### **Legislation**

***Workers Compensation Act 1987 (NSW)***

***Workplace Injury Management and Workers Compensation Act 1998 (NSW)***

### **Other**

***NSW workers compensation guidelines for the evaluation of permanent impairment, State Insurance Regulatory Authority NSW***