Chapter 25
Methods of Ascertainment of Personal Damage in Australia

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Abstract This chapter illustrates the historical, judicial and juridical framework of personal injury assessment and compensation in Australia, illustrating the expert's qualification and competences and the ascertainment methodology for identifying, describing and estimating any personal injury, its temporary and permanent consequences and the causal value/link between the event and the injury and between the injury and the impairment. In particular, the chapter discusses the principles related to the assessment of personal injuries and impairment, both physical and psychiatric, when assessing the extent of damages resulting from traffic accidents and from wrongful injuries sustained in other compensable circumstances, such as medical malpractice, in Australia. The emphasis is on the medical methods of ascertaining the quantum of damages, which in Australia is generally undertaken in accordance with impairment rating instruments prescribed by statute.

25.1 Historical and Juridical Overview

When the Commonwealth of Australia came into existence on 1 January 1901, six Australian colonies (New South Wales, Victoria, Tasmania, Queensland, South Australia and Western Australia), became the original States of the Federation, united under the *Commonwealth of Australia Constitution Act*, *1900* (UK). The *Commonwealth Constitution Act* ratified the agreement among the old colonies to give up some of their powers to the new central body—the Commonwealth—while preserving sovereignty over the powers they had retained. The 'residual' powers, which remained with State Parliaments and were subsequently partially vested in the Australian

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Capital Territory and the Northern Territory Parliaments, encompassed the legislative power to administer and regulate the common law of torts. Each jurisdiction had created its own legislative framework that provided rehabilitation and compensation benefits for those injured in motor vehicle accidents. Likewise, jurisdiction over personal injury litigation at common law remained with the States and Territories.[1]

Consequently, Australia does not have a uniform nationwide legal framework governing motor vehicle accidents and award of damages for injuries sustained in such accidents. Except for Victoria (*Transport Accident Act 1986*),[2] Tasmania (*Motor Accidents (Liabilities and Compensation) Act 1973*),[3] the Northern Territory (*Motor Accidents (Compensation) Act 1979*)[4] and partly *Motor Accidents Compensation Act 1999* (NSW) s 7A in New South Wales[5], all other schemes are fault based (*Motor Accident Insurance Act 1994* (Qld), *Motor Accident Commission Act 1992* (SA), *Motor Vehicle (Third Party Insurance) Act 1943* (WA), *Road Transport (Third Party Insurance) Act 2008* (A.C.T.)). Under some no-fault schemes, persons wrongfully injured in motor vehicle accidents may have a choice of either claiming benefits under the relevant statutory motor vehicle compensation scheme or suing for damages at common law. For example, in the *Transport Accident Act 1986* (Vic) s 93(4)(b), 'serious injury' is defined as an impairment of 30 % or more, which gives the claimant a right to sue for damages at common law.

[1] Mendelson D. Devaluation of a constitutional guarantee: the history of Section 51(xxiiiA) of the Commonwealth Constitution. (1999) 23 *Melbourne University Law Review* 308. For a general introduction to Australian legal history, the reader is referred to Castles, A.C., *An Australian Legal History*, (Sydney, 1982).

[2] *Transport Accident Act 1986* (Vic): benefits in respect of loss of earnings and medical and associated expenses are provided, regardless of fault, to all persons injured in 'transport accidents', defined in s 3(1) as incidents 'directly caused by the driving of' a motor car or motor vehicle, railway train or tram. *Transport Accident Act 1986* (Vic) s 93(17) prescribes that to sue for damages at common law, the claimants have to be assessed as having suffered 'serious injury'—a disability of 30 percent or greater (serious long-term impairment or loss of a body function, or permanent serious disfigurement, or severe long-term mental or severe long-term behavioural disturbance or disorder or loss of a foetus).

[3] *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas): the no-fault compensation scheme provides for scheduled benefits payable in cases where a Tasmanian resident dies or suffers bodily injury as a result of an accident occurring in Tasmania or involving a vehicle registered in Tasmania. The maximum total sum payable for medical and disability (loss of income and the inability to perform housekeeping duties) benefits for persons injured in a motor accident is $400,000 (additional benefits are accessible on the basis of special need).

[4] The *Motor Accidents (Compensation) Act 1979* (NT) provides a no-fault accident compensation scheme, but abrogates common law damages (s 5). The scheme covers everyone injured or killed in a motor vehicle accident in the territory, irrespective of where the motor vehicle is registered (s 6).

[5] *Motor Accidents Compensation Act 1999* (NSW) s 7A provides that road users can claim for a blameless motor accident: i.e. 'a motor accident not caused by the fault of the owner or driver of any motor vehicle involved in the accident in the use or operation of the vehicle and not caused by the fault of any other person'. Excluded from recovery of damages are drivers who by an act or

25.2 Damages for Personal Injury Under Australian Law of Torts

In August 2001, the second largest Australian insurance group, HIH, collapsed. The collapse affected some 30,000 policyholders ranging from home and small-business owners to public authorities and such professionals as medical practitioners, lawyers, engineers, etc. At the end of 2001, three major medical insurance companies (United Medical Protection Ltd, Australasian Medical Insurance Ltd and MDU Australia Insurance Co Pty Ltd) went into provisional liquidation blaming record damages awarded to plaintiffs suing in for medical malpractice [1]. The causes of the 2001 insurance crisis were multifactorial, including a dramatic increase in personal injury litigation payouts over the final two decades of the twentieth century [2].

During September 2002 a special panel, chaired by Hon Justice David Ipp, and appointed by Commonwealth, State and Territory ministers, completed and published the report titled *Review of the Law of Negligence Report* and known as the *Ipp Report* [3]. It recommended partial codification of modified law of negligence and the law of damages that each jurisdiction would enact as a single, nearly identical statute. This did not happen. Instead, during 2002–2003 each parliament enacted its own statutory code of tortious liability based on, but not always replicating, the *Ipp Report*'s model statutory provisions. The new statutory principles are applicable to any claim for damages for personal injury or death resulting from negligence, regardless of whether the claim is brought in tort, contract and equity or under a statute or any other cause of action.

The main thrust of the post-Ipp reforms was to restrict tort liability for personal injuries by introducing statutory thresholds that claimants have to meet before they can obtain damages for noneconomic loss. It should be noted, however, that in some jurisdictions motor vehicle accident compensation schemes incorporated thresholds to claims for benefits prior to the Ipp inquiry.

There are four different statutory models in Australia for determining whether the claimant is entitled to sue for noneconomic loss at common law:

(1) Under the *Competition and Consumer Act 2010* (Cth) ss 87P–87S and the *Civil Liability Act 2002* (NSW) s 16(1), 'the severity of the non-economic loss ...

omission caused motor accident in which they were injured or killed even if (a) the act or omission did not constitute fault by the driver in the use or operation of the vehicle (e.g. the vehicle's brakes failed), (b) the act or omission was involuntary (e.g. heart attack), (c) the act or omission was not the sole or primary cause of the death or injury or (d) the act or omission would have caused the death or injury but for the occurrence of a supervening act or omission of another person or some other supervening event (s 7E). Also, under *Motor Accidents Compensation Act 1999* (NSW) s 7J: children under 16 years of age, who at the time of the accident are residents of NSW, can make a claim for the children's special benefit (hospital, medical, rehabilitation, pharmacy, respite care and attendant care expenses and in the case of death funeral or cremation expenses). However, under s 7K of the Act, special entitlement is not available for a child injured or killed while, or following, engaging in conduct that constitutes an offence punishable by 6 months or more in prison.

[must be] at least 15 per cent of a most extreme case'. A judge's assessment of whether a case is 'a most extreme case' involves:

> Questions of fact and degree and matters of opinion, impression, speculation and estimation, calling for the exercise of common sense and judgement (*Dell v Dalton* (1991) 23 NSWLR 528 at 533–534)

Statutory table in *Civil Liability Act 2002* (NSW) s 16(3), based on the table contained in s 79A of the *Motor Accidents Act 1988* (NSW), sets out percentages of loss relative to a most extreme case and the corresponding statutory percentage of the maximum award. The amount payable is determined by multiplying the maximum amount that may be awarded in a most extreme case by the percentage set out in the table [4].

(2) South Australia's *Civil Liability Act 1936* s 52(1) specifies that to be compensable the injury need not be permanent; however, damages may only be awarded for noneconomic loss if: '(a) the injured person's ability to lead a normal life was significantly impaired by the injury for a period of at least 7 days; or (b) medical expenses of at least the prescribed minimum have been reasonably incurred in connection with the injury.' Once this threshold is reached, the court has to assess (under *Civil Liability Act 1936* (SA), s 52(2)):

   (a) Whether the claimant has established, on the balance of probabilities, that his or her injury resulted in compensable noneconomic loss on the grounds of pain and suffering, loss of amenities of life, loss of expectation of life and/or disfigurement.
   (b) The level of severity, which might be significant, moderate or low.
   (c) Then allocate the value of the claimant's injury by comparing it 'with the most serious and the least serious non-economic loss which anyone could suffer'—on a value scale of 0–60.

In Queensland, under the *Civil Liability Act 2003* (Qld), ss 61 and 62 provide for a similar process, though scale is from 0 to 100. Provisions in both jurisdictions (Queensland and South Australia) assume that the gravest conceivable kind of injury would attract the highest value. Monetary damages for noneconomic loss are calculated by application of a statutory mathematical formula.

(3) In Victoria the *Wrongs Act 1958*, ss 28LB, 28LE and 28LF, and in the Northern Territory the *Personal Injuries (Liabilities and Damages) Act 2003*, Division 4, ss 22–28 require claimants to establish a minimum statutory level of permanent impairment defined as 'significant injury'. In the *Wrongs Act 1958* s 28LB, '*threshold level*' is defined as:

   (a) 'in the case of injury (other than psychiatric injury), impairment of more than 5 per cent'
   (b) 'in the case of psychiatric injury, impairment of more than 10 per cent' of the 'whole person resulting from the injury' as assessed by an approved medical practitioner or a medical panel (*Wrongs Act 1958* (Vic), s 28LF(1)(a) and s 28LF(2))

Secondary psychiatric or psychological impairment cannot be included in the assessment of degree of impairment:

> 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. (*Wrongs Act 1958* (Vic), s 28LJ)

There is a provision for binaural loss of hearing of more than 5 % (*Wrongs Act 1958* (Vic), s 28LK). The loss of a foetus, or loss of a breast, and 'psychological or psychiatric injury arising from the loss of a child due to an injury to the mother or the foetus or the child before', during or immediately after the birth, come within the definition of 'serious injury'.

(4) The Tasmanian *Civil Liability Act 2002* s 27(4) and the Western Australian *Civil Liability Act 2002* s 9 and s 10 set minimum indexed monetary thresholds of $5000 or $15,500, respectively, for eligibility to claim noneconomic loss. Western Australia has a statutory formula for small claims' payouts. Under the Tasmanian scheme: (1) If the amount of noneconomic loss is assessed to be not more than $5000 (gazetted for period between 1 July 2013 and 30 June 2014), no damages are to be awarded for noneconomic loss. (2) If the amount of noneconomic loss is assessed to be more than $5000 but not more than $25,000 (gazetted for period between 1 July 2013 and 30 June 2014), damages awarded for noneconomic loss are calculated as follows: amount awarded $= 1.25 \times$ (amount assessed minus $5000). (3) If the amount of noneconomic loss is assessed to be more than $25,000, damages awarded for noneconomic loss are an amount equal to the amount assessed.

The Australian Capital Territory does not impose monetary thresholds on damages; however, the *Civil Law (Wrongs) Act 2002* (A.C.T.) s 181 imposes a statutory maximum on amounts for legal services payable in cases where damages recovered on a claim for personal injury are $50,000 or less.

The relevant legislation and regulations in the various States and Territories that provide for compensation and determination of the quantum of damages for personal injuries sustained in traffic accidents and injuries negligently caused by another person (as in the case of medical malpractice and other torts) are:

- New South Wales
  - Motor Accidents Compensation Act 1999
  - Civil Liability Act 2002
- Queensland
  - Motor Accident Insurance Act 1994
  - Motor Accident Insurance Regulation 2004
  - Civil Liability Act 2003
  - Civil Liability Regulation 2014
- South Australia
  - Motor Accident Commission Act 1992

  - Civil Liability Act 1936
  - Civil Liability Regulations 2013
  - Civil Liability Variation Regulations 2014
- Tasmania
  - Motor Accidents (Liabilities and Compensation) Act 1973
  - Motor Accidents (Liabilities and Compensation) Regulations 2010
  - Civil Liability Act 2002
- Victoria
  - Transport Accident Act 1986
  - Wrongs Act 1958
- Western Australia
  - Motor Vehicle (Third Party Insurance) Act 1943
  - Civil Liability Act 2002
- Australian Capital Territory
  - Motor Vehicle (Third Party Insurance) Regulations
  - Civil Law (Wrongs) Act 2002
- Northern Territory
  - Motor Accidents (Compensation) Act 1979
  - Motor Accidents (Compensation) Regulations
  - Personal Injuries (Liabilities and Damages Act) 2003

In the assessment of damages for personal injury, one of the questions asked of expert medical witnesses is to quantify the extent of permanent impairment. The assessment of permanent impairment is particularly difficult where the injury is not apparent to the judge, jury or tribunal, for example, in cases of chronic pain or mental illness. As a result, the evaluation of impairment and disability has been an ongoing problem in the psychiatric assessment of plaintiffs in personal injury claims and of applicants for pension and other social security benefits [5].

According to Colledge and Krohm, writing in the journal of the International Association of Industrial Accident Boards and Commissions, 'even primitive workers' compensation schemes had intuitive systems for cash awards for permanent injury, with amputation of extremities being the easiest cases to assess and assign specific benefits' [6]. They wrote that 'Caribbean pirates in the early colonial era had developed written rules for compensating loss of hands, arms, eyes, etc in the course of their nefarious 'trade''.

Lerner referred to 'medically determinable impairment' leading to cessation of work as an important factor in the determination of eligibility for disability benefits. Lerner also noted that 'substantial loss of functional capacity' had to be present, but no specific method of rating psychiatric impairment was given in his article [7].

Many medical writers on the subject of impairment and disability have confused these concepts. Because of this, the concepts of impairment and disability are frequently misused, and the two terms used interchangeably. It is, therefore, important, in discussing the evaluation of impairment and disability, to provide clear definitions of what is meant by these terms.

Impairment, according to the *International Classification of Impairments, Disabilities, and Handicaps* (ICIDH) published by the World Health Organization (WHO), denotes 'any loss or abnormality of psychological, physiological, or anatomical structure or function', whereas a disability is 'any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being' [8].

Additionally, handicap is defined as 'a disadvantage for a given individual, resulting from an impairment or a disability, that limits or prevents the fulfilment of a role that is normal (depending on age, sex, and social and cultural factors) for that individual'.

The ICIDH, in an explanatory note, states that the term 'impairment' is 'more inclusive than disorder in that it covers losses—e.g., the loss of a leg is an impairment, but not a disorder'. It is further noted that

> Impairment is characterized by losses or abnormalities that may be temporary or permanent, and that include the existence of occurrence of an anomaly, defect, or loss in a limb, organ, tissue, or other structure of the body, including the systems of mental function. Impairment represents **exteriorization** of a pathological state, and in principle it reflects disturbances at the level of the organ. (emphasis added)

The ICIDH thus makes it clear, both in the definition of impairment and in describing its characteristics, that impairment is the objective, externalised loss or abnormality of structure or function. Impairment is what can be demonstrated, assessed, evaluated and measured by an external observer, appropriately trained in distinguishing the normal from the pathological in relation to the specific aspect of structure or function that is the subject of the evaluation.

Impairment is therefore not a subjective complaint or symptom; it is not the complaint of inability to move a limb where physical examination reveals a near-normal range of joint movement, and it is not a statement that the person feels 'depressed' where the mental status examination reveals no manifestations of lowered affect, anhedonia, depressive thought content or psychomotor disturbance.

Equally, impairment has to be differentiated from both disability and handicap, both of which might (but not always) be the consequences of an objectively demonstrable impairment. To reiterate, disability is a loss or restriction of the ability to perform an activity, whereas an impairment is an objectively demonstrable loss or abnormality of (psychological, physiological or anatomical) structure or function. Such an impairment must be capable of being described in terms of the specific normal basic function that has been lost or rendered abnormal.

In physical medicine, impairments are often assessed in terms of restrictions of the normal range of joint movements, for example, due to pain, which can be measured. In psychiatry, impairments are abnormalities of the normal mental

functions; these are commonly termed intelligence, thinking, perception, judgement, mood (or affect) and behaviour. Impairment of these basic mental functions can give rise to a range of disabilities, that is, inability to perform certain activities in a normal manner. However, such disability must be differentiated from impairment of the basic aspects of mental functioning listed above.

Lasky (1983) specifically noted that, in the final analysis, it is the responsibility of the judge—or of the administrative law tribunal—to make the definitive determination of the percentage of disability, whereas the medical expert witness can only properly determine the extent of the impairment [9].

Thus, while the rating of impairment—as defined in the ICIDH—is the task of the medical practitioner undertaking the assessment, the determination of disability involves legal and administrative factors in accordance with the relevant legislation. This is an important point to emphasise, as frequently conclusory opinions concerning work disability are inappropriately given by the medical practitioner as part of the evaluation and report [10].

Nevertheless, once the rating of impairment has been made, medical practitioners with specialised experience in occupational or rehabilitation medicine might be able to give an opinion as to the specific work disability resulting from the particular impairment in relation to the individual's work demands. However, rating of work disability requires knowledge of the particular work environment and work activities required of the individual and, for this reason, should only be undertaken by appropriately qualified and experienced practitioners.

In Australian jurisprudence, the distinction between subjective symptoms and objectively assessed impairment was emphasised in the judgement of Neilson J, in *Moran v Thomson Adsett & Partners Pty Ltd* [1996] 13 NSWCCR 484 at 491), who held that an asymptomatic constitutional back condition may be a contributory factor causing permanent impairment. This decision also, in effect, established that an impairment may be present in the absence of a diagnosable symptomatic disorder.

This chapter will review the methods specified in Australian legislation for the assessment of physical and psychiatric impairments and will also discuss provisions that specify the qualifications of the medicolegal experts whose independent medical examinations and impairment ratings are accepted by courts in the various jurisdictions that award compensatory damages for injuries caused by traffic accidents and/or other torts.

25.3 The Medicolegal Expert's Qualifications

As noted above, the various Australian jurisdictions that provide compensatory damages for those injured in motor vehicle accidents or as the result of tortious acts have differing statutory mechanisms for the assessment of impairment and determination of damages.

Similarly, there are differing provisions in relation to the qualifications of medicolegal experts whose opinions are admissible in legal proceedings to obtain damages. The considerations and qualifications as set out in the relevant legislation and case law are described in this section.

Statutory definitions of experts and expert witnesses tend to be broad. For example, according to the Uniform Civil Procedure Rules 2005 (NSW) r 31.16, an 'expert', in relation to any issue, means 'a person who has such knowledge or experience of, or in connection with, that issue, or issues of the character of that issue, that his or her opinion on that issue would be admissible in evidence'.

The 'expert witness' is defined as 'an expert engaged or appointed for the purpose of:

(a) providing an expert's report for use as evidence in proceedings or proposed proceedings, or
(b) giving opinion evidence in proceedings or proposed proceedings'.

The *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 3 defines 'expert witness' as 'a person who has specialised knowledge based on the person's training, study or experience'.

25.3.1 New South Wales

Motor Accidents Compensation Act 1999 (NSW)

Section 3.4 of the *Act* deals with 'Medical Assessment'. It provides that the Motor Accidents Authority, established under the *Act*, which is the statutory body responsible for administration of the *Act*, 'is to establish in association with its operations a unit, to be known as the Motor Accidents Medical Assessment Service (s 57A(i))' and that 'The Service is to consist of medical assessors and such officers of the Authority as the Authority determines' (s 57A(2)).

Section 58 provides that the Service will determine disagreements 'between a claimant and an insurer' concerning, inter alia, 'whether the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident is greater than 10 %'.

Section 59, which deals with the appointment of medical assessors, states that (1) 'The Authority is required to appoint medical practitioners and other suitably qualified persons to be medical assessors for the purposes of this Part' and that (2) 'The terms of any such appointment may restrict a medical assessor to disputes of a specified kind'.

While the legislation does not expressly require the medical practitioners to have any particular training or specified qualifications, in practice appointed medical assessors will have completed a training course in the use of the relevant chapter of the *Permanent Impairment Guidelines* published by the Motor Accidents Authority, and the terms of the appointment will 'restrict' the medical assessor to consider disputes concerning permanent impairment concerning the body part or system

relevant to the assessors' specialist qualifications and the training in the application of the *Permanent Impairment Guidelines*.

The power of the Motor Accidents Authority to allocate medical assessors to hear and determine disputes is not subject to judicial review (see *Goodman v The Motor Accidents Authority of New South Wales & Anor* [2009] NSWSC 875).

Civil Liability Act 2002 (NSW)

Compensation for noneconomic loss or general damages is provided under s 16 of the *Act*. Noneconomic loss is defined to mean one or more of (a) pain and suffering, (b) loss of amenities of life, (c) loss of expectation of life and (d) disfigurement.

Damages for noneconomic loss may not be awarded unless the severity of the noneconomic loss is at least 15 % of a most extreme case; the maximum that can be awarded (for a most extreme case) is AU$572,200 (this figure applies from 1 October 2014 and will be reassessed after 12 months). It should be noted, however, that as specified in the table set out in s 16 of the *Act*, the amount of damages is not directly proportional to that of the 'most extreme case' but is scaled so that, for example, an assessment below 33 % of the 'most extreme case' leads to an award lower than the corresponding percentage of the 'most extreme case'. The table, showing the amounts applicable to ratings of noneconomic loss from 15 to 33 %, is set out below.

What constitutes 'a most extreme case' is difficult to determine, and it has been held (*Owners-Strata Plan 156 v Gray* [2004] NSWCA 304) that 'a most extreme case' might include 'cases of quadriplegia, some serious cases of paraplegia, cases of serious brain damage and perhaps some cases of extremely serious scarring and disfigurement may fall into this category'.

It is of particular relevance that in this case the New South Wales Court of Appeal held that the determination of what constitutes '15 % of the most extreme case' involved a legal and not a medical assessment; that is, it was not the same as an assessment of permanent impairment.

Part 3 of the *Civil Liability Act 2002* deals with damages for 'mental harm'. It defines 'mental harm' as 'impairment of a person's mental condition' and distinguishes 'consequential mental harm' ('mental harm that is a consequence of a personal injury of any other kind') from 'pure mental harm' ("mental harm other than consequential mental harm").

Section 29 of the *Act* places some limits on recovery of damages where the injury is solely related to 'mental or nervous shock'. Section 31 of the *Act* provides that there is 'no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness'. The *Act* also stipulates that a defendant will only owe a duty of care to a plaintiff in regards to psychiatric illness if the defendant 'ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken' (s 32).

In *Hollier v Sutcliffe* [2010] NSWSC 279, the court held that the determination of what constitutes 'normal fortitude' is one that rests with the court as a

determination of fact and that it was therefore not a 'medical question' to be decided by expert opinion.

Unlike the *Motor Accidents Compensation Act 1999*, the *Civil Liability Act 2002* does not provide for permanent psychiatric impairment assessment in relation to plaintiffs who have a compensable 'recognised psychiatric illness', and thus the damages for noneconomic loss to which they might be entitled are to be determined under the general provisions of s 16.

25.3.2 Queensland

Motor Accident Insurance Act 1994 (Qld)

Motor Accident Insurance Regulation 2004 (Qld)

Section 45A of the *Act* states that the Motor Accident Insurance Commission (MAIC), established pursuant to s 6 of the Act, '(a) may establish a panel of experts for reporting on the medical condition of claimants and their prospects of rehabilitation (the 'official panel of medical experts'); and (b) may revise the membership of the panel from time to time by adding to, or removing from, the names of the experts who constitute the panel'.

This section further provides that in deciding on the composition of the panel, the Commission '(a) must consult with the professional bodies with which consultation is required under a regulation; and (b) may only include an expert on the panel if—(i) the expert's inclusion is endorsed by the relevant professional bodies; or (ii) the commission is satisfied there is good reason for inclusion of the expert on the panel despite the absence of endorsement by the relevant professional bodies'.

Section 28 of the *Motor Accident Insurance Regulation 2004* (as at 16 January 2014) states that pursuant to section 45A(2)(a) the prescribed professional bodies are APLA Limited, Insurance Council of Australia, and Queensland Law Society; thus, no professional medical colleges or organisations are required to be consulted as part of establishing the 'official panel of medical experts'. 'APLA' is the abbreviation formerly used by the Australian Plaintiff Lawyers Association, which was established in 1994, and in 2004 'rebranded' itself as the Australian Lawyers Alliance.

The *Motor Accident Insurance Act 1994* also provides (s 46) that an insurer and a claimant may jointly arrange for an expert report but that 'neither an insurer nor a claimant is under any obligation to agree to a proposal to obtain a report under this section'.

Pursuant to s 46A, if the insurer wants to obtain an expert report on the claimant's medical condition or prospects of rehabilitation but fails to obtain the claimant's agreement, the claimant 'must comply with a request by the insurer to undergo, at the insurer's expense—(a) a medical examination by a doctor to be selected by the claimant from a panel of at least 3 doctors nominated in the request; or (b) an assessment of cognitive, functional or vocational capacity by an expert to be selected by the claimant from a panel of at least 3 experts with appropriate

qualifications and experience nominated by the insurer in the request' unless such an obligatory examination 'is unreasonable or unnecessarily repetitious' (s 46A(3)).

The legislation does not provide any further guidance as to the method of appointment to the 'official panel of medical experts' and does not contain any specific provisions in relation to the professional qualifications of such 'experts'.

Civil Liability Act 2003 (Qld)

Civil Liability Regulation 2014 (Qld)

Pursuant to the *Civil Liability Act 2003* (Qld) and the *Civil Liability Regulation 2014*, general damages arising from wrongfully inflicted injuries are calculated on the basis of Injury Scale Values (ISV). Schedule 4 of the *Civil Liability Regulation* sets out the Injury Scale Values applicable to a large range of physical injuries, arranged by body systems, as well as mental disorders.

Schedule 3 of the *Regulation* sets out 'Matters to which Court may or must have regard in the application of Schedule 4'. The principal *Act* and the *Regulation* do not provide for a 'medical expert' to determine the applicable Injury Scale Values other than in relation to mental disorders. The *Regulation* specifies, in schedule 5, that the PIRS (Psychiatric Impairment Rating Scale—vide infra) is to be used to determine the extent of psychiatric impairment.

The earlier *Civil Liability Regulation 2003* included a Note, under s 11, stating that 'It is the function of a court, and not a medical report, to assess an ISV for an injury'.

The *Civil Liability Regulation 2014* states, in Notes at s 11, that 'It is not a function of a doctor to identify—(a) the item in schedule 4 to which an injury belongs; or (b) the appropriate ISV for an injury'.

Nevertheless, with respect to psychiatric impairment rating using the PIRS, the *Regulation*, in schedule 8 ('Dictionary'), states that a 'medical expert, for an assessment of a PIRS rating, means a person who—(a) is appropriately qualified to perform the assessment, including a psychologist, neuropsychologist or psychiatrist; and (b) has had appropriate training in the use of the PIRS'.

25.3.3 South Australia

Motor Accident Commission Act 1992 (SA)

The *Act* established the Motor Accident Commission 'to provide policies of compulsory third party insurance under Part 4 of the *Motor Vehicle Act 1959*' (s 14 (1)(a)) and, inter alia, 'to perform the functions of the nominal defendant while the Commission holds that office under Part 4 of the *Motor Vehicle Act 1959*' (s 14(1) (c)).

Claims for noneconomic loss arising from a motor vehicle accident may be made with respect of pain and suffering, loss of amenities of life, loss of expectation of life and/or disfigurement. No claim may be made unless the plaintiff can show that there had been significant impairment for at least 7 days or medical expenses had exceeded the prescribed minimum.

Compensation payable for noneconomic loss is assessed on a numerical scale (the Injury Scale Values or ISV) ranging from 0 to 100 points. Damages for noneconomic loss will only be made if the ISV for the injury exceeds ten.

The ISV is determined by 'an accredited health professional'; such medical assessments might be requested either by the insurer (Allianz), which administers the scheme on behalf of the Motor Accident Commission of South Australia, or by the plaintiff's lawyer.

Any claim for a psychological injury that does not develop from a physical injury ('pure mental harm') is assessed using the *Guides to the Evaluation of Psychiatric Impairment for Clinicians* (GEPIC; see below).

An accreditation scheme for Injury Scale Value assessments, pursuant to s 76 of the *Civil Liability Act 1936*, was established during 2014. An Accreditation Panel, appointed by the responsible minister (the State's Attorney General) and consisting of representatives from the Motor Accident Commission, The Law Society and Australian Medical Association, was appointed to establish the criteria for accreditation of health professionals who will be able to undertake ISV assessments or to perform psychiatric impairment assessments using the GEPIC.

Civil Liability Act 1936 (SA)
Civil Liability Regulations 2013 (SA)
Civil Liability Variation Regulations 2014 (SA)

The *Act* and *Regulations* establish an Accreditation Panel that determines:

- The criteria for accreditation of health professionals to undertake ISV or psychiatric impairment assessments
- The process of accreditation
- which health professionals meet the accreditation criteria for inclusion on the register of accredited health
- professionals
- Performance requirements and to review accredited health professionals
- The process by which accredited health professionals are removed from the register

As indicated above, the accredited health professionals pursuant to s 76(2) of the *Civil Liability Act 1936* (SA) will also be accredited under the *Motor Accident Commission Act 1992* (SA).

With respect to psychiatric impairment assessments using the GEPIC, the *Civil Liability Regulations 2013* provide (s 3) that

medical expert, in relation to an assessment of a GEPIC rating, means a person:

(a) Who is registered under the Health Practitioner Regulation National Law:

  (i) To practise in the medical profession
  (ii) Holding specialist registration as a psychiatrist

(b) Who has successfully completed a course of training in the use of the GEPIC under a scheme determined by the minister for the purposes of these regulations.

25.3.4 Tasmania

Motor Accidents (Liabilities and Compensation) Act 1973 (Tas)

Motor Accidents (Liabilities and Compensation) Regulations 2010 (Tas)

Pursuant to s 4 of the *Act*, the Motor Accident Insurance Board (MAIB) operates a combined common-law/no-fault motor accident scheme in Tasmania. As noted elsewhere in this chapter, this scheme provides medical and income benefits on a no-fault basis to persons injured in motor vehicle accidents while enabling access to common law.

The *Motor Accidents (Liabilities and Compensation) Regulations 2010* (Tas) quantify the benefits payable by the MAIB and specify conditions that may apply.

The total amount payable for medical and disability benefits is subject to a maximum sum ($400,000 for injuries sustained on or after 23 November 2005 or $500,000 from 1 August 2012 if the injured person was hospitalised continually for longer than 4 days commencing on the day of the accident).

The legislation and regulations under the *Act* do not provide for expert assessment of the degree of disability resulting from a motor vehicle accident.

If the person had been injured through the negligence of another, damages at common law can be sought pursuant to the *Civil Liability Act 2002* (Tas).

Civil Liability Act 2002 (Tas)

Section 27 of the *Act* sets out the 'Restrictions on damages for non-economic loss (general damages)'. Pursuant to s 27(1) 'If the amount of non-economic loss is assessed to be not more than Amount A, no damages are to be awarded for non-economic loss'. For the financial year ending on 30 June 2004, Amount A was $4000. The amount is calculated for each financial year based on a formula that takes into consideration the consumer price index (CPI) for Hobart, the capital city of Tasmania. For the period 1 July 2014 to 30 June 2015, the applicable Amount A is $5500.

Section 27(2) provides that 'If the amount of non-economic loss is assessed to be more than Amount A but not more than Amount B, damages awarded for non-economic loss are calculated as follows: amount awarded = 1.25 x (amount assessed minus Amount A)'. Section 27(4)(b) provided that 'Amount B is five times Amount A' ($27,500 for the period 1 July 2014 to 30 June 2015).

Section 27(3) provides that 'If the amount of non-economic loss is assessed to be more than Amount B, damages awarded for non-economic loss are an amount equal to the amount assessed'.

There is no provision for expert health practitioners to quantify the extent of physical or psychiatric impairment under the *Act*. Section 33, however, provides that 'There is no liability to pay damages for pure mental harm resulting from breach of duty unless the harm consists of a recognised psychiatric illness', and similarly s 35 provides that 'A court cannot make an award of damages for economic loss for consequential mental harm resulting from breach of duty unless the harm consists of a recognised psychiatric illness', and therefore in practice an

expert witness would be involved in the determination as to whether or not a diagnosable mental disorder is present.

25.3.5 Victoria

Transport Accident Act 1986 (Vic)

Sections 93(2) and 93(3) of the Act specify that to sue for damages at common law, the claimant has to be assessed as having suffered a 'serious injury', defined as an impairment of 30 % or greater when assessed in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th edition, for physical injuries sustained after 19 May 1998) or if he/she is accepted as having:

(a) Serious long-term impairment or loss of a body function
(b) Permanent serious disfigurement
(c) Severe long-term mental or severe long-term behavioural disturbance or disorder
(d) Loss of a foetus (Transport Accident Act 1986 (Vic) s 93(17)(d))

The *Act* provides that the assessment of psychiatric impairment be undertaken according to the GEPIC (see below).

Under the 'no-fault' provisions of the Act, impairment benefits are payable for an impairment greater than 10 % assessed under the AMA Guides. The maximum amount payable under this provision of the Act was $320,130 (for the 12-month period commencing 1 July 2013).

The impairment assessment can only be undertaken by a registered medical practitioner who has completed a course approved by the responsible minister (s 46A(2)(b)); at the time of writing, such courses are conducted by the Victorian branch of the Australian Medical Association. The course, as currently structured, provides administrative information on the assessment of impairment, as well as theoretical and practical training in assessing impairment in the area relevant to the medical practitioner's specialty.

However, by virtue of the Transport Accident Act 1986 (Vic), s 93(4)(b), even persons whose degree of impairment was assessed at less than 30 % may still bring proceedings for the recovery of damages at common law if either the Transport Accident Commission issues a certificate that it is satisfied that the injury is a serious injury or a court, on the application of the injured person, gives leave to bring the proceedings.

Wrongs Act 1958 (Vic)

Division 3 of the *Wrongs Act 1958* (Vic) deals with 'Assessment of impairment'. Section 28LH provides that 'The assessment of degree of impairment must be made by an approved medical practitioner'.

Section 28LB defines an 'approved medical practitioner' as a medical practitioner who 'has successfully completed' an approved course with reference to the

Accident Compensation Act 1985 (the *Act* that provides for the workers' compensation arrangements in Victoria).

For all practical purposes, an 'approved medical practitioner' under the *Wrongs Act 1958* is the same as an 'independent impairment assessor' under the *Transport Accident Act 1986* (Vic).

25.3.6 Western Australia

Motor Vehicle (Third Party Insurance) Act 1943 (WA)

Section 3C(2) of the Act provides that 'The amount of damages to be awarded for non-pecuniary loss is to be a proportion, determined according to the severity of the non-pecuniary loss, of the maximum amount that may be awarded'. Pursuant to s 3C of the Act, non-pecuniary loss means '(a) pain and suffering; (b) loss of amenities of life; (c) loss of enjoyment of life; and (d) bodily or mental harm'.

Section 3C(3) provides that 'the maximum amount of damages that may be awarded for non-pecuniary loss . . . may be awarded only in a most extreme case'. As of 1 July 2014, the maximum amount that can be awarded is $390,000. No damages are awarded if the threshold of $19,500 (as of 1 July 2014) is not met; the legislation provides that from claims awarded below $59,000, the threshold amount is deducted from the entitlement; there is a sliding scale of deductions from awards between $59,000 and $78,500, and there is no deduction from amounts greater than $78,500 (all amounts stated as of 1 July 2014).

The quantum of damages is decided by the Insurance Commission of Western Australia; there is no provision for assessment by a medical expert. In case of a dispute, the injured person is entitled to commence legal proceedings against the commission.

Civil Liability Act 2002 (WA)

The *Act* provides that the ward for general damages (noneconomic loss) must exceed a specified 'threshold' amount before payment can be made. At the time the legislation was enacted that threshold was $12,000; at the time of writing (January 2015), the threshold is $19,500. Plaintiffs whose damages for noneconomic loss fall between $19,500 and $59,000 will receive a percentage calculated according to a statutory formula (s 9(4)).

The legislation does not prescribe any method for the determination of general damages, and the task is undertaken by the court. There is thus no role for a medical expert in determining damages for noneconomic loss pursuant to the *Civil Liability Act 2002* in Western Australia.

25.3.7 Australian Capital Territory

Motor Vehicle (Third Party Insurance) Regulations (ACT)

Civil Law (Wrongs) Act 2002 (ACT)

In the Australian Capital Territory, common law applies to general damages awarded to those injured in motor vehicle accidents as well as those suing for the tortious infliction of personal injury. There is no threshold, and the quantum of damages is decided by the court.

In this jurisdiction there is no statutory provision for medical experts to quantify the extent of impairment suffered by the plaintiff whatever the mechanism of injury.

25.3.8 Northern Territory

Motor Accidents (Compensation) Act 1979 (NT)

Motor Accidents (Compensation) Regulations (NT)

The *Act* established a no-fault accident compensation scheme and pursuant to s 5 (1) abrogated common-law damages. The scheme covers everyone injured or killed in a motor vehicle accident in the territory, irrespective of where the motor vehicle is registered (s 6). The scheme is administered by the Territory Insurance Office (TIO).

Permanent impairment benefits are available under the *Act* provided that the injuries sustained in the motor vehicle accident are permanent and stable, and there is a whole person impairment (s 17(2)). The TIO arranges for the extent of impairment to be assessed by an independent medical specialist in the appropriate field, and the legislation stipulates that the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment* be used.

Regulation 4 of the *Motor Accidents (Compensation) Regulations* (NT) (which commenced on 1 July 2007) provides that, pursuant to s 4C(2)(a) of the *Act*, the 6th edition of the AMA *Guides* is prescribed.

Section 4C(2)(b) of the Act states that the determination as to whether an impairment or combination of impairments is permanent and, if so, the extent of the permanent impairment is to be made 'on the advice of a medical practitioner', but it does not specify the specialist or other qualifications that should be held by that medical practitioner.

Personal Injuries (Liabilities and Damages Act) 2003 (NT)

Section 26(1) of the *Act* provides that 'A court, in determining the degree of permanent impairment suffered by an injured person, must do so on the basis of evidence adduced under this section'. Under s 26(3) 'Evidence of permanent impairment is to be given only by a medical practitioner who has assessed the degree of permanent impairment in accordance with the prescribed guides and any applicable regulation'.

Section 26(4) states that "The Regulations may provide for any matters in relation to the assessment of permanent impairment suffered by an injured person, including the following: (a) the content of the prescribed guides, including by modification of the American Medical Association Guides to the Evaluation of

Permanent Impairment; ((b) procedures relating to the assessment of permanent impairment; (c) the qualifications of medical practitioners who may give evidence under this section; (d) the costs in connection with the assessment of impairment".

Personal Injuries (Liabilities and Damages) Regulations *(NT) (accessed 26 January 2015) do not specify which edition of the AMA Guides is to be used pursuant to the* Act*, and they are also silent with respect to any specific 'qualifications of medical practitioners who may give evidence' under s 26(4)(c) of the principal* Act.

25.4 Evaluation Criteria

As discussed above, each of the six Australian States and the two Territories has legislation to provide benefits to those injured in motor vehicle accidents as well as those injured by the tortious acts of other persons. Under some legislation lump sum benefits are provided for persons who have suffered permanent impairment, and the rating method is specified either by statute or regulation made under the relevant act.

This section will describe the permanent impairment rating methods used to quantify the quantum of damages that are prescribed by legislation.

25.4.1 New South Wales

Motor Accidents Compensation Act 1999 (NSW)

Among the objects of this *Act* is 'full compensation for those with severe injuries involving ongoing impairment and disabilities' (s 5). Section 44 provides for the issuing of guidelines (MAA Medical *Guidelines*) with respect to 'the assessment of the degree of permanent impairment of an injured person as a result of an injury caused by a motor accident' (s 44(1)(c)). The *Act* further provides that '[N]o damages may be awarded for non-economic loss unless the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident is greater than 10 per cent' (s131).

Section 133 of the *Act* specifies that '[T]he assessment of the degree of permanent impairment is to be made in accordance with: (a) MAA Medical Guidelines issued for that purpose, or (b) if there are no such guidelines in force the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition'.

With respect to the assessment of permanent impairment, the Motor Accidents Authority has issued Permanent Impairment Guidelines (http://www.maa.nsw.gov.au/about-us/guidelines/permanent-impairment) 'developed for the purpose of assessing the degree of permanent impairment arising from the injury caused by a

motor accident, in accordance with section 133(2)(a) of the New South Wales Motor Accidents Compensation Act 1999'.

While the MAA Guidelines are based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th edition, 3rd printing, 1995), the introductory chapter notes that there are 'some very significant departures from that document' and that

> These MAA Guidelines are definitive with regard to the matters they address. Where they are silent on an issue, the AMA 4 Guides should be followed. In particular, Chapters 1 and 2 of the AMA 4 Guides should be read carefully in conjunction with this Chapter of the MAA Guidelines. Some of the examples in AMA 4 are not valid for the assessment of impairment under the Motor Accidents Compensation Act 1999. It may be helpful for assessors to mark their working copy of the AMA 4 Guides with the changes required by these MAA Guidelines (emphasis in original).

The MAA Guidelines provide detailed instructions for the assessment of permanent impairment in relation to the following:

- Upper extremity impairment
- Lower extremity impairment
- Spinal impairment
- Nervous system impairment
- Ear, nose and throat and related structure impairment
- Mental and behavioural disorder impairment
- The respiratory system
- The cardiovascular system
- The haematopoietic system
- The visual system
- The digestive system
- The urinary and reproductive systems
- The endocrine system
- The skin

A detailed discussion of each section is beyond the scope of this chapter. However, because the MAA Guidelines require that impairment due to 'Mental and behavioural disorders' be assessed using a method that had been developed in New South Wales and therefore is likely to be unfamiliar to readers of this book, that method (PIRS, which has been referred to previously) will be described in detail.

The Motor Accidents Authority of NSW (MAA) had initially considered adopting, for the purposes of the Motor Accidents Compensation Act 1999 (NSW), the *Clinical Guidelines to the Rating of Psychiatric Impairment* prepared by the Medical Panel (Psychiatry) in Victoria (see below). These *Clinical Guidelines*, however, were apparently considered to be too generous to prospective claimants. Following initial contacts with the authors of the *Clinical Guidelines* in use in Victoria, the MAA established a Psychiatric Impairment Reference Group, who developed guidelines that have been published as Chap. 7, 'titled Mental and Behavioural Disorders Impairment', of the MAA Impairment Assessment

Guidelines (MAA *Guidelines*). This chapter sets out a Psychiatric Impairment Rating Scale (PIRS).

As stated in subsection 5(1)(e) of the *act*, the aims of the legislation are 'to keep premiums affordable, in particular, by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injuries'. Subsection 5(2)(b) of the *Act* states 'that the law (both the enacted law and the common law) relating to the assessment of damages in claims made under this *Act* should be interpreted and applied in a way that acknowledges the clear legislative intention to restrict non-economic loss compensation in cases of minor injury'. In pursuit of these economic imperatives, the *Act* provides that no damages may be awarded for noneconomic loss unless the degree of permanent impairment is greater than 10 %.

Although titled 'Psychiatric Impairment Rating', Table 7.1 sets out six 'areas of function' to be rated, such as 'self care and personal hygiene'; 'social and recreational activities'; 'travel'; 'social functioning'; 'concentration, persistence and pace' and 'adaptation'. All of these have been taken directly from the relevant chapter of the 4th edition of the AMA *Guides*; the first three items are included within the 'activities of daily living' head of the *Guides*.

Even a cursory glance at the definitions of impairment and disability given above will make it clear that what these 'guidelines' assess is disability and not impairment. Indeed, the authors of these guidelines state '[O]ne of the ways to determine whether psychiatric impairment reaches the 10 % threshold is to examine the level of disability produced by a 10 % impairment caused by physical injuries... The compatibility between psychiatric and physical disability [sic] will minimize discrimination between persons suffering psychiatric injuries and person [sic] suffering physical injuries'.

These 'guidelines' thus rate disability and, by attempting to apply a backward leap from the disability to extrapolate what degree of impairment may have caused it, offer a percentage rating of 'impairment'. The 'guidelines' do not, however, at any stage evaluate 'impairment' in the sense in which that concept is defined by the relevant WHO publication quoted in the introduction to this chapter.

The PIRS, as published within the MAA *Guidelines*, provides five 'classes' of impairment for each of the six aspects of disability. Class 1 corresponds to either 'no deficit, or minor deficit' in the range of 0–3 %; for the other classes the corresponding percentages are as follows: Class 2 'mild impairment' 4–10 %, Class 3 'moderate impairment' 11–30 %, Class 4 'severe impairment' 31–60 % and Class 5 'totally impaired' >60 %.

The whole person psychiatric impairment is to be calculated using the median method. No allowance is made for a skewed distribution of scores, as provided for in the *Clinical Guidelines* in use in Victoria.

Other comments in Chap. 7 of the MAA Impairment Assessment *Guidelines* indicate that the 'mental and behavioural disorders impairment' rating was designed with the specific 10 % threshold in mind; the authors state explicitly that '... the threshold defined by the Act ... must be clarified. The terms 'severe injuries' and 'relatively minor injuries', contained in the Act are of some guidance'. As a result, these 'guidelines' were designed so that mild psychiatric impairment,

which could attract an impairment rating of up to 20 % south of the Murray, will at most rate at 10 % in NSW.

A further hurdle for prospective claimants assessed using the PIRS is that 'the impairment must be attributable to a recognised psychiatric condition'. There is no such requirement for the presence of a specific diagnosable mental disorder in any of the scales that assess true psychiatric impairment, because it is recognised that individual aspects of mental functioning may be impaired in the absence of a diagnosable psychiatric illness.

In *Jones Bros Bus Co Pty Ltd v Baker* (1992) 8 NSWCCR 30, the court considered the meaning of note (a) at the end of the Table, which states "[W]here a range of percentages is provided by this Table, the maximum percentage is payable only in a most extreme case and the percentage payable in any other case shall be reasonably proportionate to that maximum percentage having regard to the severity of the matter. The amount payable in any particular case shall, in default of agreement, be determined in accordance with this Act by the Compensation Court".

A subsequent decision by the Court of Appeal, in *Langdon v New South Wales* (1996) 13 NSWCCR 552, held that "[T]he legislative purpose of including 'brain damage' injuries in the Table was to extend the right to lump sum compensation to: (a) those who, by reason of consequential impairment to their higher intellectual function, while still able to engage in some form of work, were no longer able to work in their prior employment; and (b) so as to enable those who had lost, either in whole or in part, some faculty or the efficient use of some bodily part which was controlled by the brain, and the loss of which faculty, or loss of the efficient use of which bodily part was not already provided for in the new Table".

The definition of 'permanent brain damage' was considered in *Skea v Legg & Another* (2000) 19 NSWCCR 644. With respect to 'permanency', authority was cited for the view that "permanent' is a relative term and is not synonymous with 'everlasting". The trial judge then adopted the view expressed by Woodward J. in *McDonald v Director-General of Social Security* (1984) FCR 345 that 'the true test of a permanent, as distinct from a temporary, incapacity is whether in the light of the available evidence, it is more likely than not that the incapacity will persist in the foreseeable future'.

In relation to the definition of 'brain damage', the trial judge, with respect, failed to differentiate between the manifestations of brain damage that might affect motor, sensory and/or cognitive functions (although there was reference to 'extensive testing' by a psychologist that 'did not indicate any pathologically severe disorders associated with intellect, memory or frontal lobe functions') and 'losses in mental functioning from . . . psychological injury'. Reference was made to *Federal Broom Co v Semlitch* (1964) 110 CLR 626; that case, however, while holding that 'losses or impairments that flow from psychological injury are compensable', clearly cannot be considered relevant to the determination of the meaning of the phrase 'permanent brain injury' introduced into statute many years later.

With the greatest respect to the trial judge, there is further confusion of what is meant by 'brain damage' in the comment in paragraph 456 of the decision, which reads '[T]he reality in this case is that both Dr Stening and Dr White have found

permanent brain damage, although they disagree considerably about whether or not it has an organic component and on the quantum of s 66 assessment'.

It is difficult to know what to make of the learned judge's conclusions 'that the applicant suffers from both organic and psychological permanent brain damage', that 'the applicant [has] both an organic and a psychological injury which have caused permanent brain damage' and that the plaintiff was 'a case involving predominantly psychological brain damage'. In the instant case, Walker J. found that 'Mr Skea's permanent brain damage represents 25 per cent of that extreme case'.

Civil Liability Act 2002 (NSW)

As discussed above, the Act does not specify that a specific impairment rating method be used to determine the damages payable to those injured by the tortious act of another person. Section 16(1) provides that 'No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15 % of a most extreme case'. That determination is made by the court.

The maximum amount of damages is prescribed by legislation and is adjusted annually; at the time of writing (January 2015), it is $572,000.

Section 16(3) states 'If the severity of the non-economic loss is equal to or greater than 15 % of a most extreme case, the damages for non-economic loss are to be determined' in accordance with the Table shown below (Table 25.1).

25.4.2 Queensland

Motor Accident Insurance Act 1994 (Qld)

Among the functions of the Motor Accident Insurance Commission, established under section 6 of the *Motor Accident Insurance Act 1994* (Qld), are to provide a compulsory third-party motor vehicle insurance system in Queensland and to supervise insurers under the statutory scheme. Under s 3, the objectives of the *Act* also include the encouragement of 'speedy resolution of personal injury claims resulting from motor vehicle accidents' and the promotion and encouragement 'as far as practicable, the rehabilitation of claimants who sustain personal injury because of motor vehicle accidents'.

To achieve these aims, s 45A states that the commission 'may establish a panel of experts for reporting on the medical condition of claimants and their prospects of rehabilitation (the 'official panel of medical experts')'. The *Act* also provides that an insurer and a claimant may jointly arrange for an expert report on the claimant's medical condition or prospects for rehabilitation (section 46). Section 46A provides that, in the absence of agreement between the parties, the claimant 'must comply with a request by the insurer to undergo, at the insurer's request' a medical examination by a doctor selected from a panel of at least three doctors nominated in the insurer's request unless 'it is unreasonable or unnecessarily repetitious'.

Table 25.1 Damages for noneconomic loss equal to or greater than 15 %

Severity of the noneconomic loss (as a proportion of a most extreme case) (%)	Damages for noneconomic loss (as a proportion of the maximum amount that may be awarded for noneconomic loss) (%)
15	1
16	1.5
17	2
18	2.5
19	3
20	3.5
21	4
22	4.5
23	5
24	5.5
25	6.5
26	8
27	10
28	14
29	18
30	23
31	26
32	30
33	33
34–100	34–100, respectively

The *Act* does not specify the methodology that should be used by the doctor in assessing the claimant's condition or prospects of rehabilitation or in determining the extent of any permanent impairment.

In *Kalb v Smith & Ors* (2001) QSC 216, a decision given by Wilson J. in the Supreme Court of Queensland on 22 June 2001, a psychiatrist stated that 'from a psychiatric point of view', the plaintiff had an impairment of 20 % 'of his whole body'. There is no indication in the judgement on what basis that conclusion, which was accepted by the learned judge, was reached.

In *Goode v Thompson & Anor* (2001) QSC 287, decided by Ambrose J. on 2 July 2001, a 12-year-old boy had been struck by a motor vehicle and suffered severe head injuries. The judgement refers to resultant permanent 'grave intellectual impairment', but there is no specific mention of expert evidence as to the extent of that impairment or its clinical assessment or the extent of impairment resulting from post-traumatic epilepsy. Damages for the intellectual impairment, epilepsy and other physical injuries were awarded under the head of 'general damages' for 'pain and suffering and loss of amenities' at $150,000.

Civil Liability Act 2003 (Qld)

Civil Liability Regulation 2014 (Qld)

Section 61 of the *Civil Liability Act 2003* (Qld) states that 'if general damages are to be awarded by a court in relation to an injury rising after 1 December 2002, the court must assess an injury scale value' on a scale from 0 to 100.

The *Act* further states that 'the scale reflects 100 equal gradations of general damages, from a case in which an injury is not severe enough to justify any award of general damages to a case in which an injury is of the gravest conceivable kind' (s 61(1)(b)).

Section 61(1)(c) provides that 'in assessing the injury scale value, the court is to consider—(i) the range of injury scale values for similar injuries, prescribed under a regulation; and (ii) the injury scale values attributed to similar injuries in prior proceedings'.

General damages are to be calculated in accordance with a sliding scale, as provided by s 62. Thus, if the scale value of an injury is assessed at five or less, the scale value is to be multiplied by $1000. If the scale value is assessed as ten or less but more than five, the damages are calculated by multiplying the number by which the scale value exceeds five by $1200 and adding $5000. For the most severe injuries, in the range between 90 and 100 on the 'scale value', the damages are set at $215,000 plus the amount calculated by multiplying the number by which the scale value exceeds 90 by $3500 (s 62(n)). (These figures were current at 31 December 2003.)

Schedule 3 of the *Civil Liability Regulation 2003* (Qld) referred to the use of 'AMA 5' (the 5th edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, as set out in schedule 7) in the assessment of 'whole person impairment percentage'. However, 'AMA 5' is not to be used in the 'medical assessment of scarring or of a mental disorder'. In assessing the 'Injury Scale Values' (ISV) of a mental disorder, the prescribed instrument is the Psychiatric Impairment Rating Scale (PIRS). Schedule 3 also provides that 'an ISV assessed by a court must be a whole number' (s 14).

Schedule 3 s 5 deals with what is described as an 'adverse psychological reaction', as follows:

(1) This section applies if a court is assessing an ISV where an injured person has an adverse psychological reaction to a physical injury.
(2) The court must treat the adverse psychological reaction merely as a feature of the injury.

The following section, headed 'Mental Disorder', provides that:

(1) This section applies if:

    (a) A court is assessing an ISV.
    (b) A PIRS rating for a mental disorder of an injured person is relevant under schedule 4.

(2) The PIRS rating for the mental disorder of the injured person is the PIRS rating accepted by the court.
(3) A PIRS rating is capable of being accepted by the court only if it is:

(a) Assessed by a medical expert as required under schedules 5 and 6
(b) Provided to the court in a PIRS report as required under schedule 5, section 12

The 'Dictionary' set out in schedule 7 of the Regulation states that "mental disorder' means a mental disorder recognised under DSM 4' and that "DSM 4' means the 4th edition of the *Diagnostic and Statistical Manual of Mental Disorders, Text Revision (DSM-IV-TR)* published by the American Psychiatric Association in 2000'.

It is not clear why the *Regulation* accepts as mental disorders those described in what is, in essence, a regional classification developed for use in the USA, rather than the classification of mental disorders published by the World Health Organization, currently in its 10th edition (ICD-10), which is the classification officially recognised by, and used for statistical purposes in, Australia [11].

The *Regulation* also provides that a 'medical expert' for the purposes of an assessment of a PIRS rating 'means a person—(a) who is appropriately qualified to perform the assessment, including a psychologist, neuropsychologist or psychiatrist; and (b) who has had appropriate training in the use of the PIRS' (schedule 7).

Again, it is not clear why the *Regulation* includes in its definition of 'medical expert' those who have not undertaken medical studies or obtained a medical qualification and whose professional training does not include the study of the diagnosis, management and treatment of mental disorders. Neuropsychologists have their own field of expertise that differs from the study of mental disorders, while clinical psychologists—let alone psychologists who are not members of the College of Clinical Psychologists within the Australian Psychological Society—similarly do not have specific training in the diagnosis and treatment of patients suffering from psychiatric disorders.

As noted above, the PIRS was initially developed in New South Wales for use by the Motor Accidents Authority, and it was based on the 4th edition of the American Medical Association's *Guides*. The introductory chapters of the AMA *Guides* (Chaps. 1 and 2) repeatedly refer to the use of the *Guides* by 'physicians'. It is clear both from the *Guides*, and from the introduction to the PIRS, that both were designed and intended for use by medical practitioners rather than by any other healthcare practitioners.

Part 2 of schedule 4 of the *Regulation* sets out 'items' that rate the severity of the mental disorder as follows:

- Item 10—extreme mental disorder (corresponding to a PIRS rating between 31 and 100 %)
- Item 11—serious mental disorder (PIRS rating between 11 and 30 %)
- Item 12—moderate mental disorder (PIRS rating between 4 and 10 %)
- Item 13—minor mental disorder (PIRS rating between 0 and 3 %)

Schedule 6 sets out the Psychiatric Impairment Rating Scale to be used for the purposes of the *Civil Liability Act 2003*. The PIRS specified in this legislation is very similar to that set out in the MAA *Guidelines* in NSW, with some changes in

the wording of the descriptors. However, whereas the instructions for the calculation of whole person psychiatric impairment under the MAA *Guidelines* simply require the conversion of the median class score into a percentage rating, the method prescribed in the *Civil Liability Regulation 2003* (Qld) requires the calculation of both the median class score **and** the total class score be
fore using the 'Conversion table for percentage impairment' to obtain the final PIRS rating (schedule 5).

The PIRS, as noted above, is based on the 4th edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. At p. 6 of the Guides, it is specifically stated that

It must be emphasized and clearly understood that impairment percentages derived according to Guides criteria should not be used to make direct financial awards or direct estimates of disabilities.

Despite this caveat, the Queensland statute directly translates the impairment rating obtained using the PIRS into the amount to be awarded as general damages under the *Civil Liability Act 2003*.

It should also be noted that the PIRS used under the *Civil Liability Act 2003* differs from the two versions used in NSW and from that used in the workers' compensation jurisdiction in Tasmania; at the time of writing, there are thus four different versions of the PIRS in use in Australia.

As noted above, the *Act* states that the injury scale 'reflects 100 equal gradations of general damages, from a case in which an injury is not severe enough to justify any award of general damages to a case in which an injury is of the gravest conceivable kind'. However, it is not possible to assess injuries in terms of 'equal gradations' of severity. At best, injuries can be graded on an ordinal scale (i.e. stating that a particular injury is more severe or less severe than another) [9]. For gradations to be 'equal', it would be necessary for precise measurements to be made, as is the case for interval and ratio scales (e.g. measurements of length or temperature). Clearly, this degree of precision cannot be applied to the assessment of injuries.

25.4.3 South Australia

Motor Accident Commission Act 1992 (SA)

The *Motor Accident Commission Act 1992* provides for the establishment of a Commission to administer the compulsory third-party insurance scheme that covers all users of motor vehicles in South Australia. The statutory provisions that control the award of damages in respect of injuries arising from a motor accident are set out in the *Civil Liability Act 1936* (SA) (formerly known as the *Wrongs Act 1936* (SA)), as amended. Section 35A deals with motor accidents.

Compensation for noneconomic loss under the *Civil Liability Act* is awarded for pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement. It is calculated on a scale of 0–60 points, as assessed by the court on the

basis of lay and medical evidence, pursuant to section 35A(b)(i) of the *Civil Liability Act 1936* (SA). The points received are multiplied by a sum that is increased each year according to the CPI.

Section 35A(c) of the *Civil Liability Act 1936* provides that:

No damages shall be awarded for mental or nervous shock except in favour of:

(i) A person who was physically injured in the accident, who was the driver of or a passenger in or on a motor vehicle involved in the accident or who was, when the accident occurred, present at the scene of the accident
(ii) A parent, spouse or child of a person killed, injured or endangered in the accident

The *Act* does not provide for any specific method to be used in the medical assessment of the severity of injury or permanent physical impairment, although as noted above during 2014, an Accreditation Panel was established to develop a format for Injury Scale Value reports pursuant to the *Civil Liability Act 1936* that also will apply to assessment of damages under the *Motor Accident Commission Act 1992*.

Permanent psychiatric impairment is to be assessed using the *Guides to the Evaluation of Psychiatric Impairment* (GEPIC; see below).

Civil Liability Act 1936 (SA)

Civil Liability Regulations 2013 (SA)

Civil Liability Variation Regulations 2014 (SA)

The *Civil Liability Regulations 2013* (SA), which is subordinate legislation under the *Act*, in Part 2 provide for the award of damages for noneconomic loss in accordance with 'Injury scale values' (ISV). Schedule 1 of the *Regulations* sets out the 'Ranges of injury scale values' according to the body system injured. The schedule provides ranges for different types of injuries and provided 'examples of factors affecting ISV scale' to be considered for each injury.

As an example, under the rubric of 'Central nervous system and head injuries', the 'range' of ISV for quadriplegia is given as 80–100, and the factors to be considered are listed as:

- Presence and extent of pain
- Extent of any residual movement
- Consequential mental harm
- Level of function and pre-injury function
- Degree of independence
- Ability to participate in daily activities, including employment
- Presence and extent of secondary medical complications
- Loss of reproductive or sexual function
- Bowel or bladder incontinence

At the other end of the scale, with respect to chest injuries, a 'soft tissue injury, minor fracture or minor internal organ injury' is given an ISV of 0–4, with the comments that 'The injury will involve a soft tissue injury, minor fracture, or minor

and non-permanent injury to internal organs' and 'there may be persistent pain from the chest, for example from the chest wall or sternochondral or costochondral joints'. A further 'comment about appropriate level of ISV' states 'An ISV at or near the bottom of the range will be appropriate if there is a soft tissue injury from which the person will fully recover'.

Section 13 of the *Regulations* provides that '(1) This regulation applies if a court is assessing an ISV where an injured person suffers consequential mental harm following a physical injury', and '(2) The court must treat the consequential mental harm merely as a feature of the injury'.

With respect to 'pure mental harm' (i.e. a psychiatric injury that is not secondary to a physical injury), s 14 states:

(1) This regulation applies if:

   (a) A court is assessing an ISV.
   (b) A GEPIC rating for psychiatric impairment of an injured person is relevant under schedule 1.

(2) A GEPIC rating may be accepted by the court only if it is:

   (a) An assessment of pure mental harm
   (b) Assessed by a medical expert
   (c) Provided to the court in a GEPIC report

Whole person impairment due to 'pure mental harm' is to be assessed using the GEPIC.

Pursuant to s 16 of the *Regulations*, if a medical report 'states a whole person impairment percentage', it must state how the percentage is calculated. Section 16 (c) mandates that if the percentage is 'based on criteria provided under AMA 5', then an identification of the relevant provisions of AMA 5' and 'if a range of percentages is available under AMA 5 for an injury of the type being assessed—the reason for assessing the injury at the selected point in the range' must be stated.

The court is required to 'give greater weight to a medical assessment of a whole person impairment percentage' if the assessment is based on AMA 5 criteria 'than to a medical assessment of a whole person impairment percentage not based on the criteria'—this stipulation does not apply to 'assessment of scarring or of mental harm' (s 17).

25.4.4 Tasmania

Motor Accidents (Liabilities and Compensation) Act 1973 (Tas)

Motor Accidents (Liabilities and Compensation) Regulations 2010 (Tas)

The Motor Accidents Insurance Board (MAIB), established under the *Act*, provides no-fault statutory benefits to persons injured in motor accidents in Tasmania.

The MAIB also indemnifies motorists who might have been negligent in motor vehicle accident in which another person was injured.

In addition to the statutory no-fault scheme, Tasmania allows unrestricted access to common law where the fault of another party can be established.

Scheduled benefits are set out in schedule 1 of the *Motor Accidents (Liabilities and Compensation) Regulations 2010* (Tas). Part 5 provides for disability allowance of the lesser amount than 80 % of average weekly earnings if these exceed $400 per week or three times the adult average weekly earnings.

Section 27(1) of the *Act* states that 'Except as provided by subsection (2), if a liability has been incurred for the payment of damages to a person in respect of a personal injury the payment to that person of a scheduled benefit in respect of that personal injury shall, so far as it extends, be taken to be a payment in or towards the discharge of that liability, and the amount of those damages shall be reduced accordingly'.

Section 27B of the *Act* provides that the MAIB 'may require an examination of a person to whom this section applies to be carried out if . . . the right to, or amount of any, scheduled benefits or damages payable in respect of an injury referred to in subsection (2) depends on a determination by the Board, a decision of the Tribunal or a judgment by a court'.

The *Act* and the *Regulations* under the *Act* do not specify the method by which the extent of any impairment arising from a personal injury compensable under the *Act* should be determined.

Injured motorists are entitled to sue for common-law damages if they consider that the injury was due to another person's negligence. The amount of general damages that is recoverable is determined in accordance with the provisions of the *Civil Liability Act 2002* (Tas).

Civil Liability Act 2002 (Tas)

As in other jurisdictions in which comparable legislation was enacted following the Ipp Report (vide supra), the *Act* was intended to limit the quantum of damages for personal injury, including damages for noneconomic loss.

Section 27(1) of the *Act* provides for a threshold and states 'If the amount of non-economic loss is assessed to be no more than Amount A, no damages are to be awarded for non-economic loss'. The threshold (Amount A) was $4000 at the time the *Act* was proclaimed. This amount is increased annually in line with the CPI (consumer price index), and at the time of writing (January 2015), it was $5500.

The *Act* does not specify any method for the assessment of impairment due to physical or psychiatric injury on which the quantum of damages is to be based; the task of calculating the appropriate damages is left to the court.

Section 28 states:

Tariffs for damages for noneconomic loss (general damages)

(1) In determining damages for noneconomic loss, a court may refer to earlier decisions of that or other courts for the purpose of establishing the appropriate award in the proceedings.

(2) For that purpose the parties to the proceedings or their counsel may bring the court's attention to awards for noneconomic loss in those earlier decisions.
(3) In this section—other courts include a court of any jurisdiction within Australia, including Tasmania.

Part 8 deals with general damages for 'mental harm'. Section 33 provides that 'There is no liability to pay damages for pure mental harm resulting from breach of duty unless the harm consists of a recognized psychiatric illness', and s 35 has a similar provision with respect to "consequential mental harm".

25.4.5 Victoria

Transport Accident Act 1986 (Vic)

In Victoria, the *Transport Accident Act 1986* (Vic) provides that if the Transport Accident Commission 'has determined the degree of impairment of a person who is injured as a result of a transport accident; and the degree so determined is more than 10 per centum the Commission must assess an impairment benefit in respect of the person' (s 47). The lump sum impairment benefit under this section is assessed in accordance with the formula $(A - B)/C \times \$61{,}940$, where A is the degree of impairment assessed, B is 10 % and C is 90 %. The impairment assessment is undertaken 18 months after the accident or when the injury stabilises 'whichever last occurs' (s 46A).

It will be therefore apparent that the injured person must be more than 10 % impaired to be eligible for impairment benefits.

Impairment of 30 % or more is deemed to be a serious injury for the purpose of bringing proceedings for damages (s 93), and those who are less than 50 % impaired are not eligible for no-fault benefits for longer than 3 years (s 53). Persons less than 50 % impaired are eligible for benefits up to a total of $99, 220 (s 53(3)).

Amendments inserted into the workers' compensation and motor accident statutes during 1998 provide that impairment assessment pursuant to the *Transport Accident Act 1986* (Vic) must be undertaken in accordance with the 4th edition of the *Guides to the Evaluation of Permanent Impairment* published by the American Medical Association in 1993, with exceptions in relation to Chapter 14 (psychiatric impairment), Chapter 15 (pain) and hearing loss. Section 46B(1) of the *Act* states that '[I]n 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'.

Chapter 14 of the 4th edition of the AMA *Guides*, which provides for the assessment of impairment due to 'mental and behavioural disorders', does not rate aspects of mental functioning and does not provide a method of quantifying impairment in percentage terms; instead, it discusses activities of daily living, social functioning, concentration and adaptation and was therefore considered to be quite unsuitable for the purpose of assessing psychiatric impairment as required

under the provisions of both the *Transport Accident Act 1986* (Vic) and the *Accident Compensation Act 1985* (Vic). Section 46A(6) of the *Transport Accident Act 1986* (Vic) provides that '[F]or the purposes of determining the degree of psychiatric impairment, the A.M.A. *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 October 1997 and published in the Government Gazette'. (These *Guidelines* are discussed below.)

Finally, s 46A(7) of the Act states '[I]n this section "A.M.A. Guides" means the American Medical Association's Guides to the Evaluation of Permanent Impairment (Fourth Edition) (other than Chapter 15) as modified by this Act'.

Wrongs Act 1958 (Vic)

The *Wrongs and Other Acts (Law of Negligence) Act 2003* (Vic) extensively amended the *Wrongs Act 1958* (Vic), particularly with respect to compensation for negligence and mental harm, and the liability of public authorities.

Section 75 of the *Wrongs Act 1958* (Vic) now provides that 'A court cannot make an award of damages for economic loss for mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness'. Section 43, however, states that 'injury' includes 'psychological or psychiatric injury'. The phrase 'psychological or psychiatric injury' is not specifically defined in the Act and neither is 'recognised psychiatric illness'. There is an obvious inconsistency between the implication that 'psychological injury' is the same as 'recognised psychiatric illness'. It would be generally considered that 'psychological injury' means an emotional reaction that is an understandable psychological response to a physical injury or other stressful event and one that does not amount to a 'recognised psychiatric illness', that is, an emotional reaction that does not lead to, and does not meet the diagnostic criteria for, a mental disorder.

Part VBA sets out the 'thresholds in relation to recovery of damages for non-economic loss'. Under the definitions in s 28LB, a 'threshold level' of 'more than 10 per cent' is set for impairment due to psychiatric injury. Section 28LG provides that 'The assessment of degree of impairment must be made by an approved medical practitioner'. 'Approved medical practitioner' is defined (s 28LB) as '(a) if a training course has been approved under section 91(1)(b) of the Accident Compensation Act 1985, a medical practitioner who has successfully completed the course; or (b) if a training course has not been so approved, a medical practitioner'.

In accordance with s 28LI, psychiatric impairment is to be assessed using the *Clinical Guidelines to the Rating of Psychiatric Impairment*. Section 28LJ provides that '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'.

As noted above, the *Guide to the Evaluation of Psychiatric Impairment for Clinicians* (GEPIC), published in the *Victoria Government Gazette* on 27 July 2006, is used in Victoria to assess psychiatric impairment, in accordance with the provisions of the *Transport Accident Act 1986* and the *Wrongs Act 1958* when the

initial assessment is undertaken after 28 July 2006 or the motor vehicle accident occurred on or after 26 July 2006.

The GEPIC lists six factors that are to be assessed to provide the percentage rating of psychiatric impairment, namely, intelligence, thinking, perception, judgement, mood and behaviour. These six aspects of mental functioning may be briefly described as follows:

(1) *Intelligence*: refers to the level of cognitive (intellectual) function. It includes global orientation (in time, place and person), fund of general information, capacity for abstract thinking, memory functions and aspects of the use of language. Intelligence can be clinically assessed during a psychiatric consultation, and if considered necessary a screening test such as the Mini Mental State Examination can be performed. Significant impairment of intelligence occurs in dementia (e.g. following severe head injury or due to degenerative brain disease) or might be congenital or developmental.
(2) *Thinking*: impairment includes formal thought disorder involving thought processes (loosening of associations, interpenetration, metonymy, thought blocking) and abnormalities of thought content (delusions, overvalued ideas) and abnormalities of the stream of thought (e.g. pressure of speech with flight of ideas or slowed thinking due to psychomotor retardation). Delusions can be primary or secondary and might be persecutory, grandiose, etc. or involve delusions of reference. In patients with schizophrenia, specific delusions of thought broadcasting, delusions of influence, etc. might occur (sometimes termed first-rank symptoms).
(3) *Perception*: disorders of perception which need to be assessed as part of the mental status examination are hallucinations and illusions. Hallucinations are subjective sensory perceptions in the absence of an actual external stimulus; these might occur in any one of the five sensory modalities. Illusions are defined as distorted perceptions of real external stimuli; they are usually visual but might involve misperception of sounds.
(4) *Judgement*: this refers to the ability to evaluate various situations and information and reach an effective conclusion. Impaired judgement might affect the individual's capacity to perform certain complex tasks and to make autonomous decisions at work. Following injuries to the frontal lobes, judgement might be impaired leading to socially inappropriate behaviour.
(5) *Mood*: this refers to the assessment of the person's sustained feeling state, which tends to be persistent and stable, and colours the total experience of the individual. During the consultation mood tends to be manifested by the subject's affect, which is the individual's immediate emotional experience. Mood is generally described along a continuum from the extreme of severe depression with suicidal ideation to that of euphoria. Affective instability (emotional lability) with marked shifts of mood might be apparent during a consultation. Another aspect of emotion that might be present during the consultation is anxiety.

(6) *Behaviour*: impairment of behaviour is present when the individual acts in a manner that is disruptive or aggressive; disruptive behaviour might be due to agitation or argumentativeness. Persons with an obsessional disorder might be impaired by compulsive activity. In psychotic disorders, catatonic posturing or stereotyped movements interfere with goal-directed activity.

Examples are given in the GEPIC for each type of impairment, allowing a rating to be made of the severity of impairment ranging among five classes, similar to those used in the 2nd edition of the AMA Guides. The whole person psychiatric impairment rating is determined using the median method as described in the Guide.

Because a training course in the use of the *Clinical Guidelines* has been approved pursuant to the *Accident Compensation Act 1985* (Vic), in effect medical practitioners who have completed that course are 'approved medical practitioners' for the purposes of s 28LB.

If the impairment assessment is disputed as to whether or not the 'threshold level' has been reached, it can be referred as a 'medical question' to the Medical Panel established under the *Accident Compensation Act 1985* for determination that is binding on the parties and on the court (s 28LZI).

25.4.6 Western Australia

Motor Vehicle (Third Party Insurance) Act 1943 (WA)

Section 30 of the Act provides for the medical examination of injured persons, at the request of either the insured person or of the Commission established under the *Act*.

Subsection 3C(2) provides that an 'amount of damages to be awarded for non-pecuniary loss is to be a proportion, determined according to the severity of the non-pecuniary loss, of the maximum amount that may be awarded'. Subsection 3C(1) states that non-pecuniary loss means 'pain and suffering; loss of amenities of life; loss of enjoyment of life; curtailment of expectation of life; and bodily or mental harm'.

The *Act* does not prescribe a methodology for the assessment of the 'severity' of the 'mental harm' or any of the other types of non-pecuniary loss enumerated in this subsection.

Civil Liability Act 2002 (WA)

Section 9(1) of the *Act* provides that 'If the amount of non-pecuniary loss is assessed to be not more that Amount A, for the year in which the amount is assessed, no damages are to be awarded for non-pecuniary loss'. For the 12 months commencing from 1 July 2014, that threshold amount is $19,500.

With respect to 'mental harm: duty of care', s 5S(1) provides that 'A person (the defendant) does not owe a duty of care to another person (the plaintiff) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen

that a person of normal fortitude might, in the circumstances of the case, suffer a recognized psychiatric illness if reasonable care were not taken'.

The *Act* is silent on the subject of who will determine 'normal fortitude' (the court or a psychiatric expert witness).

The Act also does not prescribe the methodology to be used to determine the extent of either physical or psychiatric impairment on which the quantum of damages is to be based.

25.4.7 Australian Capital Territory

Road Transport (Third Party Insurance) Act 2008 (ACT)

The ACT, like other Australian States and the Northern Territory, has a compulsory third-party insurance scheme to cover those injured in motor vehicle accidents.

The ACT Compulsory Third Party (CTP) Insurance Regulator is an independent authority established under s 14 of the Act to regulate the CTP scheme in the Territory. The legislation provides that the Director General of the Chief Minister and Treasury Directorate is the CTP Regulator.

Pursuant to s 156C(1) of the *Act*, the CTP Regulator 'may make guidelines (the non-economic loss guidelines) setting out information to assist courts in deciding the appropriate level of damages for non-economic loss in motor accident claims', but at the time of writing (January 2015), no such guidelines had been issued.

Although the Standing Committee on Public Accounts of the ACT Assembly recommended, in its inquiry into the *Road Transport (Third Party Insurance) Amendment Bill 2011*, that the principal *Act* be amended to provide that the AMA Guides be used to determine 'non-economic loss impairment' and introduce thresholds, that recommendation was not adopted.

At the time of writing, the *Act* does not specify any method by which general damages are to be assessed, and these are determined by common-law principles.

Prior to the reform of liability insurance subsequent to the publication of the Ipp Report in September 2002, as stated in *Suffolk v Meere* (2001) ACTSC 24, the principles to be applied in the ACT to determine compensation in personal injury cases arising following motor vehicle accidents in the ACT were those enunciated by the High Court of Australia and summarised by McHugh J. in *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49:

> When a defendant has negligently injured a plaintiff, the common law requires the defendant to pay a money sum to the plaintiff to compensate that person for any damage that is causally connected to the defendant's negligence and that ought to have been reasonably foreseen by the defendant when the negligence occurred. The sum of money to be paid to the plaintiff is that sum which will put the plaintiff, so far as possible, "in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation".

Subsequent to the 2002 reform, the principles applied are those set out in the *Civil Law (Wrongs) Act 2002* (see below).

Civil Law (Wrongs) Act 2002 (ACT)

The *Act* does not provide any threshold for the recovery of damages for non-economic loss. Section 99(4) provides that in relation to 'Tariffs for non-economic loss' governing awards under this legislation, 'non-economic loss includes the following: (a) pain and suffering; (b) loss of amenities of life; (c) loss of expectation of life; (d) disfigurement'. A note to this section of the *Act* states that 'Damages for non-economic loss for injuries caused by motor accidents are subject to limitations under the *Road Transport (Third Party Insurance) Act 2008*' pursuant to any guidelines issued by the CTP Regulator; no such guidelines have been issued (see above).

Section 35 of the *Civil Law (Wrongs) Act 2002* (ACT) provides that '(1) damages must not be awarded for pure mental harm to a person resulting from negligence unless the harm consists of a recognized psychiatric illness' and '(2) damages must not be awarded for economic loss for consequential mental harm to a person resulting from negligence unless the harm consists of a recognized psychiatric illness'.

Although the *Act* defines 'mental harm' as 'impairment of the person's mental condition' (s 32), it makes no provision for assessment of that impairment by a psychiatrist expert witness utilising any recognised methodology. According to s 99 '(1) In deciding damages for noneconomic loss, a court may refer to earlier decisions of that or other courts for the purpose of establishing the appropriate award in the proceeding' and '(2) For that purpose, the parties to the proceeding or their lawyer may bring the court's attention to awards of damages for non-economic loss in those earlier decisions'.

25.4.8 Northern Territory

Motor Accidents (Compensation) Act 1979 (NT)

Motor Accidents (Compensation) Regulations (NT)

The *Act* establishes a no-fault compensation scheme that, among other benefits, provides 'compensation for loss of limb or other permanent impairment' (s 17). The Northern Territory, Tasmania and Victoria are the only jurisdictions in Australia that have a no-fault statutory compensation scheme, with replacement of earnings, for persons injured in motor vehicle accidents.

Subsection 17(1)(b) states that compensation for permanent impairment is payable if 'the extent of the impairment, as assessed by the Commission, is at least 5 %'.

Section 4C(2) of the *Act* states that determination of permanent impairment is to be made '(a) in accordance with the edition of the American Medical Association Guides to the Evaluation of Permanent Impairment prescribed by regulation as modified by regulation; and (b) on the advice of a medical practitioner'.

Regulation 4(1) of the *Motor Accidents (Compensation) Regulations* (NT) provides that 'For section 4C(2)(a) of the Act, the American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition is prescribed'.

Personal Injuries (Liabilities and Damages) Act 2003 (NT)

Section 26 of the *Act* provides that in determining the degree of permanent impairment suffered by an injured person, 'Evidence of permanent impairment is to be given only by a medical practitioner who has assessed the degree of permanent impairment in accordance with the prescribed guides and any applicable regulation' (s 26(3).

Pursuant to s 27(2), 'A court must not award damages for non-pecuniary loss if the court determines the degree of permanent impairment to be less than 5 % of the whole person'.

Section 26(4)(a) states that the degree of permanent impairment is to be assessed in accordance with 'prescribed guides, including by modification of the American Medical Association Guides to the Evaluation of Permanent Impairment' as provided by Regulations made under the *Act*.

The definition of 'prescribed guides' in s 18 of the *Act* states '(a) the guides prescribed by the Regulations; or (b) if no guides are prescribed by the Regulations—the American Medical Association Guides to the Evaluation of Permanent Impairment (s modified by any regulation) as published from time to time'.

There are no guides prescribed by the Regulations at the time of writing.

In *Kampourakis v DCT (NT) Pty Ltd* [2013] NTSC 76, the Supreme Court of the Northern Territory discussed the principles relevant to the assessment of the quantum of damages for noneconomic loss pursuant to the *Personal Injuries (Liabilities and Damages) Act 2003* (NT). With reference to the use of the AMA Guides, the court stated that whereas 'as a matter of practice, the most current of the Guides available is likely to be preferred; however, an assessment made using an earlier Guide is not by virtue of that fact invalid'.

The *Act* does not make any special provisions for the award of damages with respect to mental harm or psychiatric injury.

25.5 Summary

According to Biklen, the exercise of clinical judgement in the rating of impairment and disability is influenced by many factors. Among such factors, of which the rater may be unaware, are service traditions, economics, bureaucratic exigency, politics and societal prejudice. Indeed, Biklen considers these factors to be so pervasive that he describes reliance on clinical judgement to be 'little more than a mythology' [12].

In view of the statutory requirements noted above, which vary to the extent to which they require medical ratings of impairment for the purpose of assessing the quantum of damages for noneconomic loss as against assessments made by the

court, there is a clear need for a wider appreciation both of the different and, specifically defined, concepts of impairment and disability and also of the method of impairment rating if this has been stated in the relevant legislation.

The difficulties in the rating of psychiatric impairment and disability were discussed by Heiman and Shanfield, who noted the tendency—with respect to the evaluation to of psychiatric impairment—to 'legitimize subjective distress' that might be overemphasized during the process of psychiatric assessment [13]. In the absence of objective, agreed upon, impairment rating criteria, this at times causes personal values to influence the assessment of impairment due to both physical and psychiatric injuries.

It is to avoid the likelihood of such personal and idiosyncratic factors influencing the rating of psychiatric impairment that detailed and specific evaluation methods are required.

As described above, different methods of assessing physical and psychiatric impairment are in use throughout Australia.

Following the changes, subsequent to the Ipp Report in 2002, to liability for personal injury, there has been a move to introduce specified methods for the assessment of physical and psychiatric impairments as well as both thresholds and caps for damages.

The most objective methods of rating impairment are those that are based on a structure or function, including the basic aspects of mental function, as defined by the WHO assessment of abnormality or loss of anatomical, physiological or psychological indirect methods that purport to evaluate impairment but in reality assess disability, such as the PIRS, and are influenced by the various factors that impact on the examiner as well as those that affect the subject. Factors that influence the examiner were noted by Biklen and have been listed above—they include service traditions, economics, bureaucratic exigency, politics and societal prejudice.

Factors that influence the subject's level of function and disability include motivation, as well as numerous other factors related to premorbid personality, demographics, interpersonal dynamics, cultural and occupational factors as well as societal and economic factors. It is because these various factors impact on the various aspects of functioning that the rating of impairment can only take into consideration that which can be directly observed by the examiner and which represents a departure from normal anatomical, physiological or psychological structure or function.

The adoption of uniform methodology for the assessment of impairment in the various Australian jurisdictions, based on rating instruments for physical and psychiatric injuries that truly assess impairment rather than disability, would be an important step in eliminating the haphazard ways in which entitlements to damages for non-pecuniary loss, as well as other statutory entitlements, are currently assessed, and it would make a significant contribution to the establishment of a more equitable approach to the awarding of benefits and compensation for those who had suffered a personal injury through no fault of their own.

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[6] Parts of this chapter are based on previous publications by the authors, especially 'Mendelson, G., Survey of methods for the rating of psychiatric impairment in Australia. (2004) 11 Journal of Law and Medicine 446' and 'Mendelson, D., The New Law of Torts. 3rd edition, Oxford University Press 2014 (Chapter 1)'.