



# When should TPD be Assessed?

Assessment Series 4 April 2008  
Presented by Peter Riddell



## Typical TPD Definition

*“Having been absent from employment with the company through injury or illness for six consecutive months and in the opinion of the Insurer after consideration of medical evidence having become incapacitated to such an extent as to render the Life Insured unlikely to ever engage in or work for reward in any occupation or work for which he or she is reasonably qualified by education training or experience...”*

## Complex Definition

- Other life insuring clauses are more straightforward
- Date of assessment of liability in death, total disability and trauma definitions is straightforward
- Because of the various qualifying elements and the assessment of future likelihood the assessment of TPD is more problematic



## The Three Elements of a TPD Definition

- Injury or illness during employment;
- Causing absence from work for six consecutive months; and
- An opinion of the insurer as to whether the insured will likely work again in a job for which he/she is qualified by education, training or experience



## Difficulty with Third Limb of Definition

- Third limb calls for a subjective assessment of the future employability of insured
- BUT when is this assessment to be made? The standard definition does not make it clear when the assessment is to be made
- Is it:
  - at the end of the six months absence from work?
  - at the time claim is lodged?
  - when the insurer forms its opinion?



## Why is “When” so Important?

- Because medical conditions can wax and wane, the date when the assessment of future employability is made can be critical to the eventual outcome
- The increasing gap between date of injury and claim lodgement is making this issue more important



## So When does TPD Occur? Conflicting Authority

*Auspine v Henderson* (October 2006) – Federal Court

- The TPD definition: disablement which:
  - Occurs prior to 65<sup>th</sup> birthday;
  - Occurs whilst the insured is insured for TPD under policy;
  - Whilst the insured is in active service of employer; and
  - Results from an illness, accident or injury and results in the insured being continuously absent from his employment for at least 6 consecutive months prior to his 65<sup>th</sup> birthday and the insurer has determined that it is unlikely he will ever be able to engage in any regular remunerative work for which he is reasonably fitted by education, training or experience

## The facts

- Insured, then 53 year old credit manager, ceased worked in May 1999 due to a stress condition
- Lodges TPD claim in June 2001. Rejected by both insurer and trustee on grounds he was not TPD
- Complaint to SCT. SCT finds *correct date for assessment* (of TPD) *is six months after the date on which the complainant finished work* (ie. November 1999)
- SCT dismisses claim against insurer on the basis that medical evidence showed that for 10 months after ceasing work there was no evidence of TPD

## The facts

- But insured succeeds against trustee on basis that trustee failed to match policy definition in deed (and inform members of implications). Trustee ordered to pay amount equivalent to sum insured
- Appeal lodged by both the insured and trustee to Federal Court
- Insured argued there is nothing in the definition which mandated a particular date for the assessment of future work capacity. N.B. Does not have to be 6 months after ceasing work

The judgment

Justice Jessup found:

*“the (TPD) definition does not limit the period within which the insurer might make such a determination: it is not beyond the scope of the definition for the insurer, in a particular case, to make its determination months, or even years, after the last day of the six consecutive months”*

The judgment

Justice Jessup found:

*“...the tribunal’s statement that the correct date for assessment was six months after the date on which the complainant finished work... As a matter of construction of the policy, that was not a correct statement”*

The judgment

Justice Jessup found:

*“...the insurer must consider whether it is presently unlikely that the person concerned will ever again be able to engage in work of the kind described. It follows that, when it considers whether to make a determination, the insurer must look at the facts as they present themselves at that time. It must consider all of the available material...For the insurer not to take this approach, but to have looked only at facts and circumstances as they existed previously would not be in accordance with the definition of the TPD in the policy”*

- Court found that having made the error about the correct date of the assessment of future employability the decision by the SCT to affirm the insurer's decision was flawed
- The matter was referred back to the SCT for it to decide in accordance with the Court's judgment
- Trustee's appeal succeeded on grounds that it had been denied procedural fairness by the SCT (lack of opportunity to make submissions to SCT as to the matters relied upon by the SCT to find against the trustee)

## *Auspine* – Implications

- Date of Assessment of future likelihood of obtaining work is when the insurer forms its opinion not six months after ceasing work
- When assessing this likelihood all evidence must be considered not just evidence relevant to the end of the six month period

- Where there has been a deterioration in an insured's condition since leaving work, he or she will more likely be TPD
- Conversely, cases where there has been an improvement since leaving work, will less likely result in TPD finding
- Consider “present likelihood” of return to work by reference to original disability, not intervening accident or other medical condition

[*Samaras v ARF* [2007] FCA 1323]

*Halloran v Harwood Nominees (July 2007) – NSW Supreme Court*

TPD means:

- Having been absent from employment with the Company through injury or illness for six consecutive months
- and in the opinion of the Insurer after consideration of medical evidence having become incapacitated to such an extent as to render the Life Insured unlikely to ever engage in or work for reward in any occupation or work for which he or she is reasonably qualified by education training or experience...

## The facts

- Insured last worked as a greaser for CSR in May 1996 – injuries to the back. Left his employment in July 1996
- Mid 1996 insured started TAFE courses in administration and computer studies – finished courses in 1998
- From August 1999 to February 2000 employed as a regional project officer with Aboriginal Lands Council
- Further study in 2001 and 2002, applied for disability pension in 2002

## The facts

- Lodged claim for TPD benefit in December 2003
- Claim denied by insurer in June 2004 on the basis that insured was gainfully employed after his effective last day at work
- Insured commenced Court proceedings
- Critical issue was date of assessment of TPD

The judgment

Justice Brereton found:

- The Insurer's determination of likelihood of future employment had to be made "as at the date six months from when he last worked for CSR within that definition"
- Insurer can take into account evidence of subsequent employment but only if such employment is one which the insured is suited by education training and experience at the end of the six months
- "If an employee is not disabled as defined at the relevant date, a subsequent deterioration in his or her condition does not qualify him for a disablement benefit"

## The judgment

Justice Brereton found:

- “Conversely, if he or she is disabled as defined at the relevant date, a subsequent improvement in his or her condition does not retrospectively disqualify the employee from the benefit”
- To adopt a different “construction” would make the time at which the application is lodged as decisive, rather than the time objectively fixed by the trust deed

- Given insurer had taken into account the subsequent work its decision had miscarried and the Court would decide for itself the TPD issue
- Court found the insured was TPD as at December 1996

- Relevant date for assessment of TPD is six months after ceasing work
- Subsequent employment relevant where re-training not necessary
- Subsequent employment obtained as a result of re-training should be disregarded

## *Auspine v Halloran*

- Two decisions within one year of each other, diametrically opposed on the issue of when TPD should be assessed
- Which do you follow?

## So what is the Answer?

- It is apparent that insurers, plaintiffs and the courts have not addressed the “When” question with any consistency over the last 25 years of reported cases on TPD
- Often the issue is lost or glossed over because it is not critical
- There appears to be no common approach amongst insurers as to the date the assessment is to be made. This is apparent from the reported judgments

## So what is the Answer? (cont'd)

- Case law with respect to this issue as with most aspects of TPD case law is unsatisfactory
- Conflicting judgments and judgments which misinterpret previous authority or ignore it completely are frustrating. Often the court will be influenced to answer the question differently depending upon the judge's view on the merits of the case
- There is no “magic bullet” case. Further there is no reason why an inconsistent single judge decision should be followed
- Whilst there is conflict and there is no definitive answer there is a thread of credible cases (ie. *Tonkin* and *Maciejewski*) which suggest that date of the assessment of future employability should be 6 months after ceasing work

- Assessment of future employability should be 6 months after last actively worked
- Medical and other evidence including vocational assessment reports should be directed to this time
- This may require your medical experts to provide retrospective assessments. You will need to make your service providers aware of this

- Training undertaken after the 6 months period has elapsed cannot be taken into account when assessing future employability
- Whilst subsequent training cannot be taken into account subsequent employment is a different matter and regardless of *Halloran* should be taken into account



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## **Practical Considerations in Defending a Litigated Claim**

Presented by Helen Mentiplay & Benjamin Buckhurst | 4 April 2008



# Practical Considerations in Defending a Litigated Claim

## Victorian Courts

- The majority of cases are held in one of the following state level Courts:
  - Magistrates' Court – money claimed is < \$100,000
  - County Court – unlimited jurisdiction
  - Supreme Court – unlimited jurisdiction
- Federal jurisdiction



# Practical Considerations in Defending a Litigated Claim

## Procedure in Magistrates' Court

- Plaintiff files Statement of Claim, serves on Defendant
- Defence must be filed within 21 days (no need for appearance)
- Matter listed for a pre-hearing conference within 4 – 6 weeks
- If matter does not settle at pre-hearing conference, is listed for hearing within 2 – 3 months



# Practical Considerations in Defending a Litigated Claim

## **Magistrates' Court – Pre-Hearing Conference**

- Informal conference presided over by Registrar of the Court
- Parties must attend the Court (but can attend by telephone)
- Registrar strongly encourages settlement
- If settlement not reached, matter is listed for hearing



# Practical Considerations in Defending a Litigated Claim

## Procedure in County & Supreme Courts

- Plaintiff files Statement of Claim, serves on Defendant
- Defendant must file a Notice of Appearance within 10 days, or 21 days if served interstate
- Defendant must file Defence within 30 days of Notice of Appearance



# Practical Considerations in Defending a Litigated Claim

## Procedure in County & Supreme Courts

- *County Court*: Listed for Administrative Mention, Plaintiff must submit consent orders to the Court “on the papers”
- *Supreme Court*: Listed for Directions Hearing, orders can be made on the papers, or by appearance before a Master



# Practical Considerations in Defending a Litigated Claim

## Procedure in County & Supreme Courts

- Interlocutory orders made at Directions/Admin Mention:
  - Discovery of documents
  - Time by which parties are to complete mediation
  - Further and Better Particulars
  - Interrogatories
  - Subpoenas (County)
  - Trial date (County)



# Practical Considerations in Defending a Litigated Claim

## Default Judgment

- Do not delay passing on a Statement of Claim to your lawyers
- If no Notice of Appearance/Defence is filed, the Plaintiff can apply for Default Judgment
- Court will assume you do not wish to defend the case
- Incur additional time and legal costs in making an Application to set aside Default Judgment



# Practical Considerations in Defending a Litigated Claim

## Discovery

- Victorian Courts no longer require the parties to request categories of documents from one another
- The parties are compelled to discover all documents relevant to the proceedings, and which are not subject to privilege
- Affidavit of Documents – lists all documents which are to be discovered, and those over which privilege is claimed
- Person who swears Affidavit (deponent) must check the document carefully before swearing



# Practical Considerations in Defending a Litigated Claim

## Discovery – Tips

- Do not destroy any documents: *Crimes (Document Destruction) Act 2006* & *Evidence (Document Unavailability) Act 2006*
- Resist the urge to write down sarcastic or offensive remarks about a claimant or their lawyers
- Write file notes of meetings/conversations with lawyers on a separate piece of paper
- Keep claims files organised – chronological, separated into types of documents (Reports, File Notes, Correspondence, etc)



# Practical Considerations in Defending a Litigated Claim

## Evidence

- Court Books: contain all documents the parties intend to produce to Court, and must be filed prior to the hearing
- All expert evidence must be served on the opposing party 30 days before hearing (“Order 44 Statement”)



# Practical Considerations in Defending a Litigated Claim

## Evidence - Tips

- Obtain signed statements from relevant persons during the assessment of a claim – eg. underwriters
- If a doctor's report you have commissioned is insufficient, seek clarification
- It is advisable to always brief a doctor with the policy definition of disability
- Always provide a doctor with all medical reports that you have on file



# Practical Considerations in Defending a Litigated Claim

## Mediation

- The parties agree on a mediator, a date and a location
- If unable to agree, the Court will appoint a mediator
- The mediator is independent and impartial and cannot impose decisions on the parties



# Practical Considerations in Defending a Litigated Claim

## Advantages of Mediation

- Parties meet face to face (assess Plaintiff's credibility)
- Less expensive than a hearing
- Parties not bound by the rules of evidence
- Isolate the issues and discuss the evidence
- Explore possible settlement options which are not available to the Court (eg. settle on a "buy-out" basis)
- If matter does not settle, parties can still proceed to hearing
- Private, confidential & "privileged"



# Practical Considerations in Defending a Litigated Claim

## Hearings

- The case will be heard before a Judge or Magistrate
- Barristers appear at the hearing instructed by solicitors
- The format of a hearing:
  - Plaintiff's barrister opens case and presents evidence
  - Defendant's barrister opens case and presents evidence
  - Barristers make submissions orally or in writing to the Judge
  - Judge gives judgment on the spot or reserves judgment



# Practical Considerations in Defending a Litigated Claim

## Court Etiquette

- Do not speak to a claimant directly if they have legal representation
- Stand and bow when Judge enters and leaves the Court, and bow at the door when entering and leaving the room
- Address Judge as “Your Honour” (in all Courts)
- If giving evidence in Court, look at the Judge when responding to questions
- Conference with counsel, prepare minutes of matters discussed
- Remain calm



# Practical Considerations in Defending a Litigated Claim

## Costs

- Usually “follow the event”
- Party and party costs
- Solicitor and client costs
- Indemnity costs

# Practical Considerations in Defending a Litigated Claim

## Costs – Tips

- Consider costs implications before the end of a case
  - Offers of Compromise
  - Calderbank Offers
- Check assets before pursuing costs
- A favourable costs order can be used as leverage to prevent further claims or an appeal



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