The Use and Abuse of the American Medical Association Guides in Accident Compensation Schemes*

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The purpose of this article is to highlight concerns with the use of the American Medical Association Guides to the Evaluation of Permanent Impairment in workers' compensation and transport accident schemes. These concerns include the incorporation of normative values (such as age and gender stereotyping) rather than scientific measurements; anomalies in the assessment guidelines for back and psychological impairments; the scope for observer error in making assessments; and the impact of the 10 per cent threshold requirement. Attempts in the United States to challenge or limit the application of the Guides are reviewed. Application of the Guides in Victorian WorkCover and transport accident legislation is discussed, and possibilities for challenge are noted.

Introduction

What do Ned Kelly and the AMA Guides have in common? Although it is true both may have been involved in highway robbery, there is another link. During the 19th century, phrenology, much like the Guides today, enjoyed great support (there were phrenological societies in the United States and Great Britain, as well as phrenological journals). That is why Ned's skull was preserved – so that it could be "read" for phrenological purposes.

Phrenology, a now discredited pseudo-science, involved the study of the conformation of the skull as indicative of mental faculties and traits of character.[1] The originator of the idea held that areas of the brain were connected with certain emotions or character traits, and this meant that the degree of development of each of these qualities was reflected in the bony development of the part of the skull immediately above it. Thus a skilled phrenologist could appraise the moral and intellectual qualities of an individual by running his or her hands over the subject's skull. This is really not very different from assessing a person's impairment due to a back injury solely by reference to his or her loss of range of movement.[2]

The comparisons do not end there, because the basis of the system, like the Guides, was

> "constructed by a method of pure empiricism ... [the originator] having arbitrarily selected the place of a faculty ... examined the heads of his friends ... with that peculiarity in common, and in them sought for the distinctive feature of their characteristic trait".[3]

*An earlier version of this article was presented at the Victorian Conference of the Australian Plaintiff Lawyers' Association in May 1998.

[1] The theory was developed by Franz Joseph Gall (1758-1828) and his pupil, Johann Kaspar Spurzheim (1776-1832). It was the latter who coined the term "phrenology".

[2] *AMA Guides to the Evaluation of Permanent Impairment* (2nd ed, 1981), Ch 1, pp 47-59 (hereafter AMA Guides).

[3] Encyclopaedia Brittanica, *Micropaedia* (15th ed, 1997), Vol 9,

Again, this is like deciding that a feature of back injuries is loss of movement, so that if it is not present, neither is a back impairment.

Smith Pryor, in a review of the third edition of the Guides, wrote that it

"is not the objective, medical evaluative system that it purports to be and that has been so appealing to legislators and other decision makers ... [rather] it rests in large part on important and difficult normative judgments. Yet the Guides obscure this from the reader; it is laden with hidden or poorly explained value judgments that frequently are gender-biased."[4]

Professor Stone wrote that "the quest for an objective method of medical evaluation of disability has a long history and continues into the present".[5] She argued that instead of trying to find objective criteria,

"one can try to examine how particular constructs and measures *systematically* exclude certain understandings and include others, how they serve the political interests of some groups at the expense of others, and how they work to produce particular types of policy results".[6]

The Guides are an example of a construct ostensibly designed to measure impairment, but which serves, especially in Victoria, the political interests of some groups (insurers) at the expense of others (accident victims).

The purpose of this article is a polemic one: to argue that only by scrutinising the normative values upon which the Guides are based can we see how they work, and only when we understand this can we refute the "phrenology" of the Guides, and turn them to the advantage of those who are most disadvantaged by their use – accident victims.

History of the Guides

The Guides, now in their fourth edition, evolved from 13 articles published in the *Journal of the American Medical Association* (JAMA) between 1958 and 1970. The first edition of the Guides was published in 1971. In explaining why the State of New Hampshire adopted the Guides as a means of establishing permanent impairment under that State's workers' compensation scheme, the legislature wrote that the aim was to "reduce litigation and ... establish more certainty and uniformity in the rating of permanent impairment".[7] Tennessee was more idealistic, stating the aim of "providing uniformity and fairness to all parties".[8]

From the outset the Guides have sought to emphasise the distinction between impairment, on the one hand (which is a medical question, and which does not include consideration of factors such as age, sex or employability), and, on the other, disability (which is a non-medical question and involves issues relating to a person's capacity to meet personal, social or statutory demands). The carefully drawn distinction breaks down upon closer scrutiny resulting, ironically, in a lack of fairness to all parties.

Criticism of the Guides

Essentially, criticism of the Guides forms three strands:

1. that the Guides are inherently flawed because they are arbitrary and internally inconsistent;
2. that although they represent a useful tool for assessment (more useful in some body systems than others such as vision and hearing), serious anomalies result when use of the Guides is mandated; and
3. that worse than merely mandating the use of the Guides is the situation, as in Victoria, where the Guides are not only mandated but either adopted in a piecemeal fashion or legislatively disrupted.[9]

It is worth noting that some of the most trenchant criticism of the Guides comes from within the medical profession. At a recent seminar series in Melbourne, a number of leading specialists were

p 791.

[4] E Smith Pryor, "Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment" (1990) 103 *Harvard Law Review* 964 at 965.

[5] D Stone, *The Disabled State* (Temple University Press, Philadelphia, 1984), pp 108-117.

[6] Ibid, p 117 (emphasis in original).

[7] N H Rev Stat Ann 281-A:23.

[8] Tenn Code Ann 50-6-204.

[9] So in Victoria the chapter on pain has been removed, there is to be a supplementary psychological chapter, and there is also the adoption of a 10 per cent threshold, all of which, if one accepts that the Guides do have integrity, disrupts the relativities present therein.

highly critical of the Guides' inability to accurately reflect the true impact of various impairments.[10]

The Guides as inherently flawed

The distinction between impairment and disability breaks down because impairments are defined as conditions that interfere with an individual's "activities of daily living"[11] which include "work activities".[12] Despite this blatant confounding of impairment and disability, the preface states:

> "the impairment estimate or rating is a simple number. Although it may have been derived from a well structured set of thorough observations, it does not convey any information about the person or the impact of the impairment on the person's capacity to meet personal, social, or occupational demands."[13]

The result of this breakdown is that the Guides are open to biased application. Smith Pryor cites the example of a woman suffering from cardiovascular disease.[14] If this woman, according to her, has been active in sports, and if the assessing doctor's image of a woman's typical daily activities is informed by the examples mentioned earlier in the Guides, then the doctor may not inquire about and evaluate the condition's effect on her sporting activities. In this way the woman would receive an impairment rating that did not take account of this functional loss.[15]

Although the Guides purport to be objective and to be based on scientific principles, they conceal fundamental normative values. Worse, however, the normative values are discriminatory, according to Smith Pryor. She cited the third edition, published in 1988, where, in the chapter on the reproductive system, an impairment of the penis results in 5 to 10 per cent whole-person impairment when "sexual function is possible, but there are varying degrees of difficulty of erection, ejaculation, and/or sensation".[16] In contrast, the criteria for evaluating impairment of the vulva/vagina make it clear that a 0 per cent whole-person impairment rating can result if "symptoms ... do not require continuous treatment [and] the vagina is adequate for childbirth during premenopausal years and sexual intercourse is possible".[17]

Examples of gender stereotyping are contained throughout the Guides. Examples are given of a woman who "led a normal life caring for three children and her home"[18] and a woman who remained "able to do kitchen work, go shopping, and drive an automobile",[19] in contrast to a man "who was unable to participate in activities such as tennis and hiking".[20]

The gender-stereotyped examples, and arguably gender-biased assessment criteria, to which Smith Pryor refers, are examples contained in the third edition. What is extraordinary, given the criticism levelled at such practices, is that they have been carried over into the fourth edition. For example, in the fourth edition chapter on the urinary and reproductive system, we are given the example of a "32-year-old man [who] suffered a compressive injury to the penile shaft". Although "sensation and ejaculation were normal ... pain resulted if intercourse were not undertaken carefully", thus giving a "9% impairment of the whole person, which takes into consideration the patient's age".[21] In contrast, we get the example of "an obese 38-year-old married woman, who had given vaginal birth to three living children [and who] experienced recurrent chronic dermatitis of the genitocrural area". In her case "satisfying sexual intercourse was possible if precautions were observed to avoid excessive vulval irritation", giving her a "0%

[10] Medicine and Surgery for Lawyers 1998 Seminar Series, jointly sponsored by the Australian Medical Association (Victoria) and the Law Institute of Victoria. A leading hand surgeon was critical of the fact that although the little finger is vital for power grip in the hand, and hence "the ring and small fingers are of far more value than the index for a labourer", the loss of the little finger receives a 5% impairment, whereas the index finger receives 25% under the second edition. An expert in the field of rehabilitation was critical of the fact that in relation to serious head injury, the crudeness of Ch 2 of the second edition, with its focus on whether a person can wash himself or herself, does not allow for the fact that seemingly minor problems, such as low frustration tolerance and other such behavioural problems often resulting from a blow to the frontal lobe, can have a major impact on people's lives.

[11] AMA Guides (2nd ed, 1981), p 225.

[12] Ibid, p 315.

[13] Ibid, p 8.

[14] Op cit n 4.

[15] Ibid at 971.

[16] AMA Guides (3rd ed, 1988), p 196.

[17] Ibid, p 211.

[18] Ibid, p 137.

[19] Ibid, p 139.

[20] Ibid, p 132.

[21] AMA Guides (4th ed, 1993), p 256.

impairment of whole person".[22] Whilst it is true that the examples are not intrinsic to the specific assessment methods, they are no doubt included to inform and thus influence the assessors.

Anomalies in the Guides

If the normative values "hidden" in the Guides are problematic, then so too are the ways in which different types of impairment are treated. Back injuries do not receive the attention that they deserve, considering the magnitude of such injuries in the workplace. In the second edition of the Guides the thoracolumbar spine is dealt with in four pages, whereas the hand takes 12 pages. In addition, the latest edition of the Guides sets up a clumsy choice between the "DRE" (Diagnostic Related Entities) and the "Range of Motion" method for assessing impairment of the back, which is said to derive from a somewhat legendary personality clash between two highly influential orthopaedic surgeons in the orthopaedic section of the American Medical Association.

During the evolution from the second to the fourth edition there have been two significant developments: back injuries no longer cause the impairments they used to, and psychological injuries no longer cause impairment at all. There are two possible explanations for this – either we do indeed live in an age of miracles or there is some socio-political agenda at work.

In relation to the significant lowering of the impairment rating for back injuries, and the absence of any scientific basis for this change, a cynic might suggest that this has something to do with the proliferation of the Guides as the method of assessing impairment in compensation schemes,[23] and the availability of ever more sophisticated diagnostic tools, such as CT and MRI scans, which more readily demonstrate disc derangement and thus raise impairment levels.

Although not officially acknowledged by the Victorian Transport Accident Commission (TAC), the authors have been advised that the Commission undertook alternative assessments under the second and fourth editions of the AMA Guides. These assessments apparently indicated that the variations between the two editions fell within a 5 per cent range, as indicated by Table 1.

Table 1. Variation between Second and Fourth Edition Assessments in Unofficial TAC Study

Second Edition (% impairment)	Fourth Edition (variation)
0-10	-0.01
11-19	-0.08
20-29	-1.1
30-39	-1.6
40-49	-1.5
50-59	-1.4
60-69	-1.7
70-79	+1.3
80-89	+3.7
90-100	+3.3

The authors have not been able to obtain the disaggregated results specifically for spinal injuries. However, on the face of the Guides we are drawn to the conclusion that in general terms, spinal injuries will be significantly reduced in their assessments under the fourth edition. Table 53 of the second edition of the Guides contains primary assessment for discal pathology and through an asterisked footnote permits additional assessments, for example leg impairment, by reference to other chapters of the Guides. The authors suspect that the low variation in the TAC's figures derives from the response of many of their examiners to Table 53 of the second edition. In the authors' experience, many of the TAC's examiners would not go to the asterisked items in the face of residual symptoms. Given this, it is no surprise that there would be little variation between second and fourth edition assessments.

The courts, however, have routinely accepted plaintiffs' assessments predicated on the application of the additional items that are derived from the asterisk under Table 53. We suspect the fourth edition assessments when compared to equivalent assessments accepted by courts under the second edition would be greatly reduced.

[22] Ibid, pp 259-260.
[23] Ibid, Table on Use of the Guides, p 4.

Another anomaly in the Guides is that in relation to impairment of the male and female sexual organs there is a "multiplier" for age, so that the younger a person is, the higher the impairment rating.[24] This would mean that two people, one 18 and the other 78, get different impairment ratings on the basis that the effect would be greater on a younger person. We make no criticism of this method, but note its inconsistency with the mantra in the introduction. Furthermore, the argument for the use of the multiplier is just as sound for other body systems, such as the spine, and yet it is not employed anywhere else.

In the first three editions of the Guides psychological impairment was considered to warrant a high whole-person impairment, yet in the fourth edition it does not attract a percentage whole-person assessment at all. There are countless examples of other types of injury, for example serious burns which do not result in amputation or loss of movement,[25] which do not rate well under the Guides.

Criticism of the application of the Guides

Given the widespread use of the Guides in the assessment of impairment, the lack of empirical evidence as to their reliability is striking. One of the very few studies conducted, however, casts doubts on their efficacy by revealing the role of observer error in the variation between assessments. Colledge cites a 1994 study in California which was done to evaluate the effectiveness of examiners doing impairment ratings.[26] The study involved one written case being given to 65 examiners who were asked to determine the level of impairment. The results revealed multiple ratings which ranged from zero to 70 per cent. Colledge concluded that "this wide disparity not only demonstrates a lack of consensus on ratings criteria, but also suggests that ratings often are influenced by factors other than just clinical finds".[27]

Throughout the various editions of the Guides there has been at least one constant: the warning "that impairment percentages derived according to Guides criteria should not be used to make direct financial awards or direct estimates of disabilities".[28] Under the most recent amendments to the *Accident Compensation Act* 1985 (Vic), however, the sole use of the Guides is for the specific purpose of making direct calculations of financial awards and direct estimates of disabilities.

The government also makes a 10 per cent whole-person impairment a precondition for lump sum benefits under s 98C of the *Accident Compensation Act* 1985 (Vic) and s 47 of the *Transport Accident Act* 1986 (Vic). Setting a threshold of this type discriminates between types of impairment, with the result that some people will now be unable to access lump sum benefits. In their article on the Guides, Luck and Florence[29] give as an example of this type of discrimination a patient with a painful Girdlestone arthroplasty who, despite severe muscle atrophy, would only receive a rating of 8 per cent because of a good range of movement. In contrast, someone with a fused hip, who is functionally much better, would get an impairment rating of up to 40 per cent because of complete loss of motion.

In New Zealand there has been some disquiet over the use of such impairment rating systems to exclude people from compensation under the statute, while at the same time barring the right to sue at common law. Duncan[30] indicated that this unease is most manifest in situations in which injured workers may have a good common law claim against a third party, and yet be barred from bringing such an action by the compensation statute; paradoxically they have no entitlement under the same statute because they are excluded by an arbitrarily imposed threshold. He noted:

[24] Ibid, p 256 (male reproductive organs), p 259 (female reproductive organs).
[25] L H Engrav, M H Covey, K D Dutcher, D M Heimbach, M D Walkinshaw and J A Marvin, "Impairment, Time Out of School, and Time Off Work after Burns" (1987) 79 *Plastic and Reconstructive Surgery* 927.
[26] A Colledge, "Is Splitting Up Booty Turning Into A Mutiny?" (1994) *International Journal of Occupational Health & Safety* 63.
[27] Ibid.
[28] AMA Guides (4th ed, 1993), p 5.
[29] J V Luck Jr and D W Florence, "A Brief History and Comparative Analysis of Disability Systems and Impairment Guides" (1988) 19 *Orthopaedic Clinics of North America* 839.
[30] G Duncan, "Accident Compensation Act 1995 and Still Languishing" (1995) 20 *New Zealand Journal of Industrial Relations* 237 at 246.

"such cases highlight the perversity of a law which extends the insurance cover whether the individual wanted it or not, and then offers, in certain cases, no compensation, but still refuses the right to seek redress through the courts."

The threshold has a further discriminatory effect in that the Guides are constructed so as to remove low rating impairments, such as injuries resulting in minimal loss of range of movement. By imposing a threshold, there is a "double whammy" effect so that another layer of impairments, above the trivial, is excised. We can see the effect by looking at the table relating to respiratory function.[31] A person could have only 80 per cent of the predicted FEV (Forced Expiratory Volume) rate and yet get a zero impairment rating.

Litigation in the United States

The way in which the United States courts have dealt not only with the criticisms levelled at the Guides but also attacks on the very use of the Guides for compensation purposes, is instructive for our purposes in Australia.

Challenges to constitutionality on the ground of discrimination

Challenges to the use of the Guides on the basis that they are invalid under the equal protection clause contained in the United States Constitution have, ultimately, been unsuccessful. In fact, United States appellate courts have taken such challenges as an opportunity to praise the Guides! In *Brown v Campbell Board of Education*,[32] the Tennessee Supreme Court found that the "uniformity, fairness and predictability"[33] provided by the Guides advanced the interests of the State.

A more encouraging result, at least in the first appellate court, was that of *Texas Workers' Compensation Commission v Garcia*.[34] In that case the Texas Court of Appeal found that the State's adoption of the Guides was unconstitutional vis-a-vis the equal protection clause. Singled out for particular criticism was the State's requirement of a 15 per cent threshold before attracting supplemental benefits. The court said that since the Guides did not encompass all types of impairments, certain workers would, no matter how disabled, be ineligible for benefits. Thus the threshold was arbitrary and discriminatory. Unfortunately, the Supreme Court of Texas reversed this decision,[35] holding that the use of the Guides was not unconstitutional, and that the 15 per cent threshold was "a rational means for the legislature to distinguish between moderately severe impairment likely to interfere with long-term employment from less severe impairment".[36] In the United States, as in Australia, discrimination on the basis of the extent, rather than the fact, of disability is not illegal.

Some encouragement, however, can be taken from the United States decisions. In *Garcia* the Supreme Court of Texas noted two challenges which were not raised by the plaintiff. The first was whether, by not providing for an alternative rating system if the Guides did not apply (as did most other State systems) the Texas *Workers' Compensation Act* was constitutional as it applied to workers not rateable under the Guides.[37] The second was whether, by mandating the use of the third edition of the Guides, which was out of print, there might be a ground for constitutional challenge.

Challenges on the grounds of unconstitutional delegation of power

This issue was raised in the dissent of Kauger J in *Davis v B F Goodrich*.[38] The argument, in the authors' opinion, is a powerful one, and deserves quoting in full:

"Section 3(11) vests in a purely private organisation, the American Medical Association, the unbridled authority to set standards for permanent impairment which govern an employee's right to collect compensation for on-the-job-injuries. This delegation is made without guides, restrictions or standards. It has resulted in the requiring of often unnecessary but expensive tests which increase the cost of workers' compensation insurance, the cost of doing

[31] AMA Guides (4th ed, 1993), Table 8, p 162.
[32] 915 SW 2d 407 (Tenn 1995).
[33] Ibid at 415.
[34] 862 SW 2d 61 (Tex App 1993).
[35] *Texas Workers' Compensation Commission v Garcia* 893 SW 2d 504 (Tex 1995).
[36] Ibid at 524.
[37] Ibid at 526.
[38] 826 P 2d 587 (Okla 1992).

business, and the cost of products to ultimate consumers. The legislature may not delegate the legislative power to a privately controlled organisation. Section 3(11) is unconstitutional because it vests the American Medical Association with the authority to determine the standards for the evaluation of permanent impairment – a power reserved to the legislature acting in its law-making capacity".[39]

It is interesting to note that in Victoria although under both the TAC and WorkCover legislation the Minister has the power to prescribe later editions, the choice has been made to implement the fourth edition by legislative change. This choice may in part be due to the fact that although Parliament has the power to defer to a fixed system, in order to determine who may or may not bring proceedings, or who may or may not obtain compensation, it is possible that delegating to an ever-changing system would be going one step too far. In this context it is interesting to note that the American Medical Association influences the operation of the Guides by a series of newsletters that purport to modify assessment methods.

Challenges on the grounds of failure to comply with the Guides' requirements

The United States courts have begun to look very closely at whether medical evidence sought to be led in compensation cases specifically complies with the requirements of the Guides, as Babitsky and Mangraviti noted.[40] Challenges on these grounds have, in the main, been much more successful than the others considered thus far. It is the case, however, that the courts have not taken the view that any non-compliance with the Guides will be sufficient to make the medical evidence inadmissible.

In *LaBarge v Zebco*,[41] the Oklahoma Supreme Court developed the test of "substantial compliance" to determine the admissibility of medical evidence not in strict compliance with the Guides. The facts of that case involved the employer trying to rely on an impairment assessment by its rating doctor which ignored the requirement, mandated by the Guides, that a specific impairment rating be given for each of two ruptured discs. The court at first instance found that the assessment of 12 per cent impairment, based on the employer's evidence, was correct. The Supreme Court reversed this decision, finding instead that the assessment provided by the employee of 40 per cent impairment was the only one that could be relied on as not only did it substantially comply with the Guides, it was a "text-book" example of an assessment done in accordance with the Guides. The *LaBarge* test for determining whether the Guides have been followed when clearly applicable is whether, from a medical report's four corners, an unexplained facially apparent and substantial deviation from the Guides can be detected by a mere reference to their text. The test in *LaBarge* has been applied and expanded upon in a number of subsequent cases.[42] In *Whitener v South Central Solid Waste Authority* the court made it clear that in cases where reference to the Guides does not facially reveal that the directives therein have not been followed, any inaccuracy in assessment will have to be very substantial before the evidence will be held to be flawed for lack of probative value.

There are numerous appellate court decisions which serve to illustrate the sort of failure to comply which will be considered substantial and hence of no probative value. Examples include the following.

Flawed testing procedures

In *Branstetter v TRW/Reda Pump*,[43] a case involving obstructive lung disease, the employer relied on the report of a doctor, who had performed an FEV test on the claimant, to reject the claim. The doctor's report indicated his belief that despite the test result, which indicated a severe obstructive lung defect, the test was inconclusive because the claimant did not co-operate with the testing, and that as a result the Guides could not be applied. The Oklahoma Supreme Court held that the doctor could

[39] Ibid at 599.
[40] S Babitsky and J J Magraviti Jr, *Understanding the AMA Guides in Workers' Compensation* (Wiley Law Publications, 1997), p 37.
[41] 769 P 2d 125 (Okla 1988).
[42] *Spangler v Lease-Way Automotive Transport* 780 P 2d 209 (Okla Ct App 1989); *Whitener v South Central Solid Waste Authority* 773 P 2d 1248 (Okla 1989).
[43] 809 P 2d 1305 (Okla 1991).

not simply say that the claimant was not trying on the spirometry tests and deny the benefit without first following up with the VO2 (Uptake of Oxygen) estimated exercise capacity test required by the Guides when "an individual has not performed maximally or correctly in the spirometry". Therefore the employer's medical report was insufficient under the Guides and judgment was entered for the claimant. Again, in *York v Burgess-Norton Mfg Co*,[44] the appellate court found that a court-appointed doctor's assessment could not be relied upon because he had failed to use an inclinometer as recommended by the Guides (whereas the treating doctor had), and that if he had used one, he would have found a measurable impairment.

Failure to give legally sufficient reasons for departing from the Guides

It is well established in the United States that the Guides may be departed from if there is a legally valid reason for so doing.[45] This has been the case not only in jurisdictions in which the use of the Guides was recommended, but also in jurisdictions in which their use was mandated.[46] There is, in fact, a recognition in the Guides that they do not "and cannot provide answers about every type and degree of impairment",[47] and in *Sutton v Quality Furniture Co*,[48] a case involving a plaintiff suffering from chronic pain, a letter was tendered from the then director of the AMA who wrote that the Guides' "near silence on pain ... is not due to failure to recognise pain as a potentially chronically impairing condition, but due to our inability to agree upon methods of evaluation for measuring pain".[49] On this evidence the court held that despite the mandated use of the Guides, where it clearly did not apply, as here in relation to chronic pain, a departure from the use of the Guides was permissible.

In order to make such a departure, however, the courts have held that medical reasons must be given in writing as to why the Guides do not apply. In *Wheat v Heritage Manor*,[50] the court held that it was not sufficient for the assessing doctor merely to assert that the Guides did not apply, and then to supply an alternative assessment. The doctor's alternative assessment was impermissible because he had not explained what was so unusual about the plaintiff's condition that the Guides did not apply.

Failure to supply adequate medical history

In *Zebco v Houston*[51] the court upheld the employer's appeal that the plaintiff's doctor had failed to comply with the requirements of the Guides in that he had not taken an adequate history. This case involved respiratory impairment, allegedly as a result of exposure to workplace pollutants. The court found that, contrary to the requirements of the Guides, the doctor had not questioned the claimant about exposure to pollutants, nor had he estimated the level of toxicity of any possible pollutants. Without such a history, it was impossible for the doctor to determine "the extent of the exposure" as required by the Guides.

The "Oklahoma Rule"

Due to the volume of litigation involving challenges to the Guides on the basis of failure to comply, the State of Oklahoma adopted the test developed in *Gaines v Sun Refinery & Marketing*.[52] This test, which became known as the "Oklahoma Rule", was designed to reduce the number of appeals on the ground of non-compliance by placing certain preconditions on the use of this ground of appeal. The practical effect of the rule was to allow more medical evidence which failed to comply. The gist of the rule is that any objections to medical evidence on the grounds of non-compliance with the Guides must be made

- at the trial level; and
- with a high degree of specificity.

For example, if the appellate court is asked to disqualify a report for inadequate history in that the plaintiff's history of exposure to other toxic chemicals was not included, that substantially identical request must have been made to the trial court.

44 803 P 2d 697 (Okla 1990).
45 *Chavez v Industrial Commission* 575 P 2d 340 (Ct App 1977).
46 Ibid.
47 AMA Guides (4th ed, 1993), p 3.
48 381 SE 2d 389 (Ga Ct App 1989).
49 Ibid at 390.
50 784 P 2d 74 (1989).
51 800 P 2d 245 (Okla 1990).
52 790 P 2d 1073 (Okla 1990).

Interpretation of the Guides: Do they still apply if the impairment is not rateable using them?

A much-litigated question in the United States has been whether, within a compensation scheme which makes the use of the Guides mandatory, they apply to an impairment which is not specifically addressed by them, so that a claimant with such an impairment would receive a zero rating. The leading case on this question is *Trindade v Abbey Road Beef 'n' Booze*,[53] which answered it in the negative. In this case the claimant had suffered a knee injury (torn cartilage and a torn anterior cruciate ligament) which had left him with an excessive range of movement of the knee. Although the injury (the knee) was covered by the Guides, the impairment was not, since the Guides only measured loss of range of movement, not an excess of it.[54] The result for the claimant – if the Guides applied – would be a zero rating. The court held, however, that the Guides did not apply and alternative criteria could be used (in this case the American Association of Orthopaedic Surgeons' manual). The court stated that the Guides could not be viewed as "a comprehensive, all inclusive schedule of permanent impairments ... [and that they were] incomplete and unsuited to the determination of permanent impairment resulting from certain types of injuries".[55] The decision in *Trindade* has been applied in a number of cases, allowing impairment assessment for subjective pain as a result of an injury to both elbows,[56] pain as well as objective evidence of chondromalacia and calcification,[57] and soft tissue injury to the back resulting in muscle spasms.[58]

[53] 443 So 2d 1007 (Fla Dist Ct App 1983).
[54] This case involved the use of the second edition of the Guides. In the fourth edition, in Table 64, provision is made for ligamentous laxity.
[55] 443 So 2d 1007 at 1011-1012 (Fla Dist Ct App 1983).
[56] *Sutton v Quality Furniture Co* 381 SE 2d 389 (Ga Ct App 1989).
[57] *Kroeplin v North Dakota Workmen's Compensation Bureau* 415 NW 2d 807 (ND 1987).
[58] *Patterson v Wellcraft Marine* 509 So 2d 1195 (Fla Dist Ct App 1987).

Application of the Guides in Victoria

The Guides are used in both the Victorian worker's compensation and transport accident schemes.[59] The question of the status of the Guides in the legislation, and the correct interpretation of the Guides, has received surprisingly little judicial attention.

Use of the Guides: Mandatory or discretionary?

Looking at the wording of s 91 of the *Accident Compensation Act* 1985 (Vic), the conclusion drawn is that the use of the Guides is mandatory when assessing impairments, since an impairment assessment is one "made in accordance with ... the American Medical Association's Guides". A more vexed question is whether the detailed assessment procedures in the Guides are mandatory or discretionary. The issue is particularly critical in respect of observing the somewhat onerous requirements for the collection of clinical histories and diagnostic information.[60] In the authors' opinion, given the loss of rights in both the TAC and WorkCover jurisdictions if, for example, impairment thresholds are not reached, the requirements of the Guides are mandatory. In addition, there is nothing in the language of the Guides which suggests that the requirements contained therein are in any way discretionary. On the contrary, the Guides assert that the review of all clinical records is the "first key to effecting an accurate impairment evaluation".[61]

Measurement requirements

In Ch 3 of the fourth edition it has been estimated that to measure one impairment, more than 100 measurements would need to be taken. In the authors' opinion, in light of the United States "failure to comply" cases, the testing procedures would be mandatory, and there would have to be substantial compliance to ensure that any medical conclusions drawn from the tests were not appellable.

[59] *Accident Compensation Act* 1985 (Vic), *Transport Accident Act* 1986 (Vic).
[60] AMA Guides (4th ed. 1993), Ch 2, Records and Reports.
[61] Ibid, Ch 1, p 3.

Medical report and history requirements

The requirements in Ch 2 of the fourth edition in relation to the preparation of medical reports are extensive, but again, we would submit that these requirements are mandatory. The reasoning behind them is the goal of enabling "two physicians, following the methods of the Guides to evaluate the same patient ... [and] report similar results and reach similar conclusions".[62] Without all assessing doctors performing all the tests required, and looking at the full history, including any hospital records, "it is impossible to compare reports" with the result that "it tends to give rise to avoidable confrontation".[63] In this respect it should be noted that the Guides assert that if an evaluation is inconsistent with an earlier evaluation, "there should be communication between the involved physicians and clinical studies ... to resolve any disparities".[64]

Principles of interpretation

In *Masters v McCubbery*[65] Ormiston J made it clear that the "proper interpretation of the Guides is a question of law [and not] a question of medical opinion",[66] in which case the Guides would fall to be interpreted in the same way as the legislation incorporating them – beneficially. A beneficial interpretation is one in which, if there are two or more equally valid interpretations open, the one most beneficial to the recipient of the benefit under the legislation (in this case, accident victims) should be chosen.[67]

We have seen from the United States litigation that the position taken there is that if the Guides do not apply to a particular impairment, then an alternative may be used. There is some authority for this contention within the Guides themselves.[68] O'Loghlen noted that hitherto the Guides have been narrowly interpreted in Victoria.[69] The attitude taken by the United States courts – that the Guides should not be taken to apply to all impairments, so that genuine impairments which do not rate under the Guides are given a zero percentage whole-person impairment – has not been adopted here. This, it is submitted, is an area which requires urgent attention.

Challenges to the use of the Guides

The potential legal challenges to the use of the Guides are essentially the same as those discussed in relation to the United States. Arguably, the likelihood of success in relation to each potential challenge can be gauged from the United States experience.

Challenge on the basis of constitutionality

This measure would have even less chance of success in Victoria than in the United States, since the Victorian Constitution does not contain any human rights safeguards such as freedom from discrimination – the Parliament's power is a plenary one.

Challenge on the basis of an unlawful delegation of power

States have, within their area of legislative competence, plenary power and can delegate to another authority. Because of this, the principle delegatus non potest delegare does not apply. Authority for this can be found in *BLF v Minister for the Interior*.[70] It is possible, as mentioned above, that the choice to implement the fourth edition by legislative change is an indication of the Parliament's awareness that delegating to an ever-changing system (that is, the latest edition of the Guides as comes into being from time to time, or any combination of existing Guides that the Minister sees fit) would be going one step too far.

Challenge on the ground of failure to comply

As in the United States, this ground is arguably the most fruitful in terms of striking out medical material. One of the advantages of this method is that challenges of this kind force insurers to spend considerably more to ensure compliance.

[62] Ibid, p 7.
[63] Ibid.
[64] Ibid, p 3.
[65] [1996] 1 VR 635.
[66] Ibid at 641.
[67] *Dodd v Executive Air Pty Ltd* [1975] VR 668.
[68] AMA Guides (4th ed, 1993), p 3.
[69] M O'Loghlen, "The American Medical Association's 'Guides to the Evaluation of Permanent Impairment' in Australia: The Standard, and Departure from the Standard" (1997) 8 *Insurance Law Journal* 208.
[70] (1987) 7 NSWLR 372 at 383 per Street CJ.

Given the advent of medical panels in the WorkCover jurisdiction to decide medical questions, and the fact that s 63(1)(c) of the *Accident Compensation (WorkCover) Act* 1992 (Vic) effectively removes the right of appeal on the merits to the Supreme Court from a decision of a medical panel, a different approach must be developed for the WorkCover and TAC jurisdictions.

Transport Accident Commission

In this jurisdiction challenges to medical material which fails to comply with the Guides would basically be in relation to the admissibility of the evidence. This would entail a wider focus than in the WorkCover jurisdiction, where, as we shall see, the aim would be administrative review on the process by which the decision has been reached.

Looking to have medical evidence excluded could involve asking whether the Guides were used, and if so, whether it was the right edition. The qualifications and training of the assessor would also be scrutinised, as would the examination and assessment process, to see if the Guides had been complied with. The final report would also be scrutinised from this perspective.

WorkCover

Winneke P made it clear in *Masters v McCubbery* that administrative law review is not ousted by s 63(1)(c) of the *Accident Compensation (WorkCover) Act* 1992 (Vic). Indeed, the language of the Act itself points to the same conclusion. Section 66 of the Act states that "an act or decision of a Panel is not invalid by reason only of any defect or irregularity in or in connection with the appointment of a member". The necessary implication is that there are grounds upon which the validity of the acts and omissions of a medical panel may be impugned, and that they are essentially the grounds of "defect or irregularity". Hence all of the types of failure to comply which we saw in relation to the United States cases would, it is submitted, be highly relevant.

From an administrative law standpoint, failure to comply would, if the panel ignored it, be a failure to take into account a relevant consideration, since the Act specifies that assessments must be made "in accordance with" the Guides. Equally the use of inaccurately assessed material may constitute the taking into account of irrelevant matters.

The remedies available under the *Administrative Law Act* 1978 (Vic) are discretionary. Applications are subject to time limits, and there is no review on the merits.

Conclusion

1. To guard against abuse of the AMA Guides, those involved with accident compensation need to ensure:
   - an intricate knowledge of the Guides;
   - the provision of prior assessments from credentialled examiners;
   - that patients are debriefed about substance, methodology and duration of examinations; and
   - scrutiny of the information supplied to or obtained by medical panels or assessors.
2. The Guides should not be mandated, but only recommended as an assessment method, and departures from the Guides should be encouraged where the Guides are deficient or unfair. Where superior and fairer alternative assessment methods are available, they should be utilised.
3. Where the Guides provide a fair and equitable result, this should be emphasised.
4. Where use of the Guides is mandatory, assessors must be held to account with regard to compliance.