

2008 ALUCA TurksLegal Scholarship

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Question 1:

Over recent years, the courts, SCT and FOS have dealt with an ever increasing volume of disputes in relation to TPD claims. The outcomes have often been contradictory and have left critical issues in standard definitions of TPD in doubt. Most recently, this has happened in relation to the date at which permanent incapacity for work should be addressed. Uncertainty about how claims should be assessed is not good for any of the stakeholders including, most importantly, customers.

- We would like you to analyse the areas where doubts and inconsistencies have arisen in the common definitions of TPD and present some practical solutions for the industry to consider.
- Your response should address whether you think critical parts of the definition could be better drafted, and if so how drafting approaches can be improved.
- Your response should also consider whether it is time to adopt common industry standard definitions.
- In this context you should comment on other countries where common definitions have been tried and whether they have produced greater certainty in claims decisions.
- Do you consider a standard definition would stifle competition and innovation?
- If so, would any improvements in certainty come at too high a price?

It seems utterly perplexing that what seems like a fairly straightforward two limbed occupation-based TPD definition could generate such a large body of case law with inconsistent outcomes.

How are customers expected to understand what TPD offers when great legal minds are confused?

It is not the writer's view that the product should be abandoned altogether as has happened in some countries overseas¹. However, the definitions need to be improved to iron out the inconsistencies which have been ventilated in the courts and tribunals time and time again. This paper will discuss some of those and include some suggestions for improvement in wording.

It is also not the writer's view that a one-size-fits-all definition should be developed in the interests of greater clarity. The consumer-base is far too diverse for that. A definition which is designed to fit everyone is more likely to produce ambiguous outcomes when applied to specific fact situations which don't quite fit into the one shoe. If that occurs, then the courts will rule against insurers to the extent of any ambiguity.

Furthermore, having only one TPD definition will reduce competition between insurers and discourage insurers from developing more innovative products. This cannot be good for customers or the industry.

Clearly, the TPD definitions require improvement and there is no reason why this cannot be done.

Common phrases - common inconsistencies

Some of the striking examples are discussed below.

Timing of TPD

The cases of *Auspine*² and *Halloran*³, both single judge decisions handed down in the Federal and NSW Supreme Courts respectively and within a year of each other, produced diametrically opposed outcomes.

Both TPD definitions had two limbs the second of which required a formation of an opinion or determination by the insurer that the customer was unlikely ever to return to work for which they were reasonably suited. In *Auspine*, the definition went further and defined the 'Date of Disablement' to be 6 months after the later of the date of the injury or illness, or the date the customer last worked.

The issue which these cases highlighted was at what date should the assessment of whether someone meets the TPD definition occur?

¹ For example, United Kingdom, the ABI is working on this, and in Brazil, this occurred in 2007.

² *Auspine Staff Superannuation Pty Ltd -v- Henderson and AMP Life Ltd* [2006] FCA 1281

³ *Halloran -v- Harwood Nominees Pty Ltd* [2007] NSWSC 913

In *Auspine*, the Court held that the date of assessment was when the insurer made its determination. In *Halloran*, it was held to be the date 6 months after the last day worked, not at determination time which would occur later in time.

The result is that completely different outcomes can arise depending on whether or not the consumer subsequently improves or deteriorates after the original 6 months has passed.

This issue could be clarified to some extent if insurers specify, within the definition, the date at which TPD claims will be assessed. It should be expressed in the plainest language so that the date is beyond doubt. Rather than referring to this as the ‘*date of disablement*’, it should be described as the ‘*date as at which your claim will be assessed*’ or words to that effect.

Formation of opinion definitions

The requirement that insurers form an opinion as to whether a customer meets the second limb of standard TPD definitions adds no value to the product, only creates additional problems for insurers, and confusion for customers. This feature of standard TPD definitions stems back to the 19th century⁴.

Standard TPD definitions would be greatly improved if this requirement was removed so that the definition went from being a subjective test, to an objective one.

The first advantage in doing so is that it would remove any confusion as to the date at which TPD is to be assessed. That is, it would be at a point in time fixed by the insurer, say 6 months after the customer ceased work due to disability, and there could be no debate that the assessment is as at the later date when the insurer makes its determination.

If the test remains a subjective one, then the insurer’s decision-making processes will be under much greater scrutiny by the Courts as they will be required to assess whether or not the insurer’s decision was reasonable. If there is a glitch in the assessment process, then the Court will set aside the insurer’s decision, and make its own decision anyway. If the formation of opinion requirement is removed, the focus will be shifted away from the insurer’s processes, and the Court can simply assess whether or not the customer meets the TPD definition. The added benefit for insurers is that it will reduce the likelihood that claims assessors will be called for cross-examination in litigated claims.

There are many TPD definitions in the market that operate successfully without this requirement. It should be removed.

The ‘Total’ in TPD – full-time and part-time

Courts have often said that capacity for work means capacity for full-time work.⁵ Accordingly, this can produce the outcome where a person can be regarded as *totally and permanently disabled* in circumstances where the evidence says they have a capacity to work part-time. Therefore, the word ‘*total*’ seems to be meaningless in this context.

⁴ *McArthur –v- Mercantile Mutual Life Insurance Company* [2001] QCA 317 per McPherson JA at 15

⁵ *Chammas –v- Harwood Nominees Pty Ltd (No 1)* (1993) 7 ANZ Ins Cas 61-175 per Hodgson J; *Halloran –v- Harwood Nominees Pty Ltd* [2007] NSWSC 913;

Whether or not the claim is to be assessed against full-time or part-time work capacity should be made clearer in the definition.

The SCT takes a practical approach on this issue so that where a person works full-time prior to disability, they will be assessed for TPD against a full-time work capacity. Conversely where they work part-time prior to disability, the usual test is whether the person is likely ever to be able to engage in part-time work.⁶

Again, there is no reason why this cannot be clarified in the definition by providing 3 options:

- *‘If you were working full-time immediately prior to ceasing work due to illness or injury, the relevant test will be whether you can work full-time in your own occupation/ any occupation for which you are reasonably suited; or*
- *If you were working part-time immediately prior to ceasing work due to illness or injury, the relevant test will be whether you can work part-time in your own occupation/ any occupation for which you are reasonably suited; or*
- *If you were on light duties as part of a rehabilitation programme immediately prior to ceasing work due to illness, but were full-time prior to starting that programme, the relevant test will be whether you can work full-time in your own occupation/ any occupation for which you are reasonably suited’.*

‘Own occupation’ v ‘any occupation’

This creates an important distinction in standard TPD definitions.

The *‘own occupation’* is a much easier definition to satisfy. Accordingly, whether or not it is offered depends on the occupational category because it would not be commercial for insurers to offer it to certain high risk manual occupations where the risk for workplace injury, particularly to the back, is greatly increased.

The distinction is not as relevant in cases where the customer has a very low level of education, and has only worked in manual jobs at the time they sustain a back injury. They are likely to meet the TPD definition regardless of whether or not it is an *‘own occupation’* or *‘any occupation’* definition.

A highly skilled white collar professional will have more difficulty meeting an *‘any occupation’* TPD definition because they will have more transferable skills, and the education, training and experience to undertake a broad range of desk jobs. However, they are more likely to claim for depression than for a back injury and this may exclude them from a number of jobs which they were otherwise suited to.

It is the writer’s view that this distinction is appropriate and should remain as it enables insurers to manage their risk having regard to occupational categories, and offers choice to those customers who can be offered either version, and are willing to pay the higher premiums to obtain the *‘own occupation’* cover.

⁶ Superannuation Complaints Tribunal Brochure *‘Total and Permanent Disability Benefits’*

‘Unable’ v ‘unlikely ever’ ‘likely never’

The courts traditionally drew a distinction between ‘unable’ and ‘unlikely ever’.⁷ From the customer’s perspective, the ‘unlikely ever’ TPD definition was much easier to satisfy as it requires the insurer to have regard to the availability of work in addition to considering the customer’s physical or mental ability to work. The ‘unable’ definition was easier for insurers to assess as they only had to consider the customer’s ability to work.

Now, the courts have moved away from that distinction with the result that insurers are now required to have regard to whether there is full time employment reasonably open to the customer in the open job-market.

While this will add to the costs of claims assessment, and makes it more difficult for insurers to assess ‘unable’ definition claims than was previously the case, it has removed what seems to be an incredibly artificial distinction, thereby making the TPD more straightforward, and better for customers.

Non-occupation TPD definitions

In recent years, more TPD products have been developed to meet the needs of those customers who are not in employment, and particularly home-carers and retirees. This is certainly a welcome development for insurers and customers alike as it makes the product more readily available in a market where people are living longer, and may adopt more flexible working practices in later life.

The overseas experience with standardising TPD definitions

The TPD product has not fared very well overseas.

In September 2005, the Brazilian insurance authority, SUSEP decided to prohibit the commonly sold life rider that covers TPD with effect from 1 January 2006 because there were too many complaints from customers who argued that coverage was not clear to them, and their claims were being unjustly declined.

In the United Kingdom, TPD cover forms part of the Critical Illness cover. Unfortunately, the TPD products have not gained a great deal of favour as a result of one out of every two claims being declined⁸, and customers being confused over the number of TPD definitions, and what those definitions actually mean. Many customers have also held the mistaken belief that TPD cover offers a safety net which guarantees to sweep up any illnesses not listed on the Critical Illness Policy⁹. Some of the problems highlighted were the subjective nature of the definitions, the over-reliance on the use of occupation, and the difficulty in determining the long-term diagnosis.¹⁰

⁷ *Ivkovic –v- Australian Casualty & Life Limited* (1994) 10 S.R. (W.A.) 325.

⁸ Perks, John, Director of Protection, Prudential ‘*Re-defining the Critical Illness Model*’ presentation slides at p5,

⁹ Tirbutt, Edmund ‘*Defining momento. The term total permanent disability is causing confusion. Edmund Tirbutt finds out how insurers can increase clarity.*’ <http://www.hi-mag.com/healthinsurance/article.do;jsessionid=123E74CF6A38B62F5>.

¹⁰ Perks, John, Director of Protection, Prudential ‘*Re-defining the Critical Illness Model*’ presentation slides at p5.

As at 21 August 2008, the Association of British Insurers was working on getting rid of TPD cover altogether and in its stead, develop more conditions to be integrated into the Critical Illness definitions.¹¹

Standardisation v product innovation

What has happened overseas and within the Australian market has shown that standard TPD definitions are confusing.

With confusion comes dissatisfaction for customers, which is not good for the industry.

It is difficult to recommend a one-size-fits-all definition as consumer's needs are diverse, and the industry must cater for this. The development of TPD products to cover retirees and home-carers is definitely a positive development. These definitions clearly have to differ from occupation-based definitions and more specificity is required. The downside is that there are more definitions floating around in the market. The upside is that they will be more tailored to fit particular situations, and hopefully, clearer as a result.

If a single definition is imposed on the industry, it will clearly stifle competition as there will be very little product differentiation. Furthermore, insurers will not be challenged to develop better products which meet the evolving insurance needs of our community.

Standard occupation-based definitions, which have been responsible for a great deal of litigation, can definitely be improved. Some suggestions have been discussed above which aim to increase clarity, and reduce the number of inconsistent outcomes. These changes aim to remove proven problems with the TPD product which have been highlighted time and time again by the courts.

Overall, the TPD product meets a definite insurance need in the community and should not be abandoned. It just needs to be improved, and it can be.

¹¹ Scott, Tracey '*ABI says it is near to scrapping TPD*' Money Marketing; <https://secure.moneymarketing.co.uk/cgi-bin/item.cgi?id=171541&d=pndpr&h=phhpr..>