



JUDGE D J MCGILL

Holds bachelor degrees in Arts, Law and Economics from the University of Queensland between 1968 and 1976, and a Master of Laws degree from the University of London in 1977. Spent two years as associate to Mr Justice Lucas and two years with Morris Fletcher & Cross, solicitors, being admitted as a barrister in March 1974.

Started private practice at the Bar in Brisbane in January 1978. A general civil practice ultimately developed some emphasis on administrative and revenue law. Appeared in the High Court a number of times as junior to G L Davies QC for Queensland, and on a few occasions as junior to the Commonwealth Solicitor-General.

Appointed an acting District Court judge for four weeks in 1992. In 1994, one of the first four Senior Counsel appointed by the Bar Association after the decision no longer to appoint Queen's Counsel. Appointed to the District Court on 6 September 1996. So far as he is aware he was the first "Senior Counsel" in Australia to achieve judicial office.

Lately a member of the Rules Committee which supervises the Uniform Civil Procedure Rules, and other matters of procedure in state courts.

Assessment of ISV under the Civil Liability Regulation

Judge McGill SC

ISV

1

\$1000

- Civil Liability Act 2003 s 61 (1)(c)(i)
 - Original form:

“in assessing the injury scale value, the court is to consider the range of injury scale values for similar injuries prescribed under a regulation”.

ISV

2

\$2,000

- Civil Liability Act 2003 s 61 (1)(c)(i)
 - New form:

“in assessing the injury scale value, the court must assess the injury scale value under any rules provided under a regulation”.

ISV

3

\$3,000

- Civil Liability Regulation 2003 s 6
 - (1) This section and schedules 3 to 6 provide the rules under which a court must assess the injury scale value (ISV) for an injury.
 - (2) Schedule 4 provides the ranges of injury scale values for particular injuries that the court is to consider in assessing the ISV for those injuries.

ISV

4

\$4,000

- (3) For an injury not mentioned in schedule 4, a court , in assessing an ISV for the injury, may have regard to the ranges prescribed in schedule 4 for other injuries.
- (4) Schedule 3 provides matters to which a court is to have regard in the application of schedule 4.

ISV

5

\$5.000

Schedule 3 –

1 – Objectives ... include ...

2 – Use the range of ISV in Schedule 4.

3 – Multiple injuries – prima facie, assess within range of dominant injury, ie the one with the highest maximum ISV: Sch 7.

4 – If inadequate, can be higher, but rarely more than 25% above top of the range.

ISV

6

\$6,200

Schedule 3 – others:

9 – Court may have regard to other relevant matters. Examples incl: age, life expectancy, pain, suffering, loss of amenities of life, and, for multiple injuries, the range for non-dominant injuries.

10 – Whole person impairment important.

12 – Prefer assessments of whole person impairment under AMA 5 (exceptions)

14 – ISV must be a whole number.

ISV

7

\$7,400

Mental disorders (ie psychiatric injury)

Schedule 4 – 4 items, from **10** – Extreme mental disorder – 41 to 65, to **13** – Minor mental disorder – 0 to 1. All defined by a PIRS rating.

Schedule 3 – s 6: Court can accept a PIRS rating only if assessed by a medical expert as required by schedules 5 and 6, *and* in a PIRS report as per schedule 5 s 12.

ISV

8

\$8,600

Schedule 3 – also note:

s 5: An adverse psychological reaction to a physical injury merely a feature of the injury.

s 13: In assessing permanent impairment caused by a mental disorder, must give greater weight to a PIRS report than another medical assessment (eg AMA 5)

ISV

9

\$9,800

Judgments on the court web page:

2005 - 2 Supreme Court, 1 District Court.

2006 - 3 Supreme Court, 6 District Court

1 Court of Appeal (from S Ct)

1 District Court appeal (from M Ct)

2007 - 1 Court of Appeal (from S Ct).

NO trial judgments.

ISV

10

\$11,000

Multiple injuries –

- 10 out of the 12 matters (8 involved spine)
- Of the 10, ISVs were assessed:
 - 2 within the range of dominant injury
 - 4 not more than 25% above
 - 4 more than 25% above, up to 100%
- 3 of 5 Supreme Court matters > 25% up.
(all 3 of the 2006 judgments!)

ISV

11

\$12,400

- Multiple injuries – selection of dominant injury:

“What constitutes the dominant injury has little relation in the regulation dictionary to the objective facts.”

- *Clark v Hall* [2006] QSC 274 per White J at [64]

ISV

12

\$13,800

- Orthopaedic injuries – pattern in ISV

Approx. = 120% of whole person impairment under AMA 5.

- Dutney J in *Clement v Backo* [2006] QSC 129 (not mentioned on appeal)
(not helpful for ordinary whiplash etc)

ISV

13

\$15,200

Psychiatric injury - PIRS rating

6 Areas of Functional Impairment, in each of which the plaintiff is assessed on a scale from 1 to 5 - list of 6 numbers.

- No attention to anything else eg misery, suicidal ideation, propensity to kill people.

ISV

14

\$16,600

Psychiatric injury - PIRS rating -

From the 6 numbers, derive a total score,
and a median score:

ie, list the numbers in ascending order
the number between the third and
fourth numbers, rounded up if necessary
to the nearest whole number, is the
median score.

ISV

15

\$18,000

Psychiatric injury

-

PIRS rating

-

For example, if the scores are:

1, 3, 3, 2, 1, 2

Arrange in ascending order;

1, 1, 2, 2, 3, 3

So median score = 2

ISV

16

\$19,600

Psychiatric injury - PIRS rating -

Another example, if area scores are:

1, 3, 1, 2, 1, 2

Arrange in ascending order;

1, 1, 1, 2, 2, 3

So median score = 2

Total score is 10, so PIRS is 5% (from conversion table, in Schedule 5 s 7.)

ISV

17

\$21,200

Psychiatric injury - PIRS rating -

Consider 2 examples:

1, 1, 1, 1, 1, 5

Total 10, median class score 1

PIRS 2%, Item 13, ISV 0 – 1, max \$1,000

1, 1, 2, 2, 2, 2

Total 10, median class score 2

PIRS 5%, Item 12, ISV 2 – 10, max \$11,000.

ISV

18

\$22,800

Psychiatric injury - PIRS rating-

Consider 2 more examples:

3, 3, 3, 4, 4, 4

Total 21, median class score 4

PIRS 44%, Item 10, ISV 41 – 65, max \$136,100

2, 3, 3, 4, 4, 4

Total 20, median class score 4

PIRS 41%, Item 10, ISV 41 – 65, max \$136,100.

ISV

19

\$24,400

Psychiatric injury - PIRS rating-

What if the change is slightly different:

3, 3, 3, 4, 4, 4

Total 21, median class score 4

PIRS 44%, Item 10, ISV 41 – 65, max \$136,100

3, 3, 3, 3, 4, 4

Total 20, median class score 3

PIRS 26%, Item 11, ISV 11 – 40, max \$68,000.

ISV

20

\$26,000

Psychiatric injury - PIRS rating-

So compare two **very similar** plaintiffs:

2, 3, 3, 4, 4, 4

Total 20, median class score 4

PIRS 41%, Item 10, ISV 41 - 65, max \$136,100

3, 3, 3, 3, 4, 4

Total 20, median class score 3

PIRS 26%, Item 11, ISV 11 - 40, max \$68,000

ISV

21

\$27,800

Costs outcomes:

In 20 matters in 2006, according to ALA
conference paper -

Plaintiff – indemnity costs: 13

Plaintiff – standard costs: 5

Defendant – some costs: 2

ISV

22

\$29,600

White J, *Clark v Hall* [2006] QSC 274, [62]:

“The assessment of general damages, rarely a matter of great dispute between the parties or particular complexity at common law in this state, has been made difficult The time involved in traversing the labyrinthine structure of the CLA and regulation has cast a larger burden than hitherto on the medical and legal professions and the courts. It is to be hoped that the reduction in general damages awards will have the anticipated effect of reducing premiums Otherwise it seems to be a rather vexing exercise in over prescription with nothing much to see for it.”

ASSESSMENT OF ISV UNDER THE CIVIL LIABILITY REGULATION

by Judge McGill SC

When the *Civil Liability Act* 2003 was enacted, it provided in s 61 that general damages awarded by a court in relation to an injury arising after 1 December 2002 had to be assessed on the basis of an injury scale value on a scale running from 0 to 100, from a case in which an injury is not severe enough to justify any award of general damages, to a case in which the injury is of the gravest conceivable kind. Initially subsection (1)(c) required the court “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.”

However, by a provision hidden in the *Professional Standards Act* 2004 this was changed so as to provide that, in assessing the injury scale value, “the court must – (i) assess the injury scale value under any rules provided under a regulation; and (ii) have regard to the injury scale values given to similar injuries in previous proceedings.” The change was clearly intended to ensure that judges followed the rules. Once an injury scale value is determined, it is converted into a monetary amount by the formula set out in s 62 of the Act; essentially, the higher the ISV, the greater the value of each additional gradation in the scale. This is despite the reference in s 61(1)(b) that the scale reflects “100 equal gradations in general damages.”¹

The relevant regulation was the *Civil Liability Regulation* 2003 which commenced on 26 September 2003. Section 6 of the regulation dealt with ranges of injury scale values for the purpose of s 61(1)(c)(i) of the Act. Initially that section and the schedules 3 to 6 referred to in it expired one year after the commencement of the section, that is on 26 September 2003; however, by an amendment to the regulation by SL196 of 2004, which commenced on 25 September 2004, that provision of s 6 was removed; it follows that the regulation will not expire for 10 years, when it will expire under the *Statutory Instruments Act* unless some other provision is made.

¹ Shades of George Orwell.

The new s 6 of the regulation inserted in 2004 identified that section and schedules 3 to 6 as providing “the rules under which a court must assess the injury scale value for an injury.” Subsection (2) provides: “Schedule 4 provides the ranges of injury scale values for particular injuries that the court is to consider in assessing the injury scale value for those injuries.” Schedule 4 runs for 102 pages, and contains no fewer than 162 specific injuries, ranging from “1 – quadriplegia” to “162 – minor dermatitis”. For any injuries missed, subsection 6(2) of the regulation provides that a court in assessing an injury scale value for an injury not mentioned in Schedule 4 may have regard to the ranges prescribed in Schedule 4 for other injuries. There are in Schedule 3 six pages of instructions on how to use and apply Schedule 4.

Schedule 3 contains a number of provisions as to matters to which courts are to have regard in the application of Schedule 4. Section 1 of the schedule sets out the objectives of Schedule 4 in the following terms:

“The objectives of Schedule 4 include promoting – (a) consistency between assessment of general damages awarded by courts for similar injuries; and (b) similar assessments of general damages awarded by courts for different types of injury that have a similar level of adverse impact on an injured person.”

What was not said there was that undoubtedly one of the objectives of schedule 4, and indeed this whole system, was to reduce the amount of general damages awarded, particularly in the case of less serious injuries. That has been amply borne out by the experience to date with the application of the regulation. There is in my view nothing to suggest that the implementation of this system has increased consistency between assessments of general damages awarded by courts for similar injuries.² I have previously, in a paper delivered elsewhere, compared the sort of injuries which give rise to the same range of ISV under the schedule, in a way which I think leads to the conclusion that the use of this system makes it more difficult for courts to assess damages by reference to the level of adverse impact on an injured person. In other words, what matters is not just the level of impact but what sort of injury you have; it

² For example, compare *Schmidt v Dobb* [2006] QDC 6 and *Whitney v Whiteway* [2006] QDC 163, where the same ISV was assessed for significantly different injuries.

seems to me that the ISV ratings for injury to the spine in particular are artificially depressed in this schedule. To some extent, that has been borne out by the decisions which have occurred under the legislation.

Multiple Injuries

One of the features of the cases so far decided has been that most of them involved more than a single injury, as indeed one would expect on the basis of the sort of litigation which has been occurring in courts for years. This gives rise to the issue about how multiple injuries have been treated. The note to s 3 of schedule 3 recognises that the effects of multiple injuries commonly overlap with each injury contributing to the overall level of adverse impact on the injured person, which may well be the case but is not invariably the case; sometimes the effect of multiple injuries is to produce a situation which is collectively worse than the sum of its parts, as indeed seems to be acknowledged by the next note, that “if each of the multiple injuries were assigned an individual ISV and these ISVs were added together, the total ISV would generally be too high.” This appears to recognise that there would be some situations where they would not be too high, and possibly even where they would be too low.

Nevertheless, the mechanism adopted for multiple injuries seems calculated to minimise the damages awarded. A court is required to identify the “dominant injury”, which simply means the injury in respect of which the item in schedule 4 has the highest ISV rating for the range provided for that item. Once a dominant injury is identified in this way, prima facie that existence of additional injuries is to be reflected by assessing a higher ISV within the range than the court would assess with a dominant injury only: s 3(2) of schedule 3. Obviously that is not always going to be appropriate, either because the dominant injury alone justifies an ISV at or near the top of the range, or because the non-dominant injuries are together of considerable significance relevant to the dominant injury.

Section 4 contemplates that that method of assessment might be inadequate, and permits the court to make an assessment of the ISV that is higher than the maximum dominant ISV provided it is not more than 100 (obviously) and “should rarely be more than 25% higher than the maximum dominant ISV.” The problem with the

application of this provision of course is that courts only decide matters one at a time, and strive to determine the result which is appropriate in that particular case. If it turns out that that means an ISV of more than 25% above the maximum dominant ISV, that is what will happen in that case. It is not as though judges see themselves as having a quota of assessments above 25% which they have to use only sparingly. Judges no doubt console themselves with the thought that these days it is a rare, indeed very rare, claim which makes it to a trial, and it is likely that there will be something special about any particular claim that does.

Subsection (4) provides that if the increase is more than 25% of the maximum dominant ISV “the court must give detailed written reasons for the increase.” The provision of detailed written reasons has certainly been a feature of those decisions I have seen which perform an assessment under the regulation, whether or not there is an uplift of more than 25%. The assessments of damages in those reasons are longer, generally very much longer, than assessments of general damages used to be at common law.

There have now been a number of decisions of courts making assessments under the regulation, but not all that many; not so many that it is inconvenient just to summarise most of them here. There have been some additional judgments, but they have not been put on the court webpage and are not readily accessible, and therefore not such useful subjects for analysis. Interestingly, I have not been able to find any judgments this year in either the Supreme or District Courts assessing damages under the regulation. I shall summarise them before trying to draw some general conclusions as to the way in which courts are approaching this process.

The first decisions - 2005

***Coop v Johnston* [2005] QDC 79**

The first cab off the rank was the decision of Judge Britton SC delivered on 24 March 2005. The judgment was detailed and thorough and a model for other judges to follow. He found that the injuries suffered by the plaintiff in a motor vehicle accident in that case were seven in number, and proceeded to determine which item in the injury column of schedule 4 applied to each injury, in order to determine the range of

ISV for that injury. The injuries found and the items in schedule 4 attributed to them were as follows:

- (i) soft tissue injury to the left hip/thigh – Item 128
- (ii) soft tissue injury – bruising to mid shaft of left humerus – Item 124
- (iii) soft tissue injury – bruising left side of face – no item
- (iv) soft tissue injury – small scratch left side of face – Item 22
- (v) cervical spine injury – Item 88
- (vi) ganglion to the left wrist – Item 108
- (vii) displaced fracture of nose – Item 16

It followed that the dominant injury was the nasal fracture, because that item had the highest ISV range, going up to 13. His Honour noted at [136]: “This is a surprising result because on any view of the evidence the most significant of the plaintiff’s injuries is the cervical injury.”

The plaintiff had continuing neck pain on most days and headaches nearly every day, made worse by certain types of activities including driving. They had also become worse when she obtained employment. There had been a difference in the medical evidence, with two specialists both purporting to give an impairment assessment under AMA 5, the plaintiff’s specialist giving a range of 5%-8% whole person impairment and the defendant’s assessment being 0% whole person impairment. His Honour, however, rejected some of the findings of the defendant’s specialist, and ultimately preferred the assessment of the plaintiff’s specialist. This condition was essentially a persisting whiplash injury, which his Honour put in Item 88.

Because of the significance of the injuries other than the dominant one, particularly the cervical spine injury, his Honour made a higher assessment than would have been appropriate if the dominant injury had existed alone, and indeed considered that the level of adverse impact of the plaintiff’s multiple injuries was so severe that the maximum within the range for the dominant injury was inadequate to reflect the level of impact: [144]. “I have taken into account the pain and suffering of the plaintiff and her loss of amenities of life as well as the fact that she is still a relatively young woman with a normal life expectancy.” He went on to assess an ISV for the multiple injuries at 16 (\$19,600), which was not more than 25% higher than the maximum for the dominant injury.

Although this judgment contains a detailed discussion of the various relevant provisions of the Act and the regulation, and in particular the provisions in relation to multiple injuries, it does not appear that there was anything particularly contentious in relation to the operation of these provisions which arose or which was considered by his Honour. Ultimately, it is simply an example of the application of the multiple injury provisions in circumstances where the plaintiff suffered an enduring whiplash, and some other injuries. The only other significance, perhaps, is that it tends to confirm that the injury scale in schedule 4 does artificially depress the ISV for injuries to the neck.

***Ballesteros v Chidlow* [2005] QSC 280**

The first Supreme Court decision came out on 10 October 2005, following a three-day trial at which liability was not in issue. In that case, the plaintiff suffered in a motor vehicle accident a cervical spine injury, graze to the left shoulder, bruising to the left ankle, left lower leg, left hip, chest and stomach, and a cracked back tooth; a claim that she also suffered a lumbar spine injury was rejected by her Honour. The plaintiff had good days and bad days, but at times the neck was stiff and uncomfortable and caused difficulties in sleeping, and difficulties with concentration. She had headaches at times which were quite severe. On the other hand, her neck was often pain free. Her Honour analysed the relevant provisions of the Act and regulation from para [54], and placed each injury within an item in schedule 4 so as to derive the dominant injury: [66]. Most of these were obvious enough, but in relation to the cervical spine injury there was a dispute as to whether it fell into Item 88 or 89. Her Honour referred to the description of each injury and said at [77]:

“The description of the plaintiff’s cervical spine injury seems to fall between 88 and 89. [One doctor] assessed the plaintiff’s injuries as equating to an 8% whole person impairment (excluding pain and headaches). [Another doctor] assessed the impairment at 1% ... The plaintiff says that these symptoms have significantly abated. However, it would not be correct to characterise those symptoms 18 months after the injury as ‘merely a nuisance’.”

Ultimately, her Honour concluded that the injury belonged in Item 88. This made it the dominant injury. An ISV of 7 would have been found if the neck injury had existed alone: [78]. Her Honour said in relation to the other injuries at [85]: “To take account of her other injuries, including the loss of the tooth and the severe impact which her injuries have had on her quality of life it is appropriate to increase that to an ISV of 9.” This meant \$9,800. Her Honour regarded *Coop v Johnston* (*supra*) as a worse injury. White J did note that the general damages derived under the Act as a result were “substantially less than the plaintiff would have obtained had a claim for damages been calculated at common law”: para [87].

An appeal to the Court of Appeal was allowed, but not in relation to the assessment of general damages: [2006] QCA 323. The trial judge’s finding that a lumbar spine injury was not caused by the accident survived a challenge, but the assessment for damages for future economic loss was held to be manifestly inadequate, and the total award was increased from \$99,819 to \$124,979. The court, however, by a majority rejected an argument based on the proposition that the reasons of the trial judge were insufficient to satisfy the requirements of s 55(3) of the Act, that “the court must state the assumptions on which the award is based and the methodology it used to arrive at the award.” That suggests that the Court of Appeal is (fortunately) not going to be too strict with trial judges when it comes to assessing economic loss which cannot be precisely calculated. Unfortunately, there was no guidance from the Court of Appeal as to the application of the ISV provisions.

***Morrison v Hudson* [2005] QSC 290**

A few days later another Supreme Court decision came out; again a quantum only case. The principal matter in issue in that case appears to have been economic loss. The plaintiff had suffered in a motor vehicle accident an injury to his right leg, serious soft tissue injury to the calf, with no fracture: [7]. He also sustained facial lacerations, which led to scarring of the face, primarily of the central forehead and nasal bridge. There was some evidence that there was some prospect of improvement with surgery, and of some loss of feeling in the upper lip which could not be treated. There was some persisting pain in the right leg which also occasionally gave way, and on one occasion this led to a further injury to his hand, which was also treated as having been caused by the accident: [18]. This involved the top of the thumb being

cut off. This has changed the appearance of the end of the right thumb, and most of the nail has been lost, there was some difficulty in gripping objects and some continuing pain in the hand. He was assessed at 23% loss of function of the thumb, equivalent to 8% loss of function of the arm. It was his dominant hand. It was common ground that the scarring was the dominant injury, though there was the issue as to whether it fell within Item 19 or Item 20. His Honour said at [47]:

“Each was presumably driven to make these submissions because of the relatively minor nature of each of the other individual injuries. Together, however, the three injuries constitute significant injuries and the impairment of the thumb and the injury to the lower leg have significant consequences to the plaintiff’s earning capacity.”

In the event, he treated the scarring as falling within Item 19 and allowed an additional 25% of the highest ISV for that item for the impact of the other injuries. This produced an assessment of \$32,500, which appears to have been arrived at without regard to the requirement in s 14 of schedule 3 of the regulation, that the ISV be a whole number, since this is the amount for an ISV of 20 (\$26,000), increased by 25%. There was little more said in relation to the general damages in that case.

Supreme Court decisions - 2006

***Clement v Backo* [2006] QSC 129**

The plaintiff was injured in a motor vehicle accident which produced a number of injuries, an injury to the lumbar spine at the L1 level, a neck injury, an injury to the right shoulder, an injury to the thoracic spine, bruising to the left lower ribcage area, bruising of the left knee, bruising to the right groin area, and internal injuries to the bladder and kidneys: [8]. The plaintiff had generally recovered from the injuries to the hip or groin and shoulders, but still suffered some discomfort when he walked any great distance or was overactive. The injury to the cervical spine caused severe headaches. The three injuries to the spine produced a whole person impairment together of 15% to 18%. Dutney J noted that there was not in fact any single dominant injury, but that either Item 88 or Item 93 was the dominant injury for the purposes of s 4 of schedule 4: [42]. His Honour continued at [43]:

“Clearly an ISV of 10, even if increased by 25% to 12.5 pursuant to s 4(3)(b) of the fourth schedule, is not an adequate compensation for a whole person impairment of 15% to 18%. It also ignores the undoubted aggravating effect of the shoulder/groin injuries, both of which are continuing sources of distress to Mr Clement.”

His Honour referred to a number of items which produced much higher ISVs for a 25% whole person impairment³ and suggested that the intention of the legislature was that when considering orthopaedic injuries, the ISV should generally be proportionate to the percentage impairment of the whole person, with the ISV exceeding the percentage impairment usually by at least 20%. Applying this logic to a whole person impairment of 15% to 18% produced an ISV of between 19 and 22.5 in rough terms. He noted that the expressed intention of schedule 4 was that overlapping effects of multiple injury should produce some discount, but also that it should be increased to reflect the lesser injuries in percentage impairment terms not otherwise taken into account. In the result, he determined that the appropriate ISV overall was 20. This produced an award of general damages of \$26,000. Because there was an issue as to whether the *Civil Liability Act* applied, his Honour also assessed general damages at common law, at \$50,000.

An appeal to the Court of Appeal was dismissed on 16 March this year: [2007] QCA 81. The appeal, however, was not about the assessment of general damages, but in relation to the amount awarded in effect for gratuitous services, and the application of s 59(1) of the Act. Nothing of any assistance was said in relation to the assessment of general damages.

***Johansson v Hare* [2006] QSC 223**

The plaintiff was injured in a motor vehicle accident where the plaintiff's vehicle was substantially damaged, but the plaintiff suffered no immediate injuries, apart from being shaken and upset; there was increased pain in her lower back over the next few days and two days after the accident she ceased work for a few days before returning to work, while still suffering headaches and pain in the neck and lower back, to assist

³ Items 86, 90, 91, 95, 105, 107, 111, 121, and 126. Only the first 3 involve the spine.

her employer at a particularly busy period, and to preserve her chances of promotion. She was shortly afterwards promoted, and had been promoted twice prior to the trial. Ultimately, the plaintiff had to give up her work almost two years after the date of the accident, because she was unable to cope with her injuries. Nevertheless, there had been no significant change in the headaches and neck and lower back pain; if anything, they had become worse. They were suffered daily, though they varied in intensity, and at times required her to lie down and rest. The symptoms were found to be permanent: [12]. The trial judge accepted that the plaintiff's injuries were caused by the accident, even though to some extent they may have involved an aggravation of some pre-existing degeneration; he noted that there was often little correlation between symptoms and degeneration which could be detected by x-rays etc.

His Honour found 5% whole person impairment to the cervical spine and an 8% whole person impairment of the lumbar spine: [21]. These fell within Items 88 and 93 respectively, which gave the same ISV range, but his Honour treated the lumbar injury (93) as the dominant injury because it was the more disabling. He said that if there had been only that injury he would have assessed it at the maximum level for Item 93, of 10, but because of the other injuries, the debilitating pain and the effects on her lifestyle and quality of life, there should be a significant uplift. His Honour referred to earlier decisions under the regulation before concluding that an uplift factor of 50% should be made, to produce an ISV of 15, which resulted in the assessment of general damages of \$18,000: [25].

***Clark v Hall* [2006] QSC 274**

The plaintiff was injured in a motor vehicle accident; at the trial White J resolved an issue of contributory negligence in favour of the plaintiff: [25]. The plaintiff suffered an open fracture of the great toe of the right foot, cuts to her hand and legs, bruising to her chest and fuel burns to her skin. The toe was sutured and the plaintiff was sent home. The fracture healed. Initially the plaintiff was quite disabled but once her burns and bruising healed she could use crutches. The cut to her hand and wrist took some time to heal, and it was a long time before she was able to wear a closed shoe. An attempt to return to work four months after the accident was unsuccessful, as her work required her to be on her feet and to wear closed safety shoes. Subsequently, further x-ray examination revealed that there was some non-union of the fracture

which required further surgery leading to a further increase in symptoms, temporarily. Three months after this further surgery she again attempted to return to work but again was unable to do so (she worked as a kitchen hand at a large hotel).

Apart from the physical injuries, she developed a chronic post-traumatic stress disorder attributable to this accident, with her psychiatrist assessing a PIRS rating of 7% but adding that he did not believe that this percentage “fully captures the severity or true extent of impairment experienced”.⁴ The plaintiff had been treated with anti-depressants, and after she gave up work she put on a lot of weight. A psychiatrist retained on behalf of the defendants diagnosed a chronic adjustment disorder with fixed anxiety and depressed mood, and said that by March 2006 she was no longer suffering from any mental disorder. She had moved to a different area and begun a TAFE course, and was more positive about employment prospects: [37].

The injury to the toe was identified as being the dominant injury, and as falling within Item 153, justifying in itself an ISV at the top of the range for that item, 7: [66].⁵ Although the psychiatric conditions had essentially stabilised, they were for a time significant, and there was also a degree of pain and suffering and loss of amenities of life, which together justified an increase of more than 25% of the highest ISV: [67]. Her Honour had regard to other decisions under the regulation. Ultimately, her Honour assessed an ISV of 12 for all the injuries: [71]. That amounted to only \$13,800, in a total judgment of \$285,258.91, sufficient to support an order that the plaintiff have costs on the indemnity basis.

District Court Decisions – 2006

***Schmidt v Dobb* [2006] QDC 6**

The plaintiff suffered a whiplash injury of the cervical spine in a motor vehicle accident: quantum only was in issue at the trial. Following the accident she had daily pain in her neck and shoulders, and weekly headaches, made worse by the work she was doing, as room attendant at a hotel. Despite this she persisted in that work until she was able to obtain alternative, lighter improved work with which she was coping reasonably well, though she still experienced pain if required to perform heavier

⁴ Which is to be expected with a PIRS percentage; see the discussion below.
⁵ Compare this with the assessment in *Hay v Magnusson* [2006] QDC 191.

tasks: [10]. The injury was assessed under Item 88 (moderate cervical spine injury – soft tissue damage) on the basis of the restricted range of movement in the spine, intermittent findings of muscle spasm and the plaintiff’s ongoing symptoms of pain: [19]. Bearing in mind the plaintiff’s relative youth, and good work ethic, an ISV of 8 was assessed, towards the upper end of the range: (\$8,600): [20].

***Carroll v Coomber* [2006] QDC 146**

I had to undertake my first assessment under the regulation in this matter. The plaintiff was injured in a motor vehicle accident, as a result of which she suffered six injuries: bruising, principally associated with the seatbelt; a whiplash injury to the neck; a lower back injury; an injury to the right knee; an injury to the right shoulder; and a psychological injury. Items were identified for each of these injuries, three of which potentially qualified as the dominant injury, Items 12, 39, and 93. Of these, the lower back injury was chosen as the most significant, but the fact that there were three potentially dominant injuries indicated that this was not a case where there was one particular injury which was significantly worse than the others. Because of that, and because the plaintiff was relatively young (25 years) and most of the injuries would remain for the rest of her life, and there was ongoing pain, and the psychological injury was likely to restrict her ability to accommodate herself to these injuries so that she had poor prospects of rehabilitation, I did not regard this as a case which fell readily within the scheme contemplated by ss 3 and 4 of schedule 3. At [42] I said: “The injuries operate in a cumulative way; their effects do not greatly overlap, and the combined effect is going to be a good deal greater than the individual effect of any of them. Overall, I would assess the cumulative effect of these injuries as being quite serious, certainly much more serious than the individual contribution of any one of them. In my opinion, in those circumstances, neither an assessment within the basic ISV range of 0-10, nor an assessment within the primary uplift range of 25 per cent above 10 (notionally 12.5, presumably 13 since only a whole ISV can be adopted) would be adequate to reflect the cumulative effect of all of the plaintiff’s injuries.”

I noted that the injuries come on top of other problems the plaintiff had already, which made more significant the loss suffered in this accident, then had regard to the earlier decisions, of which the most useful for comparison was *Coop v Johnston*. Bearing all those factors in mind, and the assessments made in the earlier decisions, I allowed an

ISV of 18 (\$22,800): [47]. I noted that this was much less than the assessment would have been at common law.

***Whitney v Whiteway* [2006] QDC 163**

After a detailed consideration of a good deal of evidence, Griffin DCJ found that the plaintiff had suffered a neck injury which fell in Item 88: [63], and a lumbar spine injury which fell in Item 93: [67]. Both had the same ISV range. His Honour had regard to other decisions and held that an ISV not more than the top of the range for dominant injury, 10, was appropriate for all injuries without uplift, and indeed for all injuries an ISV of only 8 (\$8,600) was assessed: [70].

***Tomlins v Sheikh* [2005] QDC 174**

This decision is unusual in that it did not arise out of a motor vehicle accident; it was an occupier's liability case: the plaintiff was at a restaurant when her head bumped an arm of a waitress who had collected a tray full of plates, so that the tray fell onto her head. Liability was in issue but the plaintiff was successful, and an allegation of contributory negligence was rejected. The plaintiff suffered a good deal of pain in the neck and headaches for a time, and by the time of the trial was continuing to become sore by the end of each work day, and controlling the pain with medication. She also had headaches. There was some difficulty with work and with some of the things that she did at home. The injury was found to be within Item 88, and at the lower end of the range, and his Honour assessed an ISV of 6 (\$6,200): [55].

***Hook v Borehan* [2006] QDC 279**

The plaintiff was involved in a motor vehicle accident, as a result of which she suffered neck and low back pain, bruising and swelling to her left lower leg, and widespread muscular pain: [3]. There was also a psychiatric consequence: [12]. The dominant injury was identified as the injury to the neck, which had an ISV range up to 10, and having regard to the quite serious psychiatric symptoms an uplift was thought to be appropriate, leading to an ISV of 13 (\$15,200): [14].

***Raffault v Gillard* [2006] QDC 403**

The plaintiff was injured in a motor vehicle accident and as a result suffered soft tissue injury to the lumbar and cervical spine, an adjustment disorder and depressed

mood. The plaintiff had continuing problems with the neck, interfering with sleep, was stiff in the morning and sometimes had discomfort or pain, depending on what he was doing. There was also pain when lifting, so that at the end of an ordinary working day his neck was very sore. He also had problems with his lower back during an ordinary working day. There had been a significant loss of enjoyment of life. The plaintiff impressed the judge as stoic in the workplace. That of course ordinarily has the effect of reducing economic loss, but increasing damages for pain and suffering. There was a conflict of evidence about the PIRS rating, which was resolved in favour of the lower rating. The injuries were identified as Items 13, 88, and 93, each of which had an ISV range of up to 10. His Honour regarded the maximum range as inadequate to reflect the impact of all of the injuries, and increased the maximum by 20% to produce an ISV of 12 (\$13,800): [32].

Magistrates decisions

The regulation is also being applied by magistrates, but their decisions are more difficult to access. Occasionally there is an appeal, and in that way sometimes a decision on appeal to the District Court gives some information about how matters are approached in the magistrates court. That occurred in *Hay v Magnusson* [2006] QDC 191, where the plaintiff appealed against an assessment of general damages in respect of a crush fracture to the fifth toe of his left foot. The magistrate assessed general damages on the basis of an ISV of 7 (\$7,400) under Item 153 of the regulation.⁶ The toe had been fractured in a motor vehicle accident and required surgery, and it had recovered but with some continuing symptoms. There were problems particularly if the toe was bumped. The toe had not been amputated at that stage, but one of the doctors had indicated that if it continued to be painful the only other option available to the plaintiff would be amputation. The magistrate had not found that the toe would be amputated, and the assessment was challenged on that basis. However, the appeal was dismissed. The contention of the appellant that the injury fell within Item 152 was rejected. The matter was complicated because a claim that the toe was interfering with work as a scaffolder was rejected essentially on the basis of a finding of credit.

⁶ Compare with the assessment in *Clark v Hall* [2006] QSC 274.

Analysis

There have therefore been a number of cases, virtually all arising out of motor vehicle accidents. General insurers must be adopting a more cautious approach, perhaps settling claims more readily. Only 2 of the 12 trial decisions have been dealt with on the basis that the plaintiff had only one injury, so obviously multiple injuries are, and are going to be, the norm, at least in matters that come before the courts. Of these, 2 (20%) involved an assessment within the ordinary range of the dominant injury, 4 (40%) involved an assessment not more than 25% above the top of the range for the dominant injury, and 4 (40%)⁷ involved an assessment of more than 25% above the top of the range, the highest⁸ being 100% above. This suggests that, at least in respect of those matters which get to the stage of having assessments made by courts, the proposition that assessments will be rarely more than this level was wishful thinking. Of course, no doubt for the great majority of claims which do not ultimately get to court that is the situation, so that viewed in the appropriate context such cases remain rare. If a matter does get to a court, however, it would be unrealistic to assume that the 25% limit on uplift will not be exceeded, particularly for injuries to the spine.

Another feature which has produced some judicial comment has been the fact that sometimes the application of the regulation has produced a dominant injury which is by no means the most severe injury suffered by the plaintiff. In *Clark v Hall* [2006] QSC 274 White J said at [64] in relation to the identification of the dominant injury: “What constitutes the dominant injury has little relation in the regulation dictionary to the objective facts.” This is particularly noticeable where the most severe injury has been an injury to the spine, where the artificial depression of the ISV ratings for such injuries has produced a distortion which has excited some judicial notice.⁹

In this context, it is interesting to observe the generalisation of Dutney J in *Clement v Backo* [2006] QSC 129 that it appears that the ISV in orthopaedic injuries is related to the degree of whole person impairment assessed under the AMA scales, with a loading of about 20%. That generalisation was derived from a consideration of a list of injuries most of which did not involve injuries to the spine, but his Honour then

⁷ Of the Supreme Court matters, 60% (3 out of 5), two of which involved injuries to the spine.

⁸ *Clement v Backo* [2006] QSC 129.

⁹ For example, in *Coop v Johnston* [2005] QDC 79 at [136].

applied it in a case which did involve an injury to the spine, indeed multiple injuries to the spine, to produce a relatively generous ISV rating.¹⁰ It will be interesting to see whether his Honour's analysis will come to be picked up by other judges.

It may be noted, of course, that s 10 of schedule 3 of the regulation provides "The extent of whole person impairment is an important consideration, but not the only consideration affecting the assessment of an ISV." Impairment is preferably to be assessed using the AMA guide: s 12(2). At common law general damages were awarded not just for physical impairment, but bearing in mind all of the various consequences of the injury.¹¹ Indeed, the term commonly used for such damages was "pain and suffering and loss of amenities", and these are factors which generally exist and operate without a great deal of connection to the level of impairment, whether or not whole person impairment. This attempt to increase the significance of impairment in the assessment of damages, essentially at the expense of other factors, particularly pain, is one of the features which in my opinion makes the system unfair.

Psychiatric Injuries

One feature of this system which has not received a great deal of attention so far has been the method of assessing an ISV in circumstances where the plaintiff has received a psychiatric injury. There have been some examples, but little detailed analysis of the method by which psychiatric injuries are assessed. They appear in Items 10 to 13 of schedule 4, ranging from extreme mental disorder with a maximum ISV of 65 down to a minor mental disorder with a minimum ISV of 0.

It is interesting to contrast the approach adopted in relation to psychiatric injury under this regulation with the approach adopted in the schedule to the *Criminal Offence Victims Act 1995*, where there are three levels of what is described in that schedule as "mental or nervous shock" (which effectively means psychiatric injury), minor, moderate and severe. The range for severe injury is up to 34% of the scheme maximum, which, since the scheme maximum is \$75,000, means \$25,500. For minor mental or nervous shock, on the other hand, the range is 2% to 10%, that is between

¹⁰ Still only about half the common law assessment!

¹¹ The AMA tables "do not take account of matters such as the amenities of life and the subjective nature of pain and suffering." *Andrews v Traynor* [2003] QSC 292 at [47] per White J.

\$1,500 and \$7,500. By contrast, the range for minor mental disorder under the regulation is an ISV of 0 or 1, that is to say, nothing or \$1,000. Admittedly, s 22(3) of the Criminal Offence Victims Act does say that compensation under that Act “is intended to help the applicant and is not intended to reflect the compensation to which the applicant may be entitled under common law or otherwise”, but that has always been understood as indicating that compensation under the Act was likely to be less than damages at common law, rather than, in the case of minor psychiatric injury, potentially much higher.

In order to assess an ISV for a mental disorder, the court must first assess a PIRS, that is to say, Psychiatric Impairment Rating Scale rating for the particular injury, in accordance with Schedules 5 and 6. By s 6(3) of schedule 3, a PIRS rating is capable of being accepted by the court only if it is assessed by a medical expert as required under schedules 5 and 6 and provided to the court in a PIRS report as required under schedule 5 s 12. This suggests that the court’s function is essentially limited to accepting a PIRS rating assessed by a medical expert in accordance with schedules 5 and 6 and provided in the appropriate report, but s 13 of schedule 3 says “in assessing an ISV, a court must give greater weight to a PIRS report provided as required under schedule 5 than to another medical assessment of the permanent impairment caused by a mental disorder.” Interestingly, that includes an assessment made in accordance with AMA 5; although generally speaking assessments based on AMA 5 are to be given preference under s 12(2) of the regulation, by subsection (1) that provision specifically does not apply to a mental disorder.

All this gives rise to a number of difficulties, and potential obscurities, as to the operation of these provisions. Does it follow that, if there are two reports which contained two PIRS ratings, a court is forced to choose between accepting one or accepting the other, and would not be entitled for example to “split the difference”? On the other hand, if it could be shown that one of the ratings had not been assessed as required under Schedules 5 and 6, or that the report from that psychiatrist was not one which complied with s 12 of Schedule 5, is that particular report taken out of contention? That would seem to leave open only accepting the PIRS rating in the remaining report, or not accepting a PIRS rating at all.

If that is correct, will defendants run cases without putting in their own psychiatric report and simply try to get the plaintiff's report excluded from consideration under s 6(3) of Schedule 3? That would seem to have the effect of preventing the court from "accepting" any PIRS rating, which would effectively make it impossible to assess an ISV for a mental disorder in accordance with the schedule. I suspect that it would still be possible to assess an ISV for the injury, but at the moment we do not really know. Little of this has been explored or clarified by the decisions involving psychiatric injuries so far.

The PIRS system, as explained by schedule 5, involves six scales each of which rates permanent impairment in a particular area of function; these are self care and personal hygiene, social and recreational activities, travel, social functioning, concentration persistence and pace, and adaptation. In respect of each of these areas, there are five classes ranging from little or no impairment to total impairment, and the idea is that a plaintiff's ability to function in respect of each of these six scales is to be placed in the appropriate class within this range. This will produce a list of six numbers, one for each scale, each number being between 1 and 5. Since the number is higher the greater degree of impairment and (very broadly speaking) proportionate to impairment, one might be forgiven for thinking that a reasonable assessment of the overall level of impairment could be achieved simply by adding up these numbers.

However, it is necessary instead first to derive what is called a median class score. That involves listing the six numbers in ascending order, that is starting at any 1s and working up to 5s. The median score is then the number which falls at the mid point between the third number and the fourth number: s 6(2). If the third and fourth class numbers are the same, then that is the median score; if they are different, the median score falls half way in between, and pursuant to subsection (2) if that is not a whole number, it is to be rounded up to the next whole number. There is then a conversion table by which a percentage impairment can be derived by reference to the median class score and the total class score. The median class score will be between 1 (where at least four classes have a score of 1) and 5 (where at least four classes have a score of 5), and the conversion table sets out the possible totals which can correspond to any possible median class score. The percentage impairment read from the conversion table is the PIRS, but that does not translate directly into an ISV; for example, an

extreme mental disorder with a PIRS between 31% and 100% produces an ISV between 41% and 65%.

This method of assessing psychiatric injury is in my opinion thoroughly unsatisfactory. The first deficiency is that the matters covered by the various classes of impairment are only concerned with the effect on a person's ability to do things, and psychiatric injury may easily adversely affect a person very greatly without having any significant impact on a person's ability to do things. A plaintiff may be thoroughly miserable, but still be able to carry out the ordinary functions of life, and under this system such a person gets effectively no damages.

In addition, the system is unfair because even extreme impairment in relation to one particular area will produce a reading which is so low as to produce effectively no damages. A very strong fear of travelling by motor vehicles, which severely impacted on an ability to travel but had no other adverse effect, would produce virtually no damages under this system, which is unfair. A person who was totally impaired on one scale but was in class one on all others has a total of 10, a median class score of 1 and a PIRS of only 2%, whereas a person who has only mild impairment (class 2) on 4 scales and class one on the rest has the same total but a median class score of 2, so the PIRS is 5%. Yet it seems to me that the former person is significantly worse off. This is an extreme example, but in general the system discriminates against people whose injuries produce extreme and very specific but limited psychiatric consequences.

But probably the worst deficiency of this scheme is that it is to a large extent arbitrary, that is to say it is not a reasonable way of objectively assessing the severity of a psychiatric injury. Even if one assumes that it is reasonable to assess psychiatric injury only by reference to the impact which that injury has on the person's ability to function in the six ways identified, this is not in my opinion a reasonable way of classifying such injuries. This is because the use of the median score system as well as the total score produces some quiet odd results.

Consider for example a person who was fairly seriously adversely affected, so that there were three class scores of 3 and three class scores of 4. That person would have

a median score of 4 (the number between 3 and 4 rounded up to the next whole number) and a total of 21, which produces a PIRS of 44%. Now consider someone whose condition was similar but not quite as bad, so that just one of the scales produced a score which was just one less, but the rest were the same. One would expect a result not much lower. If the difference was in one of the scales which in the first person produced a score of 3, then the median class score would still be 4, but the total would go from 21 to 20 and the PIRS would be only 41%, not much of a change. But if it was in one of the scales where the score for the other person was 4, so that this person had four 3s and only two 4s, the median class score goes from 4 to 3. Although the total is still 20, 20 with a median class score of 3 is only 26% compared with 41% if the median class score is 4.

I cannot see why a relatively small difference in the severity of the impacts measured in this way should produce not only such a large difference in the PIRS rating, but a different difference, much larger in one case than another, depending on the scale in which the difference occurred. Similar examples can arise in any other case where you have two plaintiffs, where the symptoms are quite similar but the difference between them means that one has a higher median class score than another. In these circumstances, in my opinion it is particularly regrettable that such a thoroughly unsatisfactory method of assessing the severity of psychiatric injury has been adopted in this regulation.

That brings me to the question of the attitude that the judges have adopted towards assessment under the regulation. There is little sign of any real enthusiasm for this system, and some judges¹² have commented on the fact that general damages are much less than they would have been at common law. Indeed in one case the judge also assessed damages at common law, at virtually twice the amount assessed under the regulation.¹³ Perhaps the most interesting comment on this scheme was that of White J in *Clark v Hall* [2006] QSC 274, at [62]:

¹² Apart from myself in *Carroll v Coomber* [2006] QDC 146, see White J in *Ballesteros v Chidlow* [2005] QSC 280 at [87].

¹³ *Clement v Backo* [2006] QSC 129 - \$26,000 under the regulation, \$50,000 at common law.

“The assessment of general damages, rarely a matter of great dispute between the parties or particular complexity at common law in this state, has been made difficult by a legislative attempt to bring some consistency into this area of the law of personal injury. The time involved in traversing the labyrinthine structure of the CLA and regulation has cast a larger burden than hitherto on the medical and legal professions and the courts. It is to be hoped that the reduction in general damages awards will have the anticipated effect of reducing premiums and the affordability of insurance will be achieved. Otherwise it seems to be a rather vexing exercise in over prescription with nothing much to see for it.”

There is little indication in any of these judgments that judges are actively attempting to subvert this system, but then, there would not be. There are, however, a few indications to suggest that judges are taking such advantage as they can of such flexibility as is left to them. One can point to the number of cases where multiple injuries have produced an ISV more than 25% above the top of the range for the dominant injury. I have also seen an analysis of costs outcomes in matters which went to judgment last year, which was that in only two out of 20 matters was the assessment low enough for the defendant to benefit in the award of costs, whereas in 13 of the matters the plaintiff obtained indemnity costs.¹⁴ It may be that general damages are a less significant part of the equation than they used to be, but after all, what really matters at the end of the day is the total amount of the judgment.

¹⁴ In the remainder the plaintiff obtained standard costs. This was in a talk by Mr R Lynch, barrister, at an Australian Lawyers Alliance Conference. Information about costs outcomes is rarely available through the court web page.