

TOTAL AND PERMANENT DISABILITY

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1 INTRODUCTION

- ✓ There are **various types of insurance cover/products** which can be purchased/obtained. These include, but are not limited to, cover for Total and Permanent Disablement (TPD), death, trauma, terminal illness, income protection, sickness or accident insurance.
- ✓ These types of insurance are generally classed in **two main categories**:
 - a) **Group**: This is taken out by an employer or superannuation fund for the benefit of the members.
 - b) **Retail**: This is sold directly by an insurer to the individual.
- ✓ The term “Default TPD insurance” is given to TPD cover that is automatically put in place when a person joins a superannuation fund. Such policies are often referred to as group life policies.

This paper will focus mainly on TPD policies found under Group policies.

2 A TPD CLAIM IS CONTRACTUAL

- ✓ TPD insurance is a life insurance contract pursuant to ss 9(1)(e) and 9A of the *Life Insurance Act 1995 (Cth)*.
- ✓ Generally, if the insured suffers TPD and is eligible for payment, a specific lump sum amount becomes payable.
- ✓ A TPD claim is not a claim for personal injury. The question to be answered is whether the member falls within the scope of the insurance policy.
- ✓ Einstein J in *Mabbett v Watson Wyatt Superannuation* noted:

*“.. the Court is merely asked to construe a contractual term, **not** to attempt to ascribe responsibility for damages. There is no question of finding the Insurer “responsible” for the plaintiff’s loss, merely establishing whether the loss falls into a particular category which the Insurer has agreed to indemnify.”¹*

3 IDENTIFYING COVER WITH YOUR SUPER

There is a simple way of identifying whether you hold insurance cover. This is by referring to your annual statement and locating the insurance component (where applicable). See the sample extract below.

Your insurance* and benefits at 30 June 2017

	Your insured amount	Benefit payable
Death	\$428,000.00	\$430,839.79
Your Death cover is based on Fixed Cover Amount		
Total and Permanent Disablement (TPD)	\$431,000.00	\$433,839.79
Your TPD cover is based on Fixed Cover Amount		

¹ [2008] NSWSC 365 at [54]

It is critical that insurance cover is held at the date of disablement. If cover is not held at the date of disablement (even if cover was held at an earlier or subsequent date) then a member will not be eligible to claim against the policy. This, however, may be arguable depending on the circumstances.

3.1 TPD ASSIST PRODUCT

Under the TPD Assist product, commonly used by Sunsuper, a member will receive 1/6th of the TPD Benefit (as opposed to the full amount as lump sum payment) following the successful approval of a claim. The member would then need to lodge their TPD claim again, approximately one year later, to receive the second 1/6th and so on provided they continue to be TPD. In the sample below, the member would receive \$40, 000 in the first 1/6th instalment (before tax).

Your insurance at 1 July 2018

Type of cover	Amount of cover	Weekly premium*
Death cover	\$240,000	\$2.32
Total & Permanent Disability Assist cover	\$240,000	\$2.00
Total		\$4.32

*Specific insurance exclusions and/or loadings may apply as previously notified. Your employer may pay for some or all of this premium. Rounding variations may apply when calculating cover and premiums. If you have two or more *Super-savings* accounts you may only be entitled to insurance cover from one account.

There are circumstances where one can qualify for a lump sum payment under an Assist Product. Contact Gerard Malouf & Partners to confirm whether you qualify.

4 BRINGING FORWARD A CLAIM: ELIGIBILITY

Before a Superfund can determine whether a member is TPD, it must first determine whether the member is eligible to bring forward a claim. If a member is not eligible, then the superfund trustee/insurer does not need to determine whether the member falls within a category of TPD under the policy as the member is deemed ineligible to claim. Our experienced Solicitors at Gerard Malouf & Partners can help determine whether you are eligible under your specific policy.

5 THE TPD DEFINITIONS

While TPD policies differ in the exact terminology used, they tend to adopt follow a similar set of 'criteria' and structure. However, each policy must be construed based on its exact terminology.

5.1 THE STANDARD DEFINITION

the Insured Person is unable to follow their usual occupation by reason of an accident or illness for six consecutive months and in our opinion, after consideration of medical evidence satisfactory to us, is unlikely ever to be able to engage in any Regular Remuneration Work for which the Insured Person is reasonably fitted by education, training or experience.

5.2 COMMON ELEMENTS OF THE STANDARD DEFINITION

5.2.1 Absent from work for six consecutive months

The absence from employment need not occur prior to the member formally leaving their employment (I.e. they can still be technically “employed” by their employer but unable to work)² however the 6 months absence needs to have occurred by the time the trustee or insurer is required to make its decision.

5.2.2 Absence as a result of injury/sickness

In [*Mabbett v Watson Wyatt Superannuation Pty Ltd*](#),³ the plaintiff was employed as a driver by P&O. He resigned from his employment, providing the required 8 hours’ notice to his employer, so that he could commence a new role as a demolition supervisor with a construction company the next day. P&O requested he complete his shift however whilst completing his shift, the plaintiff injured his back and was could not start his new role. A claim for TPD was lodged and the insurer declined the claim on the basis that the plaintiff’s absence from work was not due to injury but rather, due to his resignation.

The court found that:

“there is no express requirement that the illness or injury be the sole cause of the plaintiff’s absence from employment...both the employees injury and the plaintiffs termination are real and effective causes of the employees absence...the finding must be that the injury is, in fact, an effective cause of that absence”.

In [*Hay v Total Risk Management*](#)⁴, the plaintiff was unable to continue working as a locomotive driver and took voluntary redundancy. Burchett AJ said:

“[a] worker who resigns because some condition from which he suffers incapacitates him can be said to have terminated the contract by reason of that condition, just as much as an employer might be said to have done so if they terminated the contract for the same reason”.

While one can be “absent” for other reasons in addition to illness/injury, so long as illness/injury was a real an effective cause of that absence then this will be taken to be sufficient.

5.2.3 The insured is unlikely ever/unable to return to work

To demonstrate “unlikely ever” the plaintiff must show, on the balance of probabilities, that there is *“there is no real or realistic chance”*⁵ of ever working again.

² *Finch v Telstra Super Pty Ltd* [2010] HCA 36; (2010) 242 CLR 252 at 266 [18]-[19]

³ [2008] NSWSC 365 (Einstein J)

⁴ *Hay v Total Risk Management Pty Limited* [2004] NSWSC 94 at [7]

⁵ *Tal Life v Shuetrim; Metlife Insurance Ltd v Shuetrim (Shuetrim)* at [89].

It is a higher threshold than a less than 50% probability test of returning to work.

The ability to return to work must be based on the “realities” of the member’s situation. It is not about “theory” but requires a "*realistic and common-sense approach*".⁶

A Superfund trustee/Insurer cannot merely point to a role within the member’s medicals restrictions and deny a claim based on an alleged ability to perform such a role. The work must be work that is reasonably available⁷, it must be a recognised profession where one can obtain a living⁸, a special, light duties job does not qualify⁹ nor does work that is provided to rehabilitate a member back into the workforce.¹⁰

5.2.4 Work must be work which the insured was qualified or suited for

The work to be considered must be work which the insured was qualified or suited as at the relevant date of assessment by reason of their education, training or experience.

[Jones v United Super Pty Ltd \[2016\] NSWSC 1551](#)

Mr Jones was born in 1982. He left school at the age of 16 and completed an apprenticeship with a roofing contractor, later qualifying as a tradesman roof plumber. In 2002, Mr Jones suffered injury to his lower back whilst lifting metal roof and wall sheets. The pain radiated down his left leg and he eventually required surgery.

He was able to resume work.

From 2003 to 2011, he undertook various supervisory roles, involving substantial manual labour, with several roofing companies.

In mid-2011, Mr Jones noticed back pain while loading asbestos sheeting into a bin. The pain continued to escalate, and he later developed right leg pain causing him to cease work. By October 2011, Mr Jones’ employer shut down and its jobs and employees were reassigned to different contractors. Mr Jones did not resume work.

A claim for TPD was later lodged however this was declined in 2014 on the basis that the following occupations were identified as suitable:

- Retail Sales (Hardware)
- Courier/Delivery Driver
- Console Operator
- Customer Service Advisor/Telemarketer.

⁶ *Muinov v Johnson and Johnson Retirement Benefits Ltd*, unreported, New South Wales Supreme Court, BC9605916, 5/12/96; *Sayseng v Kellogg Superannuation Pty Ltd* [2007] NSWSC 583 at [64] per Nicholas J; *Oberlechner v Watson Wyatt Superannuation Pty Ltd* [2007] NSWSC 906; (2008) 15 ANZ Ins Cas 90-134 at [39], [40], [55], [64]; *Lazarevic v United Super Pty Ltd* [2014] NSWSC 96 at [108] per Hallen J; *Folan v United Super Pty Ltd* [2014] NSWSC 343 at [67] per Nicholas J

⁷ *Lazarevic v United Super Pty Ltd* [2014] NSWSC 96 at [108] per Hallen J

⁸ *Giles v National Mutual Life Association of Australasia Ltd* (1986) 4 ANZ Ins Cases ¶60-751 at 74,529

⁹ *Baker v Local Government Superannuation Scheme Pty Ltd* [2007] NSWSC 1173 at [58] (McDougall J); *Halloran v Harwood Nominees Pty Ltd* [2007] NSWSC 913 at [84]; *Hannover Life Re of Australasia Ltd v Colella* [2014] VSCA 205 at [30]

¹⁰ *Finch v Telstra Super* [2010] HCA 36; (2010) 242 CLR 254, at 275 [48]; In *Sayseng v Kellogg Superannuation Pty Ltd* [2007] NSWSC 583 at [60] – [67] Nicholas J rejected the insurer’s argument that the plaintiff was not totally and permanently disabled because he was able, at the date of assessment, to work in accordance with a workplace rehabilitation plan.

The court found that:

... a job which a person may be able to perform without further education, training or experience is not necessarily one for which he or she is reasonably fitted by education, training or experience ... (at [71])

*The concept of an occupation or work “for which the Insured Person is reasonably fitted by education, training or experience” refers not to any work for which the insured might have physical and mental capacity without further training, but to work for which the insured **has been prepared and shaped by education, training and/or experience**. The purpose of the provision is to provide a benefit for those who are disabled from following the vocations for which their past education, training and experience has prepared them – not any occupation which may be conceived, however far removed from his or her vocational history, which can be performed without further education, training or experience. The policy insures against loss of the ability to pursue those employments or careers for which the insured has been prepared and shaped by his or her past vocational history. (at [71])*

The court made its point in the following illustration:

.. a surgeon whose tertiary education was in medicine and whose entire vocational history was in surgery, who lost the fine motor skills required for surgery, but was otherwise physically fit, would not be reasonably fitted by education, training or experience for work as a manual labourer, even though he or she might be perfectly capable of performing it without further training.

Here, the only work for which the claimant was reasonably fitted by education, training or experience was manual labour, in which he had been consistently engaged since the age of about 16 when he had left school, and in which the insurer accepted that he was never again likely to engage. The inquiry need have proceeded no further (at [76]).

Accordingly, it was held that Mr Jones was TPD.

5.2.4.1 Volunteer work or other activity

The ability to engage in volunteer work or other activity does not necessarily cause a claim for TPD to fail.

In [*Wheeler v FSS Trustee Corporation \[2016\] NSWSC 534*](#), the Court held that evidence showing Ms Wheeler engaging in activities including netball, volunteer work at her children’s school and being actively involved in a terrier club did not render void the conclusion of the psychiatric experts that she was incapable of engaging in remunerative work¹¹ and was therefore held to be TPD.

Ms Wheeler was a former Police officer who pursued a claim for TPD on the basis of Post-Traumatic Stress Disorder (PTSD).

¹¹ at [183] – [184], [187] & [359]. Robb J made similar observations in another police PTSD case, *Hellessey v MetLife Insurance Limited [2017] NSWSC 1284* at [318]

Robb J noted:

...the medical evidence suggests that both PTSD and major depressive disorder are insidious mental injuries, which can be extremely detrimental to the sufferer's ability to hold down regular employment, whether full-time or part-time; but the symptoms of the disorders are not permanently and consistently manifested. The psychological injuries may have the effect that the sufferer becomes too unreliable, too disorganised, too unsociable, and too lethargic, to be realistically employable, among other disabilities. However, when a person is suffering from these psychological disorders, what you see is not necessarily what you get. The sufferer may, at various times and periods, appear reasonably normal, and capable of engaging in many forms of employment. In short, the ordinary person cannot safely look at evidence of the occasional day to day activities of a person suffering from PTSD and major depressive disorder, and conclude that the person is not suffering from disabilities that may make the person practically unemployable, because the person is able from time to time to engage in the sort of activities of which healthy people are capable of doing.¹²

5.2.4.2 Subsequent Education, Training and Experience (ETE)

What happens if the plaintiff re-trains after the date of assessment and becomes able to work in a new occupation?

Brereton J noted in *Halloran*¹³

the definition in the policy is concerned with employment for which the employee was suited at the expiry of the six month period.employment for which an employee becomes suited only subsequently by reason of retraining is not the type of employment which is contemplated by that definition

However, most jobs involve some form of training. In addressing this point, the courts give consideration to:

- a) Whether the training/qualification is within the plaintiff's ETE and
- b) The extent of the training/qualification required

Young J in *Chapman v United Super Pty Ltd*¹⁴ noted:

"Putting aside situations of de minimis training one does not require a plaintiff to undergo a course of retraining in order to make him or her employable. Even if an injured ballet dancer has the intellectual capacity to go to university, get a law degree and become a barrister, that would not disqualify him or her from being totally and permanently disabled (assuming that they were not able to take any part-time job that was reasonably fitted to his or her then current education, training or experience)." At [32]

¹² *Wheeler v FSS Trustee Corporation* [2016] NSWSC 534 at [273]

¹³ *Halloran v Harwood Nominees Pty Ltd* [2007] NSWSC 913

¹⁴ [2013] NSWSC 592

“Dargan makes it clear at [37] that it is no bar to the finding that work is within the plaintiff’s education, training or experience that a short qualifying course of training or retraining may be required.”at [34]

In *Dargan*¹⁵, the plaintiff was employed as a truck driver and labourer but ceased work following injury to his lower back. Unable to resume his usual occupation, he undertook a 4-day course and obtained a certificate to subsequently become qualified as a taxi driver.

The trial judge initially held that as the plaintiff had not previously worked as a taxi driver prior to his injury then work as a taxi driver was not work within his ETE. However, the Court of Appeal did not agree. A need to undergo some additional training (by way of a supplementary certificate) in respect of keeping his taxi driving qualification relevant did not mean that the plaintiff from was not reasonably fit to drive a taxi by reason of his education, training or experience.

5.3 ALTERNATE TPD DEFINITIONS

Most policies have alternative definitions of TPD based on:

- an inability to perform **Activities of Daily Living (ADL)**;
- **loss of Cognitive Functioning**;
- **loss of limbs and/or eyes**;
- inability to perform **Home Duties**; and
- a level of **whole person impairment (WPI)**, typically 20% or above.

Examples of these possible alternate definition are set out below.

5.3.1 Activities of Daily Living Definition

The Insured Person is totally and permanently disabled if they suffer an illness or injury and become totally and permanently unable to perform at least 2 of the activities of daily living without assistance from someone else.

Activities of daily living:

- (a) *Washing: the Insured Person can wash themselves by some means;*
- (b) *Dressing: the Insured Person can put clothing on or take clothing off;*
- (c) *Feeding: the Insured Person can get food from a plate into their mouth;*
- (d) *Continence: the Insured Person can control both bowel and bladder function;*
- (e) *Mobility: the Insured Person can:*
 - (i) *get in and out of bed; and*
 - (ii) *get on or off a chair/toilet; and*
 - (iii) *move from place to place without using a wheelchair.*

¹⁵ [2013] NSWCA 57; (2013) 83 NSWLR 246

5.3.2 Loss of Cognitive Functioning

The Insured Person is totally and permanently disabled if they suffer significant and permanent cognitive impairment with a loss of intellectual capacity and are required to be under the continuous care and supervision of someone else.

5.3.3 Loss of use of Limbs and/or Sight

The Insured Person is totally and permanently disabled if they suffer an illness or injury that results in the total and irrecoverable loss of:

- (a) the use of two limbs; or*
- (b) the sight of both eyes; or*
- (c) the use of one limb and the sight of one eye,*

where a limb means the whole hand below the wrist or the whole foot below the ankle.

5.3.4 Home Duties Definition

An Insured Person is engaged in home duties if they are doing at least 4 of the following duties related to running the family home:

- a. cleaning the family home;*
- b. shopping for food and household items;*
- c. meal preparation;*
- d. laundry services; and*
- e. caring for a child or dependant.*

6 PREPARING YOUR CLAIM

While a TPD claim may appear to be a straightforward process, often there are complicating factors that can arise. Engaging professional services can increase the likelihood of your matter being resolved in the first instance. If you have suffered an injury or illness and become unable to work, contact Gerard Malouf and Partners on 1800-004-878 for a free consultation to assess your legal entitlements and provide you with free advice.