

IN THE COUNTY COURT OF VICTORIA

(Un) Revised  
(Not) Restricted

AT MELBOURNE  
CIVIL DIVISION  
SERIOUS INJURY

Case No. CI-06-01245

RAYMOND DALZIEL

Plaintiff

v

P & O PORTS LIMITED

Defendant

JUDGE: HIS HONOUR JUDGE WISCHUSEN  
WHERE HELD: Melbourne  
DATE OF HEARING: 27, 28 and 29 May 2008  
DATE OF JUDGMENT: 22 October 2008  
CASE MAY BE CITED AS: Dalziel v P & O Ports Limited  
MEDIUM NEUTRAL CITATION: [2008] VCC 1251

REASONS FOR JUDGMENT

Catchwords: s134AB, back injury, aggravation, sub-s.38(e)(ii), retirement age reached before hearing.

| <u>APPEARANCES:</u> | <u>Counsel</u>                             | <u>Solicitors</u>     |
|---------------------|--|-----------------------|
| For the Plaintiff   | Mr M R Titshall QC with<br>Mr G K Coldwell | Holding Redlich       |
| For the Defendant   | Mr R P Gorton QC with<br>Mr N Y Rattray    | Herbert Geer & Rundle |

HIS HONOUR:

- 1 This is an application for leave to bring proceedings for the recovery of damages in respect of an injury to the plaintiff's lumbar spine alleged to have been sustained in the course of his employment with the defendant on 9 December 1999. Leave is sought pursuant to s.134AB of the *Accident Compensation Act 1985* ("the Act") and the application is brought by Originating Motion dated 7 April 2006.
- 2 In support of the application, the plaintiff relied on two affidavits, the first sworn on 21 November 2005 and the second on 12 February 2008.
- 3 Each of the parties tendered documents and medical reports from the Court Books. In addition a "job search" diary and a page from Dr Maccar's notes were tendered in evidence.
- 4 As opened by Mr Titshall of Her Majesty's Counsel for the plaintiff, it is the plaintiff's case that on 9 December 1999, in the circumstances described in his first affidavit, he suffered an aggravation of pre-existing degenerative changes to his lumbar spine, which aggravation had consequences for the plaintiff which satisfy the statutory tests for serious injury set out in s.134AB of the Act.
- 5 The permanent impairment or loss of body function relied on by the plaintiff is of the lumbar spine and the plaintiff seeks leave to bring proceedings in respect of both pain and suffering consequences of the injury and loss of earning capacity consequences of the injury.
- 6 At the commencement of the case, discussions with counsel, assisted by Statements of Issues filed by each party, revealed that the defendant allows that injury occurred on 9 December 1999, but puts in issue the nature of the injury sustained in December 1999, pointing to an earlier injury in April 1999, and/or the effects of naturally occurring degenerative disease, as the real

cause of the plaintiff's back disability. The defendant also raised, on the question of loss of earning capacity, whether, absent the injury relied upon in these proceedings, the plaintiff would have continued in his employment as a stevedore because of his intention to retire, the effects upon his earning capacity of the earlier back injury and because of the later emergence of the plaintiff's cardiac, weight and knee problems, for which significant medical treatment has been undergone.

7 The plaintiff gave evidence. I formed the view that he was attempting to give a straightforward account of his history and symptoms, though his memory of dates, in some cases of events eight or more years ago, was vague. He is now fifty-six years of age, having been born on 1 September 1951. He was forty-eight years of age at the time of the injury relied upon in these proceedings. He attended school until Form 2 at Collingwood Technical School, leaving at the age of fifteen. He then worked as a meat worker for eight years and has worked in manual work ever since. For the last 27 years or so of his working life he worked on Melbourne's waterfront as a stevedore. After 1990, he was employed by the first defendant. Over the years, he had sustained a number of injuries to various parts of his anatomy. Relevantly, they include knee injuries in 1983 and 1986, the last of which resulted in a claim for damages which was settled in the late 1980s for approximately \$15,000. After the injury relied upon in these proceedings, he worked for the defendant in lighter duties for various periods until his employment was terminated on 26 April 2002.

8 The plaintiff has been overweight for nearly all of his adult life. Before the injury relied upon here, his weight had often been well in excess of 120 kilograms. Before the injury, his weight had not interfered with his capacity to work as a stevedore.

9 His employment on the waterfront was not the subject of detailed evidence. It seems that he worked in general stevedoring duties, driving straddle cranes,

working in lashing gangs and performing other labouring work until about 1991. He was then made a foreman and worked for eight years or so in that capacity. As foreman, he was required to do as much "hands on" work as the other members of the gangs he had charge of.

- 10 In the late 1990s, in the process of national waterfront reform, he lost his position as foreman and was to return to his former work of straddle driving, lashing and the like. To get back to straddle driving, not having driven straddles whilst foreman, he had to complete, in a satisfactory manner, a refresher course in straddle operation. On the evidence, it seems that he did not complete the straddle refresher course at all. During the year 1999, upon which much attention was focussed during the hearing, he was "picked up" to work as a foreman on most shifts that he worked (99 percent he said) and, as I understood it, did little straddle driving at all, and when he did, it was only as part of his (never completed) refresher course. His work in this period was mostly as a "hands on" foreman, in charge of lashing gangs and other "roustabout" activities. The lashing work was heavy and arduous, involving the fixing or removing of lashing bars which secure containers on ships.
- 11 The plaintiff injured his back whilst performing lashing duties on 17 April 1999. He made a claim in respect of that injury, and the claim form appears at DCB 99-100.
- 12 In his affidavits the plaintiff said he was off work for about two weeks and then returned to work as a foreman stevedore, and that, until the injury in December, was able to pursue all of his recreational pursuits without trouble.
- 13 In evidence-in-chief, he was shown the medical certificates he had submitted in April and May 1999 (PCB 128C, D, E and F). He then said that he had initially gone back to work with a light duties certificate, but was told that no such work was available so he returned to Dr Maccar and obtained a clearance certificate dated 14 May 1999. He said that after that time he

performed his normal duties, usually being "picked up" as foreman of lashing gangs, and continued with that work until the injury of 9 December 1999.

14 The issue raised by the defendant, as to the relative significance of the 9 December and 17 April events, was explored in cross-examination of the plaintiff by reference to histories he gave after the event, and by cross-examination of the treating general practitioner at that time, Dr Maccar.

15 The plaintiff was cross-examined on histories he gave to the orthopaedic surgeon, Mr Peck (DCB 43A), to Angelica Mistika (DCB 101) and Donnelly Ayres (DCB 104) (both some form of rehabilitation consultant engaged by the defendant), Gerry Vassallo, psychologist (PCB 49) and Mr El Moussalli, chiropractor (PCB 39). Each history was different from the plaintiff's evidence in this case, the principal difference being that the two events of injury were recorded as having occurred much closer in time, November and December in some instances, and October and December in others. Further, in some histories, the "main event" was recorded as being the first in time, with a description of the circumstances of injury very like that now given of 9 December 1999 being attributed to the first event. In some, it was at least suggested that symptoms had been continuous between the first and second events.

16 The general practitioner, Dr Maccar, gave evidence and was cross-examined. In some respects his evidence about the April 1999 injury, and other matters, was unsatisfactory. He tended to speak from a general recollection of the plaintiff's condition over the years. He seemed reluctant to refer to his notes even when specific questions were directed to what he found and recorded at particular times. In part, the explanation for this is that the clinical notes he had, whilst giving evidence, end on 14 May 1999, and do not commence again until 27 January 2000. The notes for the intervening period have been lost because of a move from one surgery to another. It is known, that on 15 December 1999 he referred the plaintiff for a CT scan of his lumbar spine.

Speaking from his recollection, the doctor recalled some leg pain accompanying the April 1999 consultation and an almost complete recovery by the plaintiff by the time a clearance certificate was written in May 1999.

- 17 In cross-examination, Dr Maccar was prepared to allow that the report of leg pain in April indicated a disc injury. When the same proposition was put to Mr de la Harpe, he did not agree with that proposition at all (T80). Later, in Dr Maccar's cross-examination when the two-injury topic was revisited, he said:<sup>1</sup>

"Something like that, I can't remember the details but I remember he had another injury that he kind of brushed off and then he presented with the second injury. But it's just from memory, I can't really vouch for that."

- 18 In re-examination, Dr Maccar was persuaded to go to his own notes and read the first entry in April 1999:<sup>2</sup>

"It says that I've given him Naprosyn 1000 as he hurt his back at work. He's got – sore in the mid thoracic and lower back and the pain referred to the lower limb, mainly the right leg and that he has suffered this pain for the past 3 days."

He then read the entry of 14 May 1999,<sup>3</sup> which said:

"He is feeling good and he is back to normal duties."

- 19 The doctor's evidence about the state of the plaintiff's back in the period between May 1999 and January of the following year was vague, and is perhaps explained by the absence of notes and the lapse of time. At various times in his evidence, he offered a recollection of continuing back pain in that period and, at another point<sup>4</sup>, created the impression that he cannot really say whether he saw him in that time at all. What does seem clear is that he knew what the plaintiff's work involved when he gave the clearance certificate at the consultation of 14 May 1999 (T48). There was no suggestion that he saw the

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<sup>1</sup> T44, lines 24-28  
<sup>2</sup> T45, lines 21-25  
<sup>3</sup> T46, line 3  
<sup>4</sup> T49

plaintiff for treatment of his back problems between May 1999 and the time he referred him for the CT scan in mid December 1999.

20 After December 1999, the plaintiff did not return to his full duties at any stage and, although incomplete in this regard, the state of the evidence seems to be that between that date, 9 December 1999, and the termination of his employment by letter dated 26 April 2002,<sup>5</sup> the plaintiff lost 375 working days. The periods that he was off work were dealt with in passing in cross-examination and seem to have included the period from March to September 2001 and from Christmas 2001 until a short period of cleaning work just before the termination of employment. In the periods that he did work, he seems to have performed some work driving a bus and being the "park foreman" and there also seems to have been a period doing some general cleaning work at the Appleton Dock.

21 The plaintiff was not challenged in cross-examination as to the extent or nature of his back complaint and I accept his evidence, more particularly the evidence set out in his second affidavit dated 12 February 2008<sup>6</sup> as to the pain and disabilities his back condition causes him.

22 It was not seriously argued that the plaintiff does not now, in respect of his back condition, have a serious injury for the purposes of pain and suffering. Rather, it was contended that the plaintiff had failed to establish what injury was, in fact, suffered in consequence of the December 1999 event and what are the consequences of that injury, as distinct from any other injury and as distinct from the underlying degenerative condition.

23 The defendant argued, because of the inconsistency in a number of the plaintiff's histories as to the sequence of events, and because at least some of those histories allowed a continuity of symptoms between the April 1999 event

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<sup>5</sup> PCB 127  
<sup>6</sup> PCB 6

and the December 1999 event, that I could not be satisfied that his continuing back symptoms are connected with the December 1999 injury.

24 Dealing first with the effect of the April 1999 event, I accept the plaintiff's evidence that he made a near complete recovery from the effects of that injury. That finding is supported by the clearance certificate, by Dr Maccar's clinical note of 14 May 1999 and, to my mind most importantly, the plaintiff's (unchallenged and uncontradicted) evidence that he performed heavy and arduous work for the next six months without time off or medical treatment and that in that time he was able to pursue the full range of his recreational and domestic activities. On the description of his work activities, it seems highly improbable that he could have performed that work for such a sustained period in the presence of a significant back problem.

25 These matters stand in contrast to the aftermath of the December 1999 event, after which his back condition never recovered to the point where he was able to return to the heavy and arduous work he formerly carried out. He was shortly afterwards referred for CT scanning and has been reporting and been treated for continuing back and variable leg pain from that time until the present.

26 In respect of the 9 December 1999 injury, the defendant has accepted claims for weekly payments and for permanent impairment and, in this proceeding, accepts that a back injury was sustained on that day.

27 Although Dr Maccar's notes of his first attendance after 9 December 1999 are missing, from relatively early on in his reports which were tendered in evidence, Dr Maccar was describing the examination conducted after an event in 1999, in which the plaintiff had hyper extended his lower back, in these terms (including typographical errors):

"At the time the examination revealed severe tenderness on the area of the lumbar spine with a positive the (sic) leg raising test on

the right side raising the possibility of a disc problem in his lower back.

Raymond went further with some investigations of which a CT scan was done revealing a moderate degree of circumferential disc bulge with mild Foramina to stenosis bilaterally." PCB 33

This record of examination findings is unlikely to relate to the April 1999 presentation as those notes were available to the parties and Dr Maccar was taken to those notes when he gave evidence. It seems more likely that they are a record, or recollection, of his examination findings after 9 December 1999 and so offer some support to the conclusion that an injury of significance was sustained at that time.

28 The second issue on the question of causation is that the defendant submits that I should accept the opinions of, in the main at least, Mr Buzzard and Mr Marshall, that any aggravation suffered by the plaintiff in the admitted injury of 9 December 1999 is no longer a cause of his back symptoms. The defendant sought some support for this contention from some of the evidence of the treating surgeon, Mr de la Harpe, to whom the proposition that "he would be in this condition anyway, regardless of the injury of December 1999" was put in various ways. After saying it was difficult to say to what extent the 1999 injury contributed, the following exchange took place (T 82):

Q. "One view of it is that it could have happened and now be playing no role at all?"

A. "It is possible. However, given the history of high functioning manual labour on a boat, as you have seen in the history, manhandling bales and holding a bar 40 kilograms and coping well with his degenerative condition at that stage, falls, has a significant hyperextension injury to his spine which would by the mechanism of injury and the anatomy of the arthritis aggravate facet joint arthritis, and then having ongoing symptoms, one would have to assume that that injury was significant in the acceleration of his clinical picture if not his underlying pathology."

Further, after being given the detail of the April event and the treatment that followed in re-examination he said (T84):

Q. "Hearing about that, would that alter your view that you have expressed with respect to the significance of the December '99 accident on his condition both when you saw him and ongoing?"

A. "I think we've established that there was pre-existing degenerative change in his lumbar spine."

Q. "Yes?"

A. "He may have had a minor flare-up from the twisting injury in April but I feel that the injury in December, the hyperextension injury, falling across a rail hitting him in the lumbar spine and extending his lumbar spine, is a fairly significant triggering factor to make his osteoarthritic spine symptomatic and may well have accelerated some degenerative change."

Q. "That is so whether he had the incident in April or not?"

A. "Yes."

29 On this question, the defendant argued that the opinions which support the plaintiff's case that his back condition now results from the 1999 injury should not be accepted because the histories upon which they are based are flawed.

30 As I have found, the plaintiff substantially, if not completely, recovered from the April 1999 injury and so the history upon which the opinions just referred to are based is, to my mind, substantially correct. I am persuaded by the opinions of the orthopaedic surgeons, Mr Kevin King, Mr Rodney Simm, Mr Hugh Weaver, Mr Clive Jones, the treating orthopaedic surgeon Mr de la Harpe and the neurosurgeons, Mr Samuel Kwong and Mr Geoffrey Klug.

31 Those opinions are to the effect, and I find as a fact, that the plaintiff's continuing back complaints are causally connected with the injury sustained on 9 December 1999, which caused the aggravation and acceleration of degenerative disease of the lumbar spine with foraminal stenosis, and which continues to contribute to his back and sciatic symptoms. The changes seen on the most recent MRI (PCB 89-90) seem to be in keeping with the analysis in those reports. The contrary opinion expressed by Mr Buzzard (a general

surgeon) and Mr Marshall (another general surgeon, who has not examined the plaintiff) I do not accept, not least because of their lack of relevant expertise and because they assume that at some point, unidentified in time, the continuing symptoms of which the plaintiff has complained ceased to be connected with the injury, and began to be connected with the underlying march of his progressive degenerative spinal condition.

32 In the case of an aggravation of a pre-existing condition, the principles to be applied are set out in *Petkovski v Galletti* (1994) 1 VR 436 and *R J Gilbertsons Pty Ltd v Skorsis* (2000) 12 VR 386.

33 In *Skorsis*, Chernov JA, after reviewing the authorities, in particular *Petkovski*, said, at paragraph 40:

"In determining whether an injury which is an aggravation of a pre-existing injury is a 'serious injury', it is necessary first to make a comparison between the applicant's condition before the incident that gave rise to the second injury and to his or her condition after that incident and thereby ascertain the degree of additional impairment that has been brought about by the second injury. It is then necessary to make an assessment of whether the additional impairment is serious and long term."

34 Accepting, as I do, that the plaintiff's current spinal condition results from and is materially contributed to by the injury sustained on 9 December 1999, I find that the plaintiff has suffered a serious injury within the meaning of s.134AB after making the necessary comparison (*Petkovski, Skorsis supra*) between his pre December 1999 state and his condition since that time. Indeed, the causation issue aside, no serious argument was put suggesting the contrary and the plaintiff's evidence as to the pain and suffering consequences of his back condition was not challenged in cross-examination.

35 The next issue identified by counsel for the defendant was whether the plaintiff could satisfy the statutory tests in regard to the loss of earning capacity consequences of the injury.

36 In substance, it was submitted that the plaintiff could not satisfy the tests because other influences would have destroyed his earning capacity in any event. The influences identified were the progress of his degenerative spinal disease, his ischaemic heart disease, depression, weight gain, osteoarthritis of the knee and his intention to retire at 55 years of age.

37 In the evidence, records of his medical condition and (non back) complaints at various points of time after 9 December 1999 appear. From them and other evidence it appears that the sequence of events is as follows:

38 His employment was terminated in April 2002. Before and after that time he had been treated for depression arising from the consequences of his back injury by a psychologist, Mr Vassallo.

39 On 13 September 2002 he was seen by Mr Peck, to whom he gave a history of worsening depression and weight gain since termination of employment (DCB 43J). He gave his weight at 135 kilograms, but no history of heart problems.

40 In September of 2002 he experienced an angina attack whilst walking the dog (T 25, 39, 66). There is no suggestion that myocardial infarction or other permanent damage to the heart had been sustained at this time.

41 In November 2002 he underwent coronary artery graft surgery.

42 On 22 November 2002 he was seen by Mr Vassallo, who recorded that he was feeling physically sore but psychologically well, explaining that he had had a triple bypass three weeks before, immediately following angiography, and that his psychological state had not declined since then (DCB 42).

43 He was seen by Mr Wong in January 2003, when he gave a history of his cardiac surgery, of attending pain management and doing gym work. No record of his weight was made in Mr Wong's report.

44 It was the plaintiff's evidence that he gained weight rapidly after the bypass surgery due to depression, reaching a peak weight of 220 kilograms (T 25, 63). The plaintiff agreed that he had been unfit for any work between late 2002 and late 2004 (T26). In relation to the weight gain, the plaintiff said in re-examination that he thought he had reached that weight by April 2003 (T 69).

45 The plaintiff was seen, on the defendant's behalf, by Mr Simm in August 2003. Under the heading "Treatment" appears the following history:

"He goes to the gymnasium and swims each day. He has a heat pack, an ice pack and an exercise ball which he uses at home. He walks regularly and on a good day he claims he could walk up to 10 kilometres. He uses the treadmill, exercise bike and air walker at the gymnasium." (PCB92)

He gave his weight then at 150 kilograms, saying it was unchanged since the injury.

46 In June 2004, he was seen by Mr Buzzard. Mr Buzzard recorded his weight at 148 kilograms, having lost 30 kilograms in the preceding two months.

47 In July 2004, Mr Jones recorded that he was scheduled to have gastric banding to overcome his obesity.

48 The gastric banding took place in July 2004 and the plaintiff gave evidence that he lost a lot of weight in the six months following.

49 Seen by Mr de la Harpe in December 2004, he reported that he had lost 40 kilograms since the banding operation.

50 By May 2005, he reported to Mr Jones that he had had the banding last July and was down to 126 kilograms.

51 In early 2006, he was reporting problems with his left knee, for which he was referred to a Mr Tran and, in 2007, to Ms Boecksteiner. After at least one arthroscopy and subsequent infection, he had a total knee replacement in late 2007. The exact history of his knee complaints is a little obscure, as no

treater's reports were put in evidence. The plaintiff thought his knee had been a problem since mid 2006, though it was put to him, and he agreed, that he had radiology showing problems in March 2006, and arthroscopy in May 2007 (T 21, 67). As to the present condition of the knee the plaintiff said in evidence, "it's no problem".

52 In May 2008, Dr Lefkovits, a specialist physician, examined the plaintiff on behalf of the defendant. According to his report, his opinion was sought specifically as to whether, absent the back injury, the other medical conditions (listed as including morbid obesity, myopia, hypertension, high blood pressure, sleep apnoea, high cholesterol and coronary artery disease) would incapacitate the plaintiff. Dr Lefkovits recorded his cardiac examination:

"He was in sinus rhythm with a rate of 76. Blood pressure was 130/80. Cardiac examination revealed normal chest contours, healed central scar, two heart sounds, no added sounds and no bruits. There was no evidence of cardiac decompensation and his lungs were clear of crepitations. There was no peripheral oedema."

Dr Lefkovits concluded:

"...I believe the worker's sole reason for not being able to return to pre-injury duties still is because of his accepted work injury and that his non-work related conditions would in no way preclude his return to work." (PCB101D)

53 On the whole of the evidence, in respect of the "other conditions" I make the following findings.

54 In the period after 9 December 1999 and before September 2002, the plaintiff suffered from depression and problems controlling his weight. Those problems were contributed to by the fact of his back injury and its effect on his general level of activity, on his work capacity and by the loss of his (nearly) life long employment as a stevedore. In that setting, in September 2002, his coronary artery disease became apparent and he suffered from angina.

55 In November 2002, his coronary artery disease was treated by successful coronary artery bypass surgery. There was little evidence as to the immediate effects of the surgery. There is the note made by Mr Vassallo on 22 November 2002 and the evidence of Dr Maccar who, when cross-examined, said that he thought the surgery would have disabled him for months at the outside (T 40) and after that time would not have disabled him from climbing ladders.

56 After that surgery, the psychological and obesity problems he already had as a result of the back injury worsened over a period of time. His weight increased greatly and he became totally incapacitated by this combination of problems. Although the plaintiff agreed his weight rose dramatically after the surgery, and from this concession it was sought to be established that he had gone meteorically to 220 kilograms, there is no suggestion anywhere that it rose sufficiently to itself be disabling by 9 December 2002. Indeed the contemporaneous records (paras 39, 42, 43 and 45 above) suggest it was much slower than that. On the basis of those records, it appears more likely that the 220 kilogram figure was reached in 2004, not 2003 as the plaintiff recalled.

57 The situation was not relieved until late 2004 when the gastric banding surgery took its effect.

58 To succeed in an application for leave to bring a proceeding for the recovery of damages for loss of earning capacity the plaintiff must establish two matters. Firstly, when measured by reference to the instructions set out in s.134AB(38)(e)(f), he had to demonstrate a loss of 40 per cent or more. Secondly, that the loss of earning capacity is at least very considerable.

59 The defendant argued that the plaintiff could not satisfy s.134AB(38)(e)-(g), because, it was submitted, on the facts, the figure that "most fairly reflects" the plaintiff's earning capacity in the six year window was nil. Secondly, it argued

that because the plaintiff had, before this hearing, become disabled by knee problems and had passed his own nominated retirement date, his loss could not be very considerable and, further, he could not establish that, after the date of hearing, such loss of earning capacity would be permanent and productive of a financial loss of 40 per cent or more.

60 The operation of subsections (e) and (f) is explained in *Barwon Spinners v Podolak* [2005] VSCA 33 at paras 21–31 and in *Hayhill v Hodge* [2006] VSCA 194 where the court said:

"Essentially, paragraph (e)(i) requires the worker to demonstrate, as a condition precedent to obtaining leave, that, at the date of the hearing of the application, he or she 'had a loss of earning capacity of 40 per cent or more' measured 'as set out in (f)'. That measurement of the claimed loss of earning capacity, as prescribed by paragraph (f), necessitates a comparison of two matters:

(a) the income the worker is earning or is capable of earning in suitable employment at the date of the hearing ('after injury earnings');

and

(b) the income that the worker was earning or was capable of earning 'during that part of the period within 3 years before and 3 years after the injury as most fairly reflects the worker's earning capacity had the injury not occurred'.

In both cases the income is limited to gross income from personal exertion and is to be annualised."

61 In these proceedings the defendant accepts that, as at the date of hearing, the plaintiff's "after injury earnings" are nil.

62 The argument first concentrated upon what is the "without injury" figure, and more particularly focussed upon the meaning in this context of "most fairly reflects".

63 As to this, the Court of Appeal in *Barwon Spinners* said:

"The Court is therefore required to go well beyond actual pre-injury earnings and consider (on the hypothesis that the worker was and remained free of the compensable injury at base) both earnings

and capacity to earn during that portion of the six years marked out 'as most fairly reflects the worker's earning capacity'. As it stands, that task is not inconsiderable." (p.635)

64 Up until the onset of his cardiac problems in late 2002, there would have been no argument that, on the evidence as to the plaintiff's earnings, the plaintiff's "without injury earnings" would have been in the vicinity of \$100,000.

65 The defendant argued that, because of the emergence of coronary artery disease, surgery for it, and the weight gain and increased depression following the surgery, that the total (and, it was argued, permanent) incapacity those conditions produced within the six year window is the capacity "that most fairly reflects" the plaintiff's capacity in the period required to be examined. So that, even though this represented a very small proportion of the overall window, because it heralded the commencement of permanent total incapacity, it should be regarded as "that part of the period" that "most fairly reflects" his capacity, had the injury not occurred.

66 In its submissions, the defendant pointed out that for the purposes of divining the "without injury" figure, both adverse and favourable events, whether actual or hypothetical, affecting earning capacity within the window should be taken into account. The defendant also submitted that events outside the window are to be ignored, though it next submitted that, in selecting the criteria for determining the amount that "most fairly reflects", the fact that the artificial exercise required by the section was for the purpose of proposed common law proceedings, and for a comparison and calculation made at the time of this hearing, I should have regard to common law principles in evaluating future loss of earning capacity, and so have regard to later events – even though they occurred outside the window.

67 The defendant referred to the Minister's second reading speech (Hansard 13 April 2000) to support its argument that both favourable and unfavourable influences upon a worker's capacity occurring within the window are to be taken into account.

68 For the reasons which follow, I do not accept the defendant's submissions on this point.

69 There was no evidence, one way or the other, as to whether his coronary artery disease would have emerged when it did had the back injury not occurred. That is, whether, for the plaintiff, the consequences of the back injury, being; a period of near on three years of relative inactivity, weight problems due to the inactivity, medication for the back pain, depression due to back pain, disability and the loss of his career, were irrelevant to the timing of the emergence of symptoms of coronary artery disease. It might have been the case, had he been free of back pain, working and secure in his normal employment, that the symptoms of coronary artery disease may not have been experienced until a later time. For the purposes of considering the defendant's submissions, I will assume that the coronary symptoms and surgery would have occurred at the times they did.

70 The defendant argues that I should assume that, absent the back injury, the cardiac condition, surgery and its sequelae would have ended his working life in September or November of 2002 (or at least produced a period of total incapacity that lasted until the end of 2004), because his course following the surgery would, in any event, have been complicated by totally incapacitating weight gain and depression.

71 The opinion of Dr Lefkovits is that his cardiac function now, would not prevent him performing his former heavy work. The opinion of Dr Maccar was that, taken alone, the cardiac condition would have allowed him to return to climbing ladders, perhaps within months. So the only medical evidence is that his cardiac problems were, at worst, a cause of temporary disablement for that work.

72 The other conditions which played a part in the period of total incapacity the defendant relies upon, the depression and weight gain, were already evident

and the subject of medical concern before any heart condition revealed itself. Up until that time, they were thought to be, in part at the very least, caused by the back injury, the resultant inactivity and the loss of his job. On the hypothesis that the back injury had not occurred, and assuming for the purposes of the argument that the cardiac problems would have happened when they did, the evidence strongly suggests that the cardiac problems would have produced only a temporary period of incapacity. There is no evidence that the other conditions would have been present before, or would have progressed in the way they did after, the bypass surgery, had the back injury not occurred.

73 On the evidence, and on the required hypothesis that the plaintiff was and remained free of his back injury, I am not persuaded that, as a matter of probability, great weight gain and depression would have followed the bypass surgery and produced total incapacity within the six year window (or after that time). On the same hypothesis, I find that the condition of the plaintiff at the end of the six year window, is more likely to have been that he was temporarily incapacitated whilst recovering from successful coronary artery bypass surgery which had been performed to restore the function of his coronary arteries.

74 In my judgment, that part of the period as most fairly reflects his earning capacity is not the small portion at the end, when his capacity was compromised by his cardiac condition and surgery for it, rather, I find that the gross annual income which most fairly reflects his "without injury earnings" (as explained in the authorities referred to) is in the vicinity of \$100,000, being the figure it was agreed he could have earned had he continued to work as a stevedore, and did in fact earn in the three years before the 9 December 1999 back injury.

75 The second argument put by the defendant on the question of loss of earning capacity relied upon two events that occurred outside the six year window

marked out, but before the hearing of this application. The events being the passing of the plaintiff's intended retirement date in September 2006 (at the age of 55), and the total incapacity caused by his recent knee replacement. Those events show, the argument proceeded, that the plaintiff cannot after the date of this hearing "continue permanently to have a loss of earning capacity which will be productive of financial loss of 40 per centum or more" (s.134AB(38)(e)(ii)) because, absent the back injury, he would not now be exercising his work capacity. In this context, "permanent" means likely to last for the foreseeable future, *Barwon Spinners* (p 639).

76 It follows, the defendant argued, that whenever a worker in a proceeding such as this had, by the time of hearing, reached his retirement age, he could never be granted leave to bring a proceeding for the recovery of damages for loss of earning capacity, even if (as here) the injury and incapacity preceded the projected retirement date by many years, and the financial loss was itself very considerable. The same argument would apply to workers for whom compulsory retirement age was within the foreseeable future when the hearing took place (whether 5 weeks, 5 months or 5 years), because they too would be unable to satisfy sub-s.38(e)(ii). As counsel for the plaintiff put it, it was the defendant's argument that the section could never "apply to old blokes". Neither party was able to refer me to any decision or authority on this point.

77 I am not persuaded that the legislature intended anything like the result for which the defendant argues here. As I apprehend it, sub-s.38(e)(ii) has the more limited purpose of requiring the worker to establish that after the hearing, having satisfied (e)(i) as to the relevant measure at the date of hearing, he will not recover a physical capacity such that he no longer suffers a financial loss of 40 per cent, perhaps reflecting the considerations set out in sub-s.38(g).

78 Another consideration, that persuades me of the limited purpose of (e)(ii), is the fact that there are no instructions in the legislation as to how the "financial loss of 40%" is to be measured. If, for example, "without injury earnings" (from the period marked out in (f)) continue to be used as one of the comparators, there will be many cases in which wage inflation alone will tell against a finding that (e)(ii) has been satisfied. If some other measure is intended to be used, further financial evidence would be required in these applications, as if in the damages trial. The plaintiff might have to prove current "without injury" earnings, projected "without" and "after" injury earnings, to adduce evidence as to life expectancy, the effect of the relevant discount rate and the effect of taxation on the extent of the financial loss.

79 In *Barwon Spinners* the analysis of the operation of s 134AB(38) (e)-(g) commenced (p 635), by reference to passages in the second reading speech, with the observation that the Minister intended that the 40% threshold provide an objective criterion of a loss of earning capacity. On the analysis in *Barwon Spinners*, sub s 134AB(38)(e)-(g) operate to produce, after the establishment of the two comparators, a single objective measure of physical capacity to work which must be permanent and continue, despite any retraining or rehabilitation that might occur. The defendant's argument here, that a measure of capacity "which would have been exercised" was relevant to the task (by this means introducing the subjective working intentions of the plaintiff to the assessment), seems contrary to what was said in *Barwon Spinners*, where the Court specifically held that the test is objective, and rejected the use of considerations of economic capacity, saying, of the use of "if exercised" in (g), that

"It is not concerned with whether employment will or will not be obtained: it is concerned rather with the economic yield of such work, if the capacity for that work was in fact exercised in employment."

Concluding -

"Accordingly, we would reject the argument that paragraphs (e) to (g) of sub-s.(38) are concerned with anything but the physical or mental capacity of the injured worker to work again." (p 636)

80 The retiring age question is, of course, relevant to the additional requirement that the loss of earnings consequences be very considerable. That this is so is clear from the authorities and also from the Minister's speech (Hansard 13 April 2000). I can find nothing in the language or objects of the statute, or in the Minister's speech, which shows an intention to produce the result for which the defendant contends here, that a loss meeting both of the requirements referred to, must, in the case of a worker of a certain age, meet a third requirement – a loss continuing for the foreseeable future after hearing, regardless of the magnitude of the losses already sustained.

81 At the time of the injury, the plaintiff's projected retirement date was just short of seven years away. I find, and this was not in dispute, that as a result of the condition of his back, he has been unfit for stevedoring work since that time and will remain so for the foreseeable future. He has had only months of restricted work in the period since. I find, and this too was not in dispute, that any capacity that remained after the back injury, would not now, and will not in the future, yield 60 per cent of his stevedoring earnings. I might say, that on the evidence, I find that a more realistic view of his capacity for suitable employment as defined, and having regard only to the effects of the back injury, is that he has none.

82 Accordingly, I find that the plaintiff has satisfied the requirements of s.134AB (38)(e)-(g). I find that had he not injured his back, it is probable he would have worked for the great bulk of the time between injury and the age of 55, perhaps having some months off for coronary bypass surgery, and some time, at the very end of his intended working life, on account of knee problems. As his earnings in that time were, absent the back injury, likely to have been in the vicinity of \$100,000 per annum, I find that for him, the loss of earnings consequences of his back injury easily satisfy the very considerable test.

83 I should mention two other matters. First, the evidence concerning his knee condition and its effect upon his capacity for work is that it is improving after joint replacement surgery, and would allow him to perform some work (T 44). Secondly, whilst the plaintiff said, and his case was put on this basis, that he would retire (at least from the waterfront) at 55 years of age, it is not uncommon for previously active, busy people to seek at least some other work after a year or two of retirement, and, absent the persisting effects of the back injury, the evidence as to his "other conditions" is that he would have had a work capacity to exercise, should he have chosen to.

84 For these reasons, the plaintiff is granted leave to bring a proceeding for the recovery of damages for loss of earnings consequences and pain and suffering consequences of the injury to his lumbar spine sustained on 9 December 1999.