

IN THE COUNTY COURT OF VICTORIA

(Un) Revised
(Not) Restricted

AT MELBOURNE
CIVIL DIVISION

Case No. CI-07-03981

CORY DAVIES

Plaintiff

v

TROWEL CRAFT COMMERCIAL PLASTERING
PTY LTD

Defendant

JUDGE: HIS HONOUR JUDGE BOWMAN
WHERE HELD: Melbourne
DATE OF HEARING: 26 February 2009
DATE OF JUDGMENT: 20 March 2009
CASE MAY BE CITED AS: Davies v Trowel Craft Commercial Plastering Pty Ltd
MEDIUM NEUTRAL CITATION: [2009] VCC 0198

REASONS FOR JUDGMENT

Catchwords: *Accident Compensation Act 1985 – s.134AB – physical and psychiatric injuries – pain and suffering damages only – emphasis in case placed upon psychiatric injury but ruling made in relation to physical injury – earlier acceptance of liability – injury by way of aggravation – factors to be considered.*

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr R Meldrum QC with Mr N Dubrow	Holding Redlich
For the Defendant	Mr R Stanley QC with Ms S Manova	Herbert Geer

HIS HONOUR:

General background

- 1 This matter comes before me by way of an application pursuant to s.134AB(16)(b) of the *Accident Compensation Act* 1985, hereinafter referred to as “the Act”.

- 2 The plaintiff seeks leave to bring proceedings in relation to pain and suffering damages only. There have been many decisions of the Court of Appeal and some earlier decisions of the Full Court of the Supreme Court which have provided particular and binding assistance in relation to the interpretation of the various provisions of the Act. I have borne these in mind, and have attempted to apply the principles set out in them in coming to a decision in this case, in particular, I would refer to *Petkovski v Galletti* [1994] 1 VR 436; *Barwon Spinners Pty Ltd & Ors v Podolak & Associated Cases* [2005] VSCA 33; *Grech v Orica Australia Pty Ltd* [2006] VSCA 172; *Ansett Australia Ltd & Anor v Taylor* [2006] VSCA 171; *Smorgons Tube Mills Pty Ltd v Majkic* [2008] VSCA 230; and *Jayatilake v Toyota Motor Corporation Australia Ltd* [2008] VSCA 167.

- 3 The plaintiff is relying upon paragraphs (a) and (c) of the definition of serious injury found in s.134AB (37) of the Act. The physical injuries upon which the plaintiff places reliance are to the low back and the right hip. The plaintiff also asserts that he has a major depressive disorder with suicidal ideation. It was said at the outset by Counsel for the plaintiff that the principal emphasis was going to be placed on paragraph (c) but paragraph (a) was certainly not being abandoned. Certainly issues concerning the physical injuries were fully ventilated and argued. This shall be discussed further. In any event, the operation of s.134AB(38)(h) must be borne in mind. Possible aggregation in relation to the back and hip injuries is an issue that must also be considered, but does not strike me as being a problem of significance in this case. The

physical injuries appear to be comparatively discrete from each other. The injuries are alleged to have occurred over the period of approximately eight weeks during which the plaintiff was employed by the defendant, which employment ceased on 28 March 2007.

Burden of proof

- 4 The plaintiff bears the burden of proof in relation to this matter. Whilst the injuries under consideration could, at least in part, be considered to be in the nature of an aggravation, in my opinion the burden of proof nevertheless rests with the plaintiff.

Evidence

- 5 Mr R Meldrum QC with Mr N Dubrow of Counsel appeared on behalf of the plaintiff. Mr R Stanley QC with Ms S Manova of Counsel appeared on behalf of the defendant. Oral evidence was adduced from the plaintiff and from his treating general practitioner, Dr Akkireddi. The balance of the evidence was introduced by means of the tendering of documents and Counsel made detailed and very helpful submissions.

Findings of fact and presentation of the case

- 6 The following findings of fact are made for the purposes of this application. They are not intended to be findings which are in any way determinative in relation to issues of negligence, quantum of damages, entitlement to statutory benefits and the like.

(i) The plaintiff

- 7 I am of the view that the plaintiff did his best to answer questions in a truthful fashion. I have no reason to doubt the accuracy of his evidence. I accept that, on some occasions, he has been too embarrassed and ashamed to tell others, including medical examiners, concerning his suicidal ideation. However, essentially, I found the plaintiff to be a frank witness who did his best to give honest answers whether or not they advanced his cause.

8 Dr David Weissman, consultant psychiatrist, examining the plaintiff on behalf of his solicitors, described him as being pleasant and co-operative. Mr Rodney Simm, orthopaedic surgeon, and similarly examining, described him as genuine and co-operating fully with the medical examination. Mr Michael Johnson, treating orthopaedic surgeon, referred to him as a pleasant man who was clearly stressed by his predicament. Mr Michael Shannon, orthopaedic surgeon, who saw the plaintiff several times on behalf of the defendant, considered that he had a genuine problem in both his back and hip and that his complaints were consistent. These observations are to the effect that the plaintiff was genuine and co-operative, and are observations with which I agree.

9 Some video material was shown of the plaintiff. I do not consider that this material damaged the plaintiff's credit. Certainly he was going about his everyday activities, but it is to be remembered that he is in full employment. In one sequence the plaintiff was at work and performing physical tasks with a scraper. However, I accept that the work was not overly physical, that the plaintiff had attempted to persuade an on-site tradesman to do the particular job (this seemed to me to be clear from the film), and that, when this attempt was unsuccessful, at times he used two hands for the task and also changed position because of the pain in his back. He performed the work for some 15-20 minutes, and I accept his evidence that he was in "a fair bit of pain obviously" at the end of that period. Indeed, at one stage the plaintiff got down on his hands and knees to perform the work. He gave evidence that bending was hurting him, and I also accept that proposition. Accordingly, the film did no damage to the plaintiff's credit in relation to his physical injuries. In relation to his mental injury, daily activities, such as his trip to the TAB, are basically matters which he freely admitted.

10 In summary, I accept the plaintiff as a reliable witness. If anything, he seemed to me to minimise his symptoms and problems, and this is so particularly in relation to his physical injuries.

(ii) The plaintiff's background, training and pre-injury employment

11 As leave is sought solely in relation to pain and suffering, the amount of detail required under this heading is less than might otherwise be the case. Suffice to say that the plaintiff is aged 38 years. He left school in Year 9, qualified as a carpenter, but also became a plasterer, which was his principal occupation prior to injury.

12 At the time of allegedly sustaining the physical injuries in question, he was employed by the defendant as a plasterer involved in the hanging of plaster boards on ceilings and walls.

(iii) The injury

13 In the interest of simplicity and brevity, I will indicate now that I am satisfied that the plaintiff has discharged the burden of proof in relation to paragraph (a) of the definition, even if greater emphasis was placed upon paragraph (c). Accordingly, henceforth I shall deal only with the physical or organic injuries sustained and, in compliance with s.134AB(38)(h) the psychological or psychiatric consequences of the physical injuries shall not be taken into account.

14 I would also now indicate that the physical injury in relation to which the plaintiff has discharged the burden is that to the low back. Reference was also made to the right hip injury, and there is pathology to account for symptoms from that region. However, in my opinion, the injury to the low back is, without having regard to the hip injury and without entering into the issue of aggregation, sufficient to discharge the burden of proof in relation to pain and suffering.

15 It is also to be remembered that the plaintiff is alleging that the low back injury suffered by him occurred during the course of his employment with the defendant, the duration of this being for a period of approximately eight weeks in February and March 2001, and concluding on 28 March 2001.

(a) The state of the plaintiff's back prior to commencing employment with the defendant

16 It is clear that the plaintiff suffered some back symptoms prior to his commencing employment with the defendant. I accept that work which he performed with Trowel Craft Domestic Plastering (an entity which seems to have been a predecessor of the defendant or related to it, and also a business conducted by the plaintiff's brother) was heavy and involved the hanging of heavy plasterboards on wall surfaces. The plaintiff developed some back symptoms, causing him to miss the occasional day from work. When he saw Dr Bruce Mitchell in May 2001, the plaintiff gave to that doctor a history of long-term low grade backache when playing cricket, the plaintiff being an avid and accomplished cricketer and being a fast bowler.

17 In the year 2000, the plaintiff left that particular employment and, with a colleague, worked as a sub-contractor for Boral Limited. He continued to have back problems there, as, working in a gang of two, he found the work to be particularly hard.

18 In late 2000 or early 2001 he was contacted by his brother, Ross, who, at the relevant time, was a director of the defendant. The plaintiff indicated to the directors of the defendant that he had problems with his back and that he would not be able to do all the heavy work. His employment with the defendant then lasted some eight weeks. Whilst he could not be precise about details, he agreed that he missed some days from work during that period and also left work early on some occasions, this again being due to back symptoms.

19 Plain x-rays were performed on 27 October 2001 – see, for example, the report of Dr Kevin Sleigh of 5 March 2002. These showed a narrow disc space between L5/S1 which caused that doctor (who was examining on behalf of the defendant) to diagnose lumbar spinal intervertebral disc degeneration. It would seem from the report of Mr Richard Pease of 17 July 2002 that an MRI of the lumbar spine was performed on 29 April 2002 and this revealed loss of signal at the L4/5 and L5/S1 levels, suggesting long-standing degeneration. Examining in October 2006, Mr Michael Shannon, also on behalf of the defendant, viewed x-rays and commented on fairly widespread and significant degenerative change. In view of those findings, it seems safe to assume that degenerative changes existed in the plaintiff's lumbar spine prior to his period of employment with the defendant. These were productive of symptoms sufficient to cause him to miss the occasional day from work and to have some difficulty in coping with rigorous work.

(b) The occurrence of injury

20 During the period of employment with the defendant the plaintiff missed some time from work and also left early on some occasions. However, as described in the plaintiff's affidavit of 4 June 2007 and in his oral evidence, the work which he performed with the defendant was heavy and demanding, involving the handling of large and weighty sheets of plasterboard. The plaintiff described his back symptoms as getting worse and, during the last two or three weeks of the employment, he began to develop back spasms. The plaintiff has sworn that, by the time he ceased work with the defendant on 28 March 2001, his lower back pain was "excruciating". At this time, he was also experiencing some right hip pain, and pain down the right groin.

(c) The treatment of the plaintiff's low back injury

21 It seems that the plaintiff was first seen at Dr Akkireddi's clinic, but shortly thereafter was referred to Dr Mitchell insofar as his physical symptoms were concerned. He first attended upon Dr Mitchell on 28 March 2001, continuing

to see him thereafter. A CT scan of 6 April 2001 showed an L5/S1, L4/5 and L3/4 bulge to the right side. The plaintiff underwent a hip arthroscopy, and following this his chronic low back pain went away for a period. In mid-2001, a hernia repair was performed. Ultimately, his hip and groin pain improved, but there was a recurrence of his back pain. Dr Mitchell has commented that an MRI performed on a date which is not entirely clear, but which appears to have been in 2003, showed desiccation of the bottom two discs in addition to T12/S1, and with a moderate-sized bulge of the L5/S1 disc. In any event, the plaintiff continued to suffer from low back pain of fluctuating severity and underwent various treatments. He has had injections in his back performed by Dr Mitchell and also by Dr Paul Verrills. I note that, when referred to Mr Owen Williamson, orthopaedic surgeon, in February 2008, the plaintiff gave a history that, by that time, he had received up to 30 spinal injections, but with little symptomatic relief. He has also had extensive physiotherapy, hydrotherapy and chiropractic treatment.

22 In October 2006, Dr Mitchell reported that the plaintiff continued to be in significant back pain. He was forced to give up cricket. He experienced spasms in the back and in the legs. In September 2007, he underwent a further MRI which showed a Grade 1 degenerative retrolisthesis at L5/S1 causing mild bilateral foraminal stenosis, worse on the right with contact on the right L5 nerve root.

23 On 14 November 2007, the plaintiff was referred to Mr Michael Johnson, orthopaedic surgeon. As at that time, he had continuous low back pain radiating to the right buttock and thigh and occasionally to the calf, and approximately two to three times a day he had spasms of severe pain that caused his legs to give way. Mr Johnson reviewed the MRI scan, and expressed the opinion that it showed evidence of quite marked degenerative change at the lumbo-sacral level with moderate disc space narrowing. In addition, there was moderate right L4/5 facet joint osteoarthritis. Mr Johnson

organised for the plaintiff to have a right L4/5 facet joint injection on 22 November 2007. This was of no great assistance. Mr Johnson then organised for the plaintiff to undergo a right L5 nerve root block at the Epworth Hospital on 13 December 2007. This caused him to be almost pain free for two days, but then the symptoms recurred. A further nerve root block was performed on 2 January 2008. Again, this gave significant pain relief for a few days but then the symptoms gradually returned to the previous level. Given the results of the nerve root blocks, Mr Johnson expressed the view that the plaintiff's symptoms were possibly related to his L5/S1 pathology, but it was difficult to know whether it would be appropriate to move on to a lumbo-sacral fusion. He referred the plaintiff to Mr Williamson for a second opinion.

- 24 Mr Williamson was not of the view that spinal fusion surgery should proceed. He considered that the plaintiff had chronic discogenic low back pain with referral into the right buttock and posterior thigh. The possibility of provocative discography was raised. Mr Williamson considered that the plaintiff's buttock and groin pain was referred from his lower lumbar spine.
- 25 The most recent examination of the plaintiff in relation to his back injury was that of Mr Shannon, on behalf of the defendant, on 10 September 2008. Apart from noting that the plaintiff's biggest problem was his low back, Mr Shannon reported that the plaintiff had slight wasting of the right lower leg and possibly an absent knee reflex which would be suggestive of radiculopathy and consistent with a right-sided L4/5 disc protrusion, which protrusion he considered to be demonstrated by the MRI scan of September 2007.
- 26 Whilst the plaintiff has continued to have some hip symptoms, it seems to me that the injury to the right hip is separate and has been the subject of two arthroscopies performed by Mr Robert Howells, the more recent being performed on 3 September 2007. This revealed mild degenerative arthritis in the hip joint with some changes and a flap tear of the labrum, which was

smoothed back. It was Mr Howells who organised the MRI which revealed the retrolisthesis and who referred the plaintiff to Mr Michael Johnson. As stated, the hip injury seems to me to be separate and also to be of considerably less significance to the plaintiff, as reported by him to Mr Shannon.

(d) Causation

27 Whilst the plaintiff's employment with the defendant was comparatively brief, I am of the opinion that it was causative of the plaintiff's compensable back injury. I would refer to the following views expressed by medical examiners:-

Mr Shannon, examining on behalf of the defendant:-

"I think the employment with Trowel Craft has been a significant contributing factor to his back condition, but relatively insignificant in regard to his hip." (As there is more than one "Trowel Craft" company, I would point out that Mr Shannon has correctly identified the defendant at the commencement of his report of 10 September 2008.)

Dr Andrew Miller, occupational health consultant, who examined the plaintiff on behalf of the defendant on 18 March 2002:-

"It appears the back injury was considerably aggravated when working for Trowel Craft Commercial Plastering P/L and was 'the straw that broke the camel's back' on a background of cumulative trauma to his back over the years."

Mr Rodney Simm, orthopaedic surgeon, examining the plaintiff on behalf of his solicitors:-

"This man first developed low back pain and referred pain to the buttock and groin in about 1998 or 1999 ... There was ongoing pain from that time with a severe exacerbation of pain in early 2001 when he undertook heavier work as a commercial plasterer. Following this exacerbation of pain in early 2001 his level of symptoms has remained much worse with no period of sustained recovery."

28 I accept these opinions. In fact, the statement of Dr Miller, on behalf of the defendant and made as early as March 2002, probably most neatly summarises the situation.

29 I do not accept the type of opinion expressed in July 2002 by Mr Richard Pease, examining on behalf of the defendant, who reported as follows:-

“As I understand it from your enclosures, this gentleman was employed by Trowel Craft for a relatively short period of time. This being the case it is my view that, now more than a year since he ceased employment, any contribution as a consequence of his employment there has now largely ceased.”

30 This approach was dealt with succinctly by Dr Mitchell in his report of 26 March 2007 as follows:-

“I am totally unaware of any evidence-based medicine that a doctor can use to look at a patient who has had an injury with an onset of pain, in, say, 12 months, and conclude that the continuation of that pain is no longer due to his employment when his employment was the original cause of the injury. Ignoring evidence-based medicine, I fail to see how this can even pass somebody’s logic test.”

31 Certainly, I accept that the plaintiff’s employment with the defendant was causative of his compensable back injury and continues so to be.

32 I would also point out that the plaintiff made a claim for statutory benefits in respect of his back injury, and it is not disputed but that this claim was accepted and benefits paid. I might add that this was in contrast to a claim for the hip injury, which was rejected, and no claim was made in respect of psychological or psychiatric injuries. In any event, as stated, the back claim was accepted, it being based upon the constant lifting of plaster board over the period of time of the plaintiff’s employment with the defendant. Whilst, as stated in *Ansett Australia Limited* by Ashley JA, this is not conclusive as to liability, it is a factor which may be taken into account and can be of some significance. The required coincidence of facts would appear to be present in this regard.

(e) Psychological and psychiatric factors

33 Section 134AB(38)(h) of the Act requires that consequences of a psychological or psychiatric nature are to be taken into account only for the

purposes of paragraph (c) of the definition of "serious injury" and not otherwise. Accordingly, when considering the plaintiff's organic injury to the low back, I am adopting the approach set out by the Court of Appeal in *Jayatilake*. I have examined the consequences of the physical injury as sworn to by the plaintiff and as set out in the opinions of the various medical experts. I have not taken into account psychological or psychiatric consequences of that physical injury. As I have foreshadowed, I am satisfied that those consequences are sufficient to discharge the burden in relation to pain and suffering.

(f) Permanence

34 I am satisfied that the plaintiff's compensable injury is permanent within the meaning of the Act in that it will persist for the foreseeable future. I would refer to the following expert opinions, which are comparatively current:-

Mr Shannon (defendant):-

"The prognosis is ... for his back to stabilise ... he is therefore permanently unfit for physical work in the building industry."

Mr Simm (plaintiff):-

"The injuries have stabilised ... The injury has permanently incapacitated him for pre-injury employment as a Carpenter/Plasterer."

Mr Williamson (treating surgeon):-

"I did not consider that Mr Davies would be capable of returning to his pre-injury duties as a plasterer at any time in the future ..."

35 I accept these views. The plaintiff has now been enduring back symptoms for a period in excess of eight years. His condition appears to me to be permanent within the meaning of the Act.

(g) Aggravation

36 As it seems apparent that the plaintiff had pre-existing lumbar degeneration and suffered some symptoms, it is reasonable to view the injuries sustained by him as being in the nature of an aggravation. Accordingly, I am adopting the approach set out by the Court of Appeal in *Grech*. I am quite satisfied that the aggravation which occurred is causative of the plaintiff's ongoing symptoms and is permanent within the meaning of the Act. One scarcely need go beyond the views of the defendant's doctors in this regard. I have already referred to the view expressed by Dr Miller that the heavy work performed by the plaintiff was "the straw that broke the camel's back". I have also referred to the opinion of Mr Shannon that the employment with the defendant has been a significant contributing factor to the plaintiff's back condition and the permanent effects thereof.

37 I have also referred to the history obtained by Mr Simm to the effect that, following the exacerbation of pain in early 2001, the plaintiff's level of symptoms remained much worse with no period of sustained recovery.

38 I appreciate that the plaintiff had back symptoms both earlier and whilst working with Boral Limited immediately prior to employment with the defendant. However, the period of employment with the defendant effectively marks the end of the plaintiff's capacity to be employed as a plasterer.

(h) Summary

39 Bearing in mind the opinions and evidence which I have set out, it is the permanently aggravated low back condition of the plaintiff that constitutes the compensable injury and which satisfies the statutory requirements. The injury itself is the aggravation of degenerative changes of the lumbar spine with right-sided disc bulging and a probable protrusion.

The plaintiff's employment, retraining and other developments since the injury

40 As leave is not sought in relation to loss of earning capacity, there is no need for me to expand at length upon developments since the injury insofar as they relate to rehabilitation, subsequent employment and the like. Suffice to say that the plaintiff, admirably, has rejoined the workforce although he has had difficulty coping with some work. He has been employed by organisations such as Henley Properties, Burbank Homes, Domain Homes, Porter Davis Homes, Roof Seal, Abey Homes, and his present employment is with Zuccala Homes. Many of these employments involved duties as a building supervisor, and indeed this is his current occupation. He was unable to persist with some because of such things as problems getting in and out of motor vehicles, considerable walking, climbing on roofs and the like. Whilst he has had some problems in his present employment, he has continued with it. He also has a second part-time job driving a car for an escort service on weekends.

Ruling

41 As is apparent, I find that the plaintiff has discharged the burden of proof in relation to pain and suffering damages in respect of his low back injury. I am satisfied that the "very considerable" test has been satisfied. I would point to the following expert opinions:-

Mr Simm: -

"He is suffering a severe physical impairment ... The injury has had a profound capacity on his ability to enjoy and engage in social, recreational and domestic activities. He is now confined to light non physical activities."

Mr Williamson: -

"When I saw Mr Davies, I considered his prognosis to be fair. Whilst it is unlikely that his condition will significantly deteriorate in the foreseeable future, given the persistence and severity of his symptoms, it is unlikely that it will significantly improve."

Mr Shannon:-

“I think that he does have a genuine problem ... He is ... permanently unfit for physical work in the building industry ... He is currently working, but under difficulties.”

42 I would also refer to the affidavits of the plaintiff. They contain references to the impact which the back injury has had upon his life. He was, as stated, a keen cricketer. As a result of his back pain, he was forced to give this up. He had played at a high level, including district seconds and suburban A grade. Ultimately he became a non-playing coach of Greensborough in the A grade competition, but was forced to resign from this because of the physical demands.

43 There has been substantial disruption of his sexual life. This is again due to the back pain, and has led to strained relationships with his partner. He is greatly restricted in his activities with his two young sons. He continues to take a substantial level of medication.

44 The plaintiff can no longer run or walk more than a moderate distance without substantial back pain. Spasms have become almost a daily experience. As he has sworn in his affidavit of 17 September 2008, there have been times when he has been in tears because of the pain in the early part of the day.

45 His occupation as a plasterer is lost to him for the foreseeable future. He has had difficulties in holding down a job as a building supervisor. I accept that these problems, and those set out above, are the result of his injury to the low back.

46 In his submissions, Mr Stanley was perhaps somewhat dismissive of the back injury, and doubtless this was at least in part because of the emphasis placed upon the psychological and psychiatric consequences in both Mr Meldrum's opening and in the conduct of the matter generally. Mr Stanley referred to one answer of the plaintiff's as being "...really...the end of the matter so far as the back situation is concerned". After asking the plaintiff concerning the

repair of a hernia in September 2001, Mr Stanley asked the following questions and received the answers which are set out:-

“After you had the hernia repaired in the September of 2001, again that problem effectively resolved, did it not? ...Yes.

So you were in effect, in time, left with the same sort of problem you had had previously, namely, back problem? ...Yes.

And that’s pretty much been the situation ever since? ...Yes.”

47 To my mind those questions and answers fall a long way short of disposing of the issue of the plaintiff’s back injury. If surgical intervention effectively repaired the plaintiff’s hernia and his hip problem was considerably improved after the surgery in relation to it (which had been referred to earlier in cross examination), and he was left with his back problem, that does not mean that the back problem was either one that pre-dated the plaintiff’s employment with the defendant or was one that failed to meet the statutory requirements. Those questions, particularly viewed in context, do not, as claimed, really end the matter insofar as the back injury is concerned.

48 Furthermore, even if it were not so, the plaintiff’s opinion as to his condition is but part of the evidence viewed as a whole. An individual plaintiff, particularly during cross examination, might tend to downplay his or her symptomatology and prospects. However, the medical evidence must also be considered.

49 When the evidence in this case is considered as a whole, I am quite satisfied that the burden of proof has been discharged and that the plaintiff should be granted leave in relation to pain and suffering damages. He has already endured a great deal in relation to such pain and suffering, to the restrictions upon his social and sporting life, and to his ability to interact with his children. All of these factors will continue to persist for the foreseeable future.

50 In summary, the plaintiff has discharged the burden of proof and leave is granted to him to issue proceedings in respect of pain and suffering damages.

- 51 Given the above, and as I understand the operation of the Act, there is no necessity for me to make any ruling in relation to either the plaintiff's hip injury or the alleged severe mental or permanent severe behavioural disturbance pursuant to paragraph (c) of the definition.
- 52 The plaintiff is successful. Leave is given to him to issue proceedings in respect of pain and suffering damages.
- 53 I shall hear the parties as to any ancillary orders that may be required.