

IN THE COUNTY COURT OF VICTORIA

(Un) Revised
(Not) Restricted

AT MELBOURNE
CIVIL DIVISION

Case No. CI-06-00176

MICHAEL YOUNAN

Plaintiff

v

N. IERACI & SONS PTY LTD

Defendant

JUDGE: HIS HONOUR JUDGE ANDERSON
WHERE HELD: Melbourne
DATE OF HEARING: 8 & 9 February 2007
DATE OF JUDGMENT: 14 February 2007
CASE MAY BE CITED AS: Younan v. N. Ieraci & Sons Pty Ltd
MEDIUM NEUTRAL CITATION: [2007] VCC

REASONS FOR JUDGMENT

Catchwords: Accident compensation - Serious injury - Impairment to left wrist and lower back - Whether plaintiff had exaggerated his symptoms - Whether plaintiff had lost 40% of his earning capacity - Section 134AB *Accident Compensation Act* 1985.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr P. Halley	Holding Redlich
For the Defendant	Mr R. Smith SC with Ms M. Wolski	Hall & Wilcox

HIS HONOUR:

- 1 Michael Younan was working as a truck driver on 6 February 2002. Whilst climbing down from the back of his truck, he missed his step and fell backwards onto the road. The plaintiff fractured his wrist and some days later he developed severe low back pain. The broken wrist required surgery. The wrist remains painful and stiff and, because of post-traumatic arthritis, there is the possibility that further surgery may be required. The plaintiff continues to suffer low back pain and discomfort. The pain radiates into his buttocks and legs. The plaintiff exercises regularly, but his back prevents him from lifting weights and from standing or sitting for lengthy periods.
- 2 The plaintiff is aged 35. He had a good work history prior to the accident, including about 18 years as a tyre maker before he was retrenched in December 2000. After the accident, in July 2002, the plaintiff attempted to return to work on limited hours. He lasted two to three weeks. More recently, as part of a course to retrain in the retail sector, the plaintiff completed 192 hours practical work at Bunnings over many weeks. Apart from these periods, the plaintiff has not worked since the accident. He has unsuccessfully applied for many jobs.
- 3 There is a dispute in the medical evidence about the plaintiff's genuineness and whether, either deliberately or unconsciously, he is exaggerating his symptoms. The psychiatrists who examined the plaintiff found no evidence of abnormal illness behaviour and his mild symptoms of depression and anxiety were a consequence of the physical injuries. There is evidence that the plaintiff's wrist injury makes him unsuitable for certain tasks including his pre-accident work. It is accepted that his lower back condition restricts other employment options. It is generally agreed that the plaintiff can work in the retail sector provided he is able to move around at times and is not required to sit or stand for too long. There is also evidence that the plaintiff is unlikely to be able to return to full-time employment.
- 4 The plaintiff seeks leave pursuant to s.134AB of the *Accident Compensation Act* 1985 to bring proceedings for damages. The plaintiff relies separately upon the impairments to the body function of his left arm and to his lower back. The issues in dispute in the application are:
 - (1) The nature and extent of the plaintiff's injuries to his left wrist and lower back.
 - (2) Whether the plaintiff's symptoms arise from psychological or other factors which must be disentangled before applying the statutory test.

- (3) Whether, when considered separately, the consequences of the relevant impairment can be regarded as a "serious injury".
- (4) Whether the plaintiff has a loss of earning capacity of at least 40% calculated in accordance with the statutory provisions.

The injury to the plaintiff's wrist

- 5 The plaintiff is right-hand dominant. He worked as a tyre maker at South Pacific Tyres for about 18 years until he was made redundant in December 2000. In the accident in February 2002, the plaintiff suffered a displaced fracture of his left wrist. At Royal Melbourne Hospital the left wrist was manipulated under anaesthesia and placed in plaster. The plaster was removed after six weeks. The plaintiff suffered ongoing left wrist pain and stiffness and the wrist clicked when moved. An orthopaedic surgeon, Mr Pullen, operated on the wrist in November 2003. The ulnar bone was shortened and a metal plate inserted. The plate was removed in a further procedure in October 2004. The plaintiff received regular hand therapy but continued to suffer pain and stiffness.
- 6 Mr Pullen saw the plaintiff three times in the period 2005/2006. Radiological examinations suggest the development of post-traumatic arthritis, and Mr Pullen says the plaintiff *"may come to requiring a further wrist arthroscopy or even wrist arthrodesis if this becomes progressive"*. Mr Pullen thought the plaintiff would not be *"suitable for heavy lifting"* and his decision to retrain in the retail industry was *"very advantageous"*. Mr Pullen considered that the plaintiff *"had a reasonable range of motion and was able to do light duties with his wrist"*. Apart from the *"difficulties with any heavy lifting"*, Mr Pullen also cautioned against *"excessive repetitive use of the left wrist insofar as his work activities are involved as he would be limited in this area"*.
- 7 In May 2002, the plaintiff was referred by his general practitioner, Dr Mikhail, to orthopaedic surgeon Mr John Owen in respect of his low back pain. In August 2003, Mr Mikhail referred the plaintiff to Mr Owen *"to have a look at his left wrist"*. The plaintiff was complaining of *"loss of strength, stiffness in the wrist as well as ... numbness in his ring and little fingers"*. Mr Owen's view at that time was that the plaintiff *"had significant non-organic features to the examination of his wrist"*. Mr Owen was aware of the proposed *"shortening surgery to the ulnar side of the wrist"*. He noted that the plaintiff *"has an increased risk of developing degenerative arthritis in the wrist, but this would be unlikely to develop to the point where he would need any significant surgery"*. Mr Owen considered that the *"problem with the wrist would*

cause him discomfort in doing prolonged heavy work but would not necessarily preclude him from doing that".

8 I will discuss the views of the plaintiff's treating general practitioner, Dr Mikhail, in due course, particularly in relation to the issue of whether the plaintiff might have consciously or unconsciously exaggerated his symptoms. Dr Mikhail also expressed the view that the plaintiff would be unsuited to employment involving repetitive movements using his left wrist. Dr Clayton Thomas, a consultant in rehabilitation and pain medicine, saw the plaintiff in 2002 and 2004 at the suggestion of Mr Owen. He thought that the plaintiff *"could probably return to some form of process work"*.

9 The plaintiff has been examined by doctors at the request of the workers compensation insurer. Generally, they have examined both the lower back and the left wrist complaints.

(a) Mr John O'Brien, an orthopaedic surgeon, saw the plaintiff in July 2002, June and September 2003 and June 2004 for what Mr O'Brien said was *"fairly chronic pain in his back with persistent symptoms associated with the left wrist"*. In June 2004 following the further wrist surgery, Mr O'Brien said, *"There still remains significant restriction of wrist movement which I would suggest is the residuum of the intra-articular nature of the fracture with the development of some secondary post-traumatic arthritis"*. Mr O'Brien said that he *"would not be overly optimistic in relation to this patient's long-term prognosis. I do consider that he has manifestations of a chronic pain syndrome, particularly in association with his lumbar spine, and I would suggest it is likely this situation will persist. Furthermore, I do consider it is likely this patient has permanent restriction, particularly of function of the left wrist"*.

(b) Mr Robert Marshall, a general surgeon, examined the plaintiff in May 2006. He considered that the plaintiff *"has a full range of movement of his wrist and there is no abnormality to be found in the wrist apart from a minor click on flexion/extension ... I believe Mr Younan has no doubt a degree of quite minor osteoarthritis of the wrist and degenerative changes in his spine as a result of the ageing process, but his presentation appeared to me to be very consistent with quite abnormal illness behaviour. He is clearly deeply immersed in an 'injured role' and has not worked for more than four years. I believe the purely physical impairment or loss of body function resulting from his compensable injury is very much exaggerated by psychogenic factors"*. This latter view seems to have been reinforced by a mistaken reading of a report by the general practitioner, Dr Mikhail. Mr Marshall believed that Dr Mikhail's view was that

"there was a very significant functional overlay" in the plaintiff's presentation. This was an incorrect assumption. Mr Marshall said that "from the purely physical point of view, his incapacity should really be quite minor".

The injury to the plaintiff's lower back

- 10 On 22 February 2002, the plaintiff first presented to Dr Mikhail with *"lower back pain which hadn't responded well to simple analgesia"*. Dr Mikhail's preliminary diagnosis was *"soft tissue injuries"* and he prescribed Panadeine Forte and hydrotherapy. Soon after, Dr Mikhail arranged for a CT examination of the lumbar spine and referred the plaintiff for physiotherapy.
- 11 In April 2002, Dr Mikhail sent the plaintiff to Mr Owen. Mr Owen *"thought his examination showed him to be a rather anxious man. He certainly had non-organic features to his examination and no significant neurological loss in his legs"*. Mr Owen arranged an MRI examination which showed *"degenerative disc disease in the lumbar spine without any other significant problems"*. Mr Owen's view was that the plaintiff's clinical examination was *"considerably clouded by the development of non-organic features which make it very difficult to take his level of symptoms at face value"*.
- 12 Mr Owen reported that his *"examination showed a man who has significant signs of a functional illness ... He was generally an anxious man. He had no significant neurological loss in his legs ... I think he will inevitably have long-term significant problems, mainly due to his psychosocial problems rather than his musculoskeletal ones"*. Mr Owen's diagnosis was *"a soft tissue injury to his lumbar spine"* which he thought *"would stabilise after two years"*. He did not consider that he had been *"severely incapacitated from his back point of view [and] could certainly be improved by chronic pain management"*. He suggested that the plaintiff be referred to Dr Clayton Thomas.
- 13 Dr Thomas first saw the plaintiff in September 2002 and reviewed him on a second occasion in August 2004. The plaintiff presented with *"reported low back pain, right buttock pain and pain down both legs"*. Dr Thomas referred the plaintiff for a *"spinal rehabilitation program"*, although this was not undertaken until the period May to July 2004. Dr Thomas considered that the plaintiff's *"capacity to return to work had been affected by the injury ... He had the capacity to return to alternative employment, but not to pre-injury duties"*.

- 14 Mr Geoffrey Klug, a neurosurgeon, examined the plaintiff at the request of his solicitors in October 2006. The plaintiff told Mr Klug that *"his back condition has never resolved. He continues to have pain of variable severity in his low back with some spread of pain into both lower limbs"*. Mr Klug noted that the plaintiff was undertaking a home exercise program and *"fairly regularly takes the drugs Tramal and Voltaren to relieve his current symptoms"*. Mr Klug considered that the MRI of the lumbar spine on 26 June 2002 and the CT scan on 27 April 2005 *"do reveal degenerative changes in that region of some substance. I feel it is most likely that he is suffering from discogenic pain, most likely related to the changes at the L5-S1 level. In addition to back pain, there is referral of pain into both lower limbs"*.
- 15 The plaintiff's complaint of referred pain particularly to the left leg was consistent, Mr Klug thought, with the CT scan on 28 April 2005 which showed at the L3-4 level *"a left-sided disc protrusion which was possibly causing some neural impingement"*. By comparison with the scan on 27 February 2002, Mr Klug thought *"there could have been some progression at the L3-4 level"*. Mr Klug said the plaintiff's prognosis was *"guarded"*. He felt that *"It is more likely than not that his current symptoms will persist with some waxing and waning on an indefinite basis"*. He considered that the continuation of the home exercise program, regular self-managed hydrotherapy and taking pain relieving medication from time to time would be appropriate.
- 16 A number of medical practitioners have examined the plaintiff's lower back problems at the request of the workers compensation insurer.
- (a) Mr Jonathon Hooper, an orthopaedic surgeon, saw the plaintiff on one occasion on 5 October 2005. He noted that the plaintiff *"still has symptoms and he will continue to have symptoms. He will be unable to return to heavy work of truck driving and he is now best suited to do lighter work"*.
- (b) Mr Clive Jones, an orthopaedic surgeon, saw the plaintiff in January and October 2005. He *"thought the worker was overstating his disability, particularly as far as the back was concerned ... I thought there was probably conscious exaggeration of the symptoms considering the physical signs and radiological changes"*. He said that *"considering the very minor limitations of back function, the back symptoms appear to be somewhat disproportionate and seem to be exaggerated in degree. I note a report from Mr J. O'Brien who believes the worker has now developed a pain disorder, particularly in association with his lumbar spine and that this is likely to persist and unlikely to respond to treatment"*.

- (c) Mr John O'Brien noted that between his examinations in June and September 2003, there had been *"some loss of lumbar movement"*. He considered, however, that *"the subjective change in signs does not appear to suggest any overt significant lumbar pathology. Certainly, initially it was thought this patient was suffering from back pain associated with some aggravation of lumbar spondylosis. However the course and response to treatment really does suggest that this has turned into true chronic pain"*. In June 2004 Mr O'Brien said that, *"Back pain is described as the major disabling factor and this is certainly now associated with some variable signs of a subjective nature which I considered in my last report to represent a real chronic pain syndrome. This is now being addressed by a pain management program that is in its early stages and one can only hope that a reasonable response to this will be obtained"*.
- (d) Dr P.D. Clark examined the plaintiff in January 2003. He said the plaintiff's *"mood was one of resignation and I doubt his motivation to return to work ... [Upon examination] he was apprehensive and tentative in his responses and gave me the impression he was exaggerating his responses"*. Dr Clark's view was that, *"There is no reason to think that work has exacerbated his degenerative disease to cause his current symptoms"*.
- (e) Mr Marshall saw the plaintiff in May 2006. I have previously discussed his reports. He concluded that the plaintiff's *"back problem does not appear severe enough to pose any problems to the resumption of full-time work"*. Mr Marshall noted that a requirement to *"repeatedly lift heavy weights"* would be inappropriate, but even for lighter duties in a retail job Mr Marshall thought that by reason of the fact that the plaintiff *"has now been off work for four years and is completely convinced that he is totally and permanently incapacitated, it seems unlikely that he would be willing to attempt these sorts of duties"*.

Nature of the plaintiff's injuries

- 17 Mr Marshall said that the plaintiff's *"purely physical impairment or loss of body function ... is very much exaggerated by psychogenic factors"*. Dr Clark doubted the plaintiff's *"motivation to return to work"*. Mr O'Brien said that the plaintiff's back pain was *"certainly now associated with some variable signs of a subjective nature"* which he considered were the *"manifestations of a chronic pain syndrome"*. Mr Jones thought there was *"probably conscious exaggeration of the symptoms considering the physical signs and radiological changes"*. Mr Owen said that the plaintiff had *"significant signs of a functional illness"* and the plaintiff would *"inevitably have long-term significant problems, mainly due to his psychosocial problems rather than his*

musculoskeletal ones".

- 18 Both the plaintiff and Dr Mikhail gave evidence before me. During cross-examination the plaintiff was shown video surveillance material. Mr Smith SC, the defendant's senior counsel, submitted that the video showed the plaintiff performing activities which were inconsistent with a person suffering from disabling pain in the left wrist and back. Mr Smith referred specifically to film of the plaintiff getting into and out of his car and carrying items in his left hand.
- 19 Interpreting surveillance material may involve matters of expertise or simply impression based on everyday experience. I cannot, without expert evidence, accept Mr Smith's submission that the way in which the plaintiff was shown on the videos getting into his car would not be possible for a person suffering from the symptoms the plaintiff complained of. The plaintiff was asked to demonstrate in the witness box how he would sit down on a seat. He demonstrated using his right hand to slow his descent. The plaintiff did not use that technique when getting into his car; he sat straight down. On the other hand, my impression was that he showed some care when sitting down and simply did not "*plonk himself down*". It is a manoeuvre that I have observed many times on surveillance videos.
- 20 Mr Smith relied on the material as evidence of the plaintiff's lack of genuineness. He submitted that it supports the views of examining doctors who consider the plaintiff is exaggerating his symptoms. The video material constitutes only a few seconds of film. The defendant had the plaintiff under surveillance on many occasions and has film taken on 8 days. The film shown in Court covered 5 of these days and on some days the plaintiff was apparently under observation for periods of many hours. In this case I consider that the surveillance material is of little relevance to the determination of issues relating to the plaintiff's credit.
- 21 I had a favourable impression of the plaintiff whilst he was giving evidence. He was a straightforward, helpful respondent to all questions and had a pleasant demeanour. The plaintiff's application is supported by affidavits in which he describes his day-to-day activities and by affidavits sworn by his sister and brother. One gets the impression that the plaintiff has led a quiet life characterised by hard work and honest endeavour.
- 22 The plaintiff migrated to Australia in 1977. He worked for South Pacific Tyres for about 18 years until he was made redundant in December 2000. The plaintiff took training courses to retrain in the areas of hospitality, gaming and security. He

obtained his truck licence. He performed security work for a short period before finding employment as a truck driver with the defendant in early 2002. After the plaintiff was injured, he attempted to return to work in July 2003. He was placed in a cold room packing cheese. He only lasted two to three weeks, as his back pain made it impossible to continue.

23 The plaintiff undertook all medical procedures and treatment recommended. He carried out an exercise program at home. Between July and November 2005 he completed a Certificate II Retail course at Epping NMIT. The 192 hours of practical work were completed three days a week with four hours work each day. The plaintiff required extra painkillers to cope with the light duties he was performing. The plaintiff has cooperated fully with Centrelink and other employment agencies in an effort to find work. He has applied for numerous positions without success.

24 Dr Mikhail described the plaintiff as "*a very good person*", "*very genuine*" and someone who was "*always well conducted*". Dr Mikhail said that the plaintiff had never presented with psychogenic symptoms and he had not picked up any unconscious exaggeration. The plaintiff had never needed anti-depressants or medication other than analgesia and anti-inflammatories. Dr Mikhail contrasted the plaintiff with other patients of his who had significant psychological issues. The plaintiff had always accepted Dr Mikhail's advice and responded to Dr Mikhail's encouragement for him to obtain work and regain a normal life.

25 I accept the evidence of Dr Mikhail and his view of the plaintiff. It is consistent with the impression I gained of the plaintiff through his evidence and the unchallenged supporting affidavits. It is also consistent with the psychiatric evidence and the medical evidence I accept concerning the nature of the plaintiff's pathology.

26 The plaintiff has been examined by two psychiatrists, Dr David Weissman at the request of the plaintiff's solicitors in September 2006, and Dr M.J. Nathar at the request of the insurer in May 2003 and May 2004. Dr Weissman regarded the plaintiff as presenting "*with mild reactive depressive symptoms but not so much by way of signs on mental state examination*". He diagnosed the plaintiff as suffering from "*a mild Adjustment Disorder with depressed and anxious mood which has arisen as a consequence of the physical injuries*". Dr Weissman said that "*Whilst there is some mild pain preoccupation, perhaps understandably there is no actual abnormal illness behaviour in my view ... Overall the client's work-related injury and its psychological sequelae have had a mild impact upon his day-to-day domestic, social, leisure and recreational functioning. He feels upset and frustrated with his physical*

pain and disabilities. He has thoughts about his injury that stay with him and he is probably not as socially active as he was".

- 27 *After his first examination, Dr Nathar said, "There is no evidence of any psychiatric disturbance or psychiatric illness on examination. He complained of some worries, naturally, regarding the pain and where his future will be. He is still having active physical treatment and procedures are still being planned. Things are far from stable and I think he simply has the normal reaction of being concerned and worried about his health status. However, there was no indication of any other symptoms that would have enabled me to diagnose anxiety, depression or any pain disorder".*
- 28 *After the second examination, Dr Nathar confirmed that the plaintiff did not have "any psychiatric or psychological illness. There seemed not to be really any evidence of significant pain amplification that is pathological. A return to work last year failed because, understandably, the factory was too cold for him and that aggravated his physical problems. However, there was no psychological impediment".*
- 29 *In my view, the opinion of the treating orthopaedic surgeon, Mr Pullen, should be accepted in relation to the injury to the plaintiff's left wrist. In October 2005 the plaintiff had a "reasonable range of motion ... He still had some discomfort on the ulnar side of his wrist and occasional clicking". Mr Pullen did not think the plaintiff "would ever be suitable for heavy lifting". He may "develop some arthritis of his wrist", and he may require "a further wrist arthroscopy or even wrist arthrodesis if this becomes progressive". These views are generally confirmed by Mr O'Brien, who considered, "It is likely this patient has permanent restriction, particularly of function of the left wrist".*
- 30 *In regard to the lower back injury, there seems to be some inconsistency in the interpretation of the radiological material. For example, Mr Jones does not appear to have had access to the CT scans of the lumbar spine. Mr Klug makes the most comprehensive examination of the radiology. He concluded that he was "sure that all the changes noted in various regions of his lumbar spine could be contributing to his complaints of back pain with referral of pain into the left lower limb. It is possible that the more recent changes at the L3-4 level could be responsible for increased pain in the left lower limb. Overall I would consider that his current complaints are consistent with the changes noted on the imaging studies including the last CT scan".*
- 31 *Mr Hooper was one of the few doctors engaged by the insurer who said he was "not in a position to comment" on any "anxiety component" of the plaintiff's disability.*

Commenting within his area of orthopaedic expertise, he referred to the plaintiff's "physical disability and impairment". I accept these views in preference to the doctors who considered that there was either conscious or unconscious exaggeration of symptoms. There may well have been some "variability of signs" from time to time. I accept Dr Mikhail's explanation that "inflammation" persisting around the nerve roots can at times give signs which at other times disappear.

Plaintiff's loss of earning capacity

32 The plaintiff's tax returns disclose the following details:

Year Ended	Gross per Annum	Gross Weekly
30 June 1999	\$60,675	\$1,166.83
30 June 2000	\$56,091	\$1,078.67
30 June 2001	\$27,083	\$520.82
30 June 2002	\$15,465	\$297.40
30 June 2003	\$25,298	\$486.50
30 June 2004	\$27,980	\$538.07
30 June 2005	\$27,508	\$529

33 The accident occurred on 6 February 2002. The Court must examine the period of three years before the accident [i.e. from 6 February 1999] and the period of three years after the accident [i.e. to 6 February 2005] to determine what "most fairly reflects the worker's earning capacity had the injury not occurred" and then must compare this with the plaintiff's earning capacity for suitable employment at the present time.

34 Until he was made redundant in December 2000, the plaintiff had been employed as a tyre builder. He had carried out that occupation for 18 years. The tax returns show that for almost two years of the three year period before the accident, the plaintiff was

capable of earning about \$60,000 per annum in that occupation. After he was retrenched, the plaintiff retrained and then worked briefly in the security industry before obtaining employment as a truck driver in early 2002, less than a month before the accident.

- 35 Mr Smith submitted that I should accept that the average earnings on a selection of dates in 2003 and 2005 of three other truck drivers who were not injured and who remained in the employment of the defendant should be accepted as most fairly reflecting the plaintiff's earning capacity had the injury not occurred. Mr Smith then sought to compare this figure of \$38,841.40 per annum or \$746.95 per week with what Mr Smith suggested was the plaintiff's present earning capacity - \$740 to \$770 gross per week, being the average wage a sales clerk, or \$650 to \$700 as the average wage of a customer service person, might earn in full-time employment. These figures were contained in a report of a vocational assessor in March 2005.
- 36 I do not consider that there is any proper basis for accepting Mr Smith's submission. The plaintiff had been employed as a tyre builder for 18 years, including about two years of the three years prior to the accident. The vocational assessment considered that the plaintiff had obtained "*transferable skills/abilities*" from that employment although they had little relevance to the range of employment which the assessor considered was within the plaintiff's current work capacity. In these circumstances, it is appropriate to accept that the sum of about \$60,000 per annum most fairly reflected the plaintiff's without injury earning capacity.
- 37 The plaintiff has been trying to obtain employment. The vocational assessor noted that he "*was prepared to consider anything that was within his restrictions*". All the treating and examining doctors considered the plaintiff "*could undertake suitable types of employment*". In February 2005, Dr Thomas said the plaintiff's "*capacity to return to work has been affected by the injury*". He suggested certain restrictions. Most of the examining doctors agreed that similar limitations were appropriate. Mr Klug considered that the plaintiff "*could undertake light physical activities at bench top height with some flexibility in the workplace. Customer service would also be within his abilities*". Accepting for the moment that the plaintiff has the capacity for full-time employment and might earn the average wage, as a process worker he would apparently earn \$495 gross per week and as a customer service person between \$650 to \$700. To be reduced to earnings of \$700 per week would represent slightly more than a 40% loss of earning capacity when compared with a without injury earning capacity of \$60,675 per annum.

38 However, there is a further factor which must be taken into account, the plaintiff's capacity to undertake full-time work. For at least six months, Dr Mikhail has certified that the plaintiff is fit to undertake work for only four hours a day, three days a week. This is no doubt based on the plaintiff's work experience at Bunnings, which covered an extended period. Dr Mikhail anticipated that, in time, the plaintiff might build up to at least 20 hours per week, but he thought it unlikely the plaintiff would get beyond this. I accept Dr Mikhail's evidence in this regard. It is a reasonable assessment based upon his experience as the plaintiff's principal treating doctor both before and after the accident. It is clear, on the evidence, that the plaintiff's loss of earning capacity is more than 40% when calculated in accordance with the statutory provisions.

Conclusions

39 It is necessary to examine each of the impairments separately. They cannot be aggregated in order to satisfy the statutory test of serious injury. The wrist fracture initially was the disabling injury and it was not until October 2004 that the metal plate was removed. Mr Pullen last saw the plaintiff in April 2006 "*at that time he indicated that his wrist had improved with time. He still had some discomfort on the ulnar side of his wrist and occasional clicking. He was able to function okay, but he did occasionally complain of pain at night*". Mr Pullen felt "*It was unlikely that his symptoms would improve*". He considered the range of work the plaintiff could do was limited and there was a real prospect of further surgery, including the possibility of a wrist arthrodesis.

40 The plaintiff has always worked in manual employment, although he appears to have obtained a significant degree of skill and experience as a tyre builder. He is right hand dominant, but many activities of daily living and of manual work require the use of both hands in combination. The injury to the plaintiff's lower back appears, however, to have overshadowed the wrist as the plaintiff's more disabling complaint. The limitations on the day-to-day activities, the inability to keep performing the light duties on his return to work and the restrictions which limited his performance during his work experience at Bunnings were seen to have been derived more from the impairment to his lower back. These have been the consequences to him of that impairment. As Mr Klug said, the plaintiff's "*prognosis is guarded ... It is more likely than not that his current symptoms will persist with some waxing and waning on an indefinite basis*". Dr Mikhail anticipates that this will result in him, at best, being able to work on a part-time basis, perhaps building up to 20 hours a week.

- 41 It is now five years since the plaintiff was in regular employment. The effect on the plaintiff's daily living, as disclosed in his affidavits and those of his brother and sister, is likely to continue into the foreseeable future. In those circumstances, I consider that it is appropriate to describe the consequences to the plaintiff of the impairment to his lower back as "very considerable" and as justifying a finding of "serious injury".
- 42 In relation to the plaintiff's left wrist, it is difficult to determine what the situation would have been in the absence of the injury to the lower back. I consider, however, that the opinions expressed by Mr Pullen make it likely that the plaintiff would have similarly found himself disabled from many of the ordinary social, domestic and recreational pursuits and from returning to full-time employment. Considering the impairment to the left wrist separately, in my view a finding of "serious injury" is also appropriate.
- 43 The plaintiff will have leave to bring proceedings for pain and suffering and loss of earning capacity damages in respect of the injuries he suffered in the workplace accident with the defendant on 6 February 2002.

Certificate

I certify that these 13 pages are a true copy of the reasons for decision of His Honour Judge Anderson delivered on 14 February 2007.

Dated: 14 February 2007.

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Litsa Pavlou

Acting Associate to His Honour Judge Anderson