

IN THE COUNTY COURT OF VICTORIA

(Un) Revised
(Not) Restricted

AT MELBOURNE
CIVIL DIVISION

Case No. CI-08-01092

DANIEL HEWITT

Plaintiff

v

C & K HENDERSON ROOFING PTY LTD

Defendant

JUDGE: HIS HONOUR JUDGE BOWMAN
WHERE HELD: Melbourne
DATE OF HEARING: 5 and 6 February 2009
DATE OF JUDGMENT: 13 March 2009
CASE MAY BE CITED AS: Hewitt v C & K Henderson Roofing Pty Ltd
MEDIUM NEUTRAL CITATION: [2009] VCC 155

REASONS FOR JUDGMENT

Catchwords: *Accident Compensation Act 1985 – s.134AB – injury to low back – reliance placed upon both single incident and course of employment – whether these need be considered separately – theoretical capacity for very light work with numerous restrictions – whether suitable employment realistically exists.*

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr P Jewell SC with Mr P Halley	Holding Redlich
For the Defendant	Mr P Scanlon QC with Ms F Ryan	Lander & Rogers

HIS HONOUR:

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 both pain and suffering damages and pecuniary loss damages. 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 born 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 Limited & Anor v Taylor* [2006] VSCA 171; *Jayatilake v Toyota Motor Corporation Australia Ltd* [2008] VSCA 167; and *Smorgon Steel Tube Mills Pty Ltd v Majkic* [2008] VSCA 230.
- 3 Whilst the plaintiff originally relied upon both sub-paragraphs (a) and (c) of the definition of serious injury found in s.134AB(37) of the Act, his Counsel made it quite clear during the conduct of the case that reliance would be placed solely upon sub-paragraph (a) – that is, upon consequences of a physical injury. The injury under consideration is one to the low back, and it is alleged that it occurred in the course of the plaintiff's employment with the defendant between approximately 18 December 2001 and 19 April 2002, and on or about 18 December 2001.

Burden of proof

- 4 The plaintiff bears the burden of proof in relation to this matter. Whilst the injuries under consideration are at least, in part, in the nature of an

aggravation, in my opinion the burden of proof nevertheless rests with the plaintiff.

Evidence

5 Mr P Jewell SC with Mr P Halley of Counsel appeared on behalf of the plaintiff. Mr P Scanlon QC with Ms F Ryan appeared on behalf of the defendant. The plaintiff was called to give evidence and was cross examined. His treating general practitioner, Dr Alex Siemienowicz, was also required for cross examination. The balance of the evidence was documentary in nature and was tendered by consent, which was a most sensible and cost-effective manner in which to run the case.

Factual background

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

(i) The plaintiff

7 I am of the view that the plaintiff was an honest witness who did his best to answer questions in a truthful fashion. I note that Dr Stephen Stern, consultant psychiatrist, examining on behalf of the defendant, described the plaintiff as being co-operative and pleasant. Dr Gary Davison, specialist occupational physician, also examining on behalf of the defendant, described him in identical fashion. Mr Rodney Simm, orthopaedic surgeon, examining on behalf of the plaintiff, referred to the plaintiff's complete co-operation with the medical examination, an observation also made by Dr Michael Epstein, consultant psychiatrist, also examining of behalf of the plaintiff. Dr Epstein further described the plaintiff as being well-oriented to time, place and person. The impression formed by these witnesses coincides with my own. The

plaintiff appeared to me to answer questions frankly and honestly, even if such answers had the potential to damage, rather than advance, his application. There is little suggestion in the medical evidence that the plaintiff is in any way wilfully exaggerating his symptoms, and that was certainly not the view which I formed. In summary, he impressed me as a reliable witness.

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

8 The plaintiff is aged 44 years, having been born on 8 November 1964. He was educated only to the Year 8 level. After working for a period as a labourer, he commenced and completed an apprenticeship as a roof tiler. After working in that capacity for a period, he travelled to Queensland. He worked as a labourer. He then returned to roof tiling, before working as a truck driver delivering steel products. In approximately September 2000, he commenced working with the defendant as a roof tiler. Thus, the plaintiff's background is that of a man with very little education whose only trade or profession is that of a roof tiler and who has otherwise worked in essentially unskilled and physical occupations.

(iii) The injury

9 There was considerable debate in this case concerning how the injury should be analysed and assessed, and what ruling should be made in relation to it. That is in addition to what could be described as the usual arguments concerning consequences. I shall return to these issues shortly, but shall now set out my findings as to the occurrence and circumstances of injury. It is to be remembered that it is the low back that is under consideration.

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

10 I accept that the plaintiff suffered from some episodes of back pain prior to his commencement of employment with the defendant. When first seen at

Dr Siemienowicz's clinic on 1 February 2002, he gave a history of some two years of back pain, and of an x-ray being previously ordered, it revealing some degeneration in his lower back. In fact it would appear that radiological investigations were carried out in 1996, a CT scan revealing a mild posterior herniation of the L5/S1 disc and a moderate degree of posterior herniation of the L4/5 disc with no associated spinal canal stenosis being seen. Plain x-rays were essentially normal. The plaintiff was unable to recall whether he had any treatment of any significance at this time, or whether he missed any time away from work. His oral evidence was that, from 1996 to 2000, his back gave him trouble periodically. It did not cause him to give up work, but, from time to time, caused some annoyance or discomfort. He had no physiotherapy, but believed that he may have taken Nurofen or something similar.

11 I accept that the plaintiff had some pathology in his lumbar spine, and that he had experienced some symptoms, prior to commencing employment with the defendant. However, such symptoms were not of sufficient magnitude to cause him to miss any or any significant periods from work. He was then able to commence, and engage in, employment with the defendant which was of a particularly physical and demanding nature. Accordingly, in terms of consequences and symptoms, I am of the view that the significance of any relevant condition existing prior to the commencement of the plaintiff's employment with the defendant is far from great.

(b) The incident of approximately 18 December 2001 and its prelude

12 Before turning to the incident of approximately 18 December 2001, which date also marks the commencement of what could be described as the course of employment injury period, the question of symptoms allegedly suffered by the plaintiff whilst working for the defendant in September 2001 should be considered.

- 13 It was put to the plaintiff that the defendant's leave records indicated that, in September 2001, the plaintiff had a week off work as a result of "severe back pain". The plaintiff was unable to recall this, but in essence said that, if the records revealed that he had been absent with a back complaint, that must be so. However, he repeated that he had no recollection of it.
- 14 Whilst the wording of the records might be considered to be a little ambiguous, viewing those records as a whole I am of the view that the word "back" in relation to the week of leave without pay commencing 17 September 2001 is in fact a reference to a back complaint. That is so even though the absence is recorded as being for leave without pay rather being on sick pay. However, I have no reason to doubt that the plaintiff, a credible witness, has no particular recollection of the absence. There was placed before me no other material in relation to the absence which would clarify the reason for it or indicate the severity of the symptoms. Apart from the fact that the plaintiff appears to have been absent from employment for one week, there is nothing to substantiate the proposition that the back pain from which he suffered was "severe".
- 15 Whatever might have been the situation between 17 and 21 September 2001, there is no doubt but that in December 2001 the plaintiff was engaging in heavy and very demanding work. It was also scarcely challenged but that on 18 December 2001 he was involved in the incident which shall now be described.
- 16 In December 2001 the plaintiff and workmates were working on the roof of the church on the corner of Toorak Road and Punt Road, South Yarra. The job was a big one, the church being some three storeys high, and, presumably because of the unusual nature of the retiling job, Mr Clarrie Henderson, the plaintiff's boss, took photographs of the work that was being carried out. Some of these photographs were given by Mr Henderson to the plaintiff at the time, and before the incident in which the plaintiff was injured. At least one of

them shows the plaintiff scaling the roof in what, to the uninitiated, would appear to be a somewhat perilous fashion. These photographs were placed in evidence. I have no doubt that, when this climbing activity was combined with the necessity of carrying quite heavy tiles or slates up the roof, this was indeed demanding work.

- 17 When the incident of injury occurred on approximately 18 December 2001, the plaintiff was on scaffolding at the base of the church roof. Mr Henderson's son removed a roof ladder which was attached to a plank on which tiles were resting. This caused the tiles to fall onto the plaintiff. In the course of this incident, the plaintiff suffered injury to his back, and became aware of back and left leg pain. As stated, the occurrence of this incident was not really contested by the defendant.

(c) Events following the incident of 18 December 2001

- 18 Following the incident described above, the plaintiff was aware of bruising. The tiles had actually fallen onto his back and left side, causing him to twist. However, he worked on until the Christmas break and then rested. Tragically, during that break, his brother died of a heart attack (on Christmas Eve) and, almost immediately after the funeral, the plaintiff's father died of a similar cause. The plaintiff claims, and I readily accept, that these sad events overshadowed his complaints and he returned to work whilst still experiencing some symptoms. As he said in re-examination, "...my brother and my dad just died and I didn't – I didn't want to go sort of sooking...".
- 19 I accept that the plaintiff was suffering from symptoms, and was in pain by the end of the working day, after resuming duties in January 2002. He continued to perform the heavy work of a roof tiler.
- 20 On 1 February 2002 the plaintiff attended at the clinic of Dr Siemienowicz. The basic reason for this attendance was pressure placed on the plaintiff by his partner to have a general check-up given the recent cardiac-related deaths

of the plaintiff's brother and father. At that examination the plaintiff gave a history of two years of back pain, and the fact that an x-ray had previously shown some degeneration in his lower back was discussed. A further x-ray was ordered. When seen again on 8 February 2002, the plaintiff's back pain had increased. It is noted that he related this to an accident at work when he slipped carrying a load of tiles. Whether this was in fact a mis-recording of the incident of 18 December 2001 is unclear. In any event, the further x-ray confirmed degenerative changes in the lumbosacral spine, and the plaintiff was advised by his doctor to cease work. In fact, the plaintiff seems to have continued working until 19 April 2002.

(d) Cessation of employment

- 21 The plaintiff ceased work on 19 April 2002. He experienced an increase in left sided back pain and left leg pain, including numbness, following the lifting of tiles. He returned to Dr Siemienowicz on 24 April 2002 giving a history consistent with what has just been described. Left sided sciatica was confirmed as was decreased sensation. A CT scan was ordered. 19 April 2002 effectively marks the plaintiff's last working day as a roof tiler.

(e) The plaintiff's treatment since the cessation of employment with the defendant

- 22 The plaintiff continued to be seen by Dr Siemienowicz. A CT scan was performed, and the plaintiff was referred to Dr Chu, a rheumatologist, who advised rest, analgesia and physiotherapy. An MRI was then performed on 19 August 2002. This revealed a disc protrusion at the L4/5 level and a substantial protrusion at the L3/4 level which was seen to impinge on the right L4 nerve root. The plaintiff was referred to Mr Armin Drnda, neurosurgeon. Mr Drnda formed the view that the MRI revealed that the three lowest lumbar discs were degenerate, and that there were protrusions at each of those levels, the protrusions at L3/4 and L4/5 being more significant. On 30 October

2002, Mr Drnda performed microdisectomy and rhizolysis at L3/4 and L4/5. Mr Drnda had explained to the plaintiff in advance that this may well assist his leg pain, but may have little effect upon his back pain.

23 Over the next year the plaintiff's symptoms fluctuated somewhat with some improvement in leg pain. At the end of July 2003, the plaintiff had an episode of severe worsening of the back and leg pain after sneezing and coughing, but improved after receiving morphine and Intocid in the Emergency Department at the Frankston Hospital. He was in considerable difficulty again in August 2003, and Mr Drnda formed the view that the plaintiff's current problems were related to scarring around the nerve root of L5. He referred the plaintiff for the performance of epidural and nerve root injection of steroid and local anaesthetic, and this was carried out on 23 September 2003. The plaintiff continued to suffer discomfort, and a further MRI was performed revealing scar tissue at the sites of the operation and residual protrusion and narrowing at L4/5. As shall be discussed, by late 2003 Mr Drnda considered that the plaintiff's injuries had stabilised and that he had no capacity for his pre-injury duties, but would be possibly capable of performing light duties with quite marked restrictions, and that he might require additional education and training. Mr Drnda implicated employment in the plaintiff's condition.

24 The plaintiff then continued to attend on Dr Siemienowicz, seeing him some 14 times between May 2004 and November 2005, and also received some treatment at the Frankston Hospital. A review by Mr Drnda on 16 November 2005 revealed the continuation of chronic low back pain with occasional pain down the left leg and constant numbness in the left foot. There was also very occasional pain down the right leg. When reviewing the plaintiff on 16 September 2008, Mr Drnda noted the onset of some depression but also expressed the view that the organic injury on its own was the cause of the plaintiff's incapacity for work and for the interruption to his life generally.

25 Dr Siemienowicz has continued to see the plaintiff, who requires the use of Panadeine Forte. Dr Siemienowicz has also prescribed an anti-depressant, and it is noted that the plaintiff has, in addition, been suffering from loss of libido.

(f) Causation

26 Considerable attention was paid to the issue of causation, with reference to both the plaintiff's earlier symptoms and the issue of the role of the incident of 18 December 2001, and particularly as compared with the course of employment.

27 In relation to this latter question, a cynic may have formed the view that a considerable part of the energy devoted to fighting this case by the defendant was directed towards minimising the effect of the incident of 18 December 2001, which some might consider smacked of negligence, and shifting the blame to the general course of employment thereafter. Happily, I am not a cynic.

28 Despite the urgings of Mr Scanlon and his references to the prohibition on aggregating causes of action, I am not of the view that I am required to weigh up the relative contributions of the incident as opposed to the course of employment. What I am required to do is ascertain whether a compensable injury occurred and whether that injury is serious within the meaning of the Act. It does not seem to me that, where there are multiple employment-related incidents or causes productive of the compensable injury, I am required to analyse and assess the contribution of each such incident in regard to its causative role in that overall compensable injury.

29 In any event, such an exercise is unnecessary in the present case. I am quite satisfied that the incident of 18 December 2001 was causative of the plaintiff's compensable injury. I would refer to the report of 16 November 2005 of Mr Drnda, bearing in mind that he is the plaintiff's treating and operating

surgeon. It is also to be remembered that he was not required for cross examination, and accordingly his opinion, as expressed in his reports, effectively stands unchallenged. In his report of 16 November 2005, Mr Drnda made the following observations:

“On your specific question on the incident in 2001, when some roof tiles fell on to his left hip and caused him to twist his back, I can say that it is probably one of the significant factors related to his work has contributed to the development of his condition. He had worked as a roof tiler for 20 years and with heavy lifting working in awkward positions on roofs, balancing with heavy loads certainly puts a very significant strain on his lower back and has caused advanced accelerated degeneration of the lumbar discs. A particular incident from December 2001 possibly caused the rupture of one or both discs that were later on treated...Therefore the incident from December 2001 was very likely to have played a very significant role in the final development of disc prolapses and triggered severe symptoms.”

30 This proposition seems to me to be logical; it comes, as stated, from the treating surgeon; it is essentially unchallenged; and I see no reason why it should not be accepted. As shall be discussed, Dr Richard Bittar, consultant neurosurgeon, who examined the plaintiff on behalf of his solicitors in January 2009, also implicated the December 2001 incident.

31 Mr Daryl Nye, neurosurgeon, examining on behalf of the defendant in February 2004, took a detailed history of the event in December 2001, which history also referred to the fact that the plaintiff continued to work in the face of symptoms until April 2002 when the pain became severe and work was discontinued. The conclusion of Mr Nye was as follows:

“I consider that employment has been a significant contributing factor, to the injury which has resulted in incapacity for employment, and for which surgery has been undergone with a partial response.”

32 In commenting on causation, Mr Nye did not distinguish between the December 2001 incident and the course of employment, but it is clear that the history he has recorded focused very considerably upon that incident.

33 The defendant also obtained opinions from two occupational physicians, namely, Drs Fish and Davison. Neither opinion has much to offer on this point, but each implicates employment. Dr Siemienowicz referred to the 2001 incident as something that could be an aggravating factor. Thus, there is nothing to contradict the opinion of Mr Drdna, and indeed the reports of Dr Bittar and Mr Nye seem to me to endorse it. For the reasons that I have already stated, I accept it and find that the incident of December 2001 was causative of the plaintiff's compensable injury.

34 It is then probably unnecessary for me to find that the course of employment between December 2001 and April 2002 was also causative but, in any event, I do so find. Dr Richard Bittar expressed the view that the plaintiff's present condition is attributable to the nature of the work that he performed as a roof tiler in late 2001 and early 2002. On the question of causation, he has stated the following:

"In my opinion, his employment has been a significant contributing factor. Specifically, the incidents which occurred in December 2001 and April 2002 have been the dominant contributing factors."

35 Not only does this reinforce the causative effect of the 2001 incident, but also supports the proposition that the course of employment generally at the relevant time was causative of the injury. Dr Bittar was not cross examined.

36 A similar view was expressed by Mr Rodney Simm, orthopaedic surgeon, who examined the plaintiff on behalf of his solicitors in December 2008. Mr Simm made the following observation:

"More specifically, the work incidents described on 15 December 2001 and 19 April 2002 were probably responsible for disruption and protrusion in one or more of the compromised degenerate lumbar intervertebral discs."

37 Whilst the dates there referred to might not coincide entirely with dates earlier mentioned, when the report is read as a whole it is quite clear that Mr Simm is implicating exactly the same incidents and employment as the other doctors.

I have already referred to the views of Mr Nye, and the other defendant's doctors who simply indicate employment without being particularly specific.

38 I would also point out that the plaintiff lodged a claim form for statutory benefits specifically referring to injury on 19 April 2002 and his claim was accepted.

39 In summary, it is my view that the injury upon which the plaintiff relies was suffered in compensable circumstances and, if it is necessary so to do (a proposition which I doubt), I find that both the incident of 18 December 2001 and the course of employment between December 2001 and April 2002, and specifically in April 2002, were causative of the injury.

(g) Psychological and psychiatric factors

40 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. In the present case, whilst the plaintiff has suffered from some depression and has been prescribed anti-depressant medication, I do not consider these factors as being of any great significance.

41 Dr Stephen Stern, consultant psychiatrist, examined the plaintiff on behalf of the defendant in September 2006, and found, from a psychiatric aspect alone and not including the physical symptoms, the plaintiff was fit for work including his pre-injury duties.

42 Dr Alan Jager, consultant psychiatrist, also examining on behalf of the defendant, found, in September 2006, that the likely duration of incapacity by reason of a psychological or psychiatric condition was six to eight weeks if the plaintiff commenced treatment and responded.

43 Dr Michael Epstein, consultant psychiatrist, examining the plaintiff on behalf of its solicitors in November 2008, reached the following conclusion:

"I can see no evidence that his pain was psychologically based, rather it is physically based and in turn has led to the development of a chronic Adjustment Disorder with depressed mood."

44 Perhaps this situation is best summed up again by Mr Drdna who seems to have looked at the situation in a way which more closely resembles the approach taken by the Court of Appeal in *Jayatilake*. His method of analysis certainly seems to me to be close to what was intended by the Act. Whilst acknowledging the existence of a depressed mood, Mr Drdna states the following:

"If we can disregard the psychological consequences of the organic injury and assess only the latter ones, I would state that the organic injury on its own causes all the plaintiff's current incapacity for work and his life generally. Psychological condition adds on patient's condition in the sense that his social and recreational part of his life is basically miserable."

45 I accept and agree with the opinion of Mr Drdna, again a view which was basically unchallenged.

(h) Permanence

46 I am quite satisfied that the physical consequences of the plaintiff's compensable injury are permanent within the meaning of the Act. In his most recent report, Mr Drdna has expressed the view that the plaintiff's organic condition is stable and that his prognosis is poor. Dr Bittar has stated that the plaintiff is permanently incapacitated for his pre-injury occupation and that his condition appears to be deteriorating and will continue to do so before stabilising. It is also stated that the plaintiff's prognosis is poor and he will suffer from significant pain and disability into the foreseeable future. Mr Simm has expressed the view that the plaintiff's condition will persist as described with no prospect of improvement. Dr Davison, examining on behalf of the defendant, stated that the plaintiff's condition has stabilised and the prognosis for recovery is very poor. These are views which I accept, and indeed the contrary was scarcely argued. Permanence could not be said to have been a

major issue in this case, if indeed it was an issue at all. I am quite satisfied that the physical consequences of the plaintiff's compensable injury will persist for the foreseeable future and are permanent within the meaning of the Act.

(i) Aggravation

47 As previously stated, it seems highly probable that the plaintiff had pre-existing degenerative changes in the lumbar spine, and had certainly suffered some symptoms. Therefore, what occurred in the incidents and period under consideration could well have been in the nature of an aggravation. Accordingly, the approach which I shall adopt is that set out in *Grech*. In so doing, I shall be concentrating on the consequences of the relevant injury upon which reliance is placed.

(j) S.134AB(38)(g)

48 It was not argued that this sub-section should operate to the detriment of the plaintiff in this case. There is no suggestion that he has been less than co-operative in relation to rehabilitation and retraining. There is no reason why I should think that his attempts in this regard have been anything less than reasonable. Section 134AB(38)(g) seems to me to have no application to the case.

(k) Summary

49 In December 2001 – probably 18 December – and in the course of his employment from then until approximately 19 April 2002, and on that date, the plaintiff suffered a compensable injury to his low back. The nature of the injury was of disc prolapses at the L3/4, L4/5 and L5/S1 levels. There had probably been some pre-existing degeneration. The injury resulted in the surgery which has been described. The consequences which shall be taken into account shall not include psychological or psychiatric consequences, but

I do not regard these as being of great moment when compared with the organic consequences. I am also satisfied that the organic consequences will persist for the foreseeable future.

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

50 The plaintiff has not returned to work as a roof tiler since April 2002. He has undergone some rehabilitation in 2003 and 2004. In April 2003, he underwent vocational assessment from an organisation called Ascendence. In 2004, he was again assessed by an organisation called KTM Consultancy Services Pty Ltd, which also seems to have been looking at employment prospects. I gather that he was also assessed by an organisation called Employment Plus, and in early 2006 obtained some cleaning work at Frankston Heights Primary School. After two weeks he had to give this up because of its physical nature. In 2006 he did some voluntary work at a centre for the aged, but had to give this up due to back pain associated with sweeping. It would also seem that, in 2005, the plaintiff worked briefly cleaning tools for a concreter. In 2006 on a couple of occasions he did some light "pointing up" duties for his nephew who is a roof tiler. Before he was injured, he had registered the name "Hewitt Ballard" as a roof tiling company, but, whilst that may still exist, the entity has not been operational. Indeed, it was deregistered in August 1999. As stated earlier, he continues to see Dr Siemienowicz and also sees a psychologist, Ms Carter.

Ruling

51 I have already dealt with questions of psychological or psychiatric consequences and permanence. As stated, insofar as the injury is an aggravation, I shall deal with it in the manner set out by the Court of Appeal in *Grech*.

52 I shall now deal with the question of loss of earning capacity. I am quite satisfied that the plaintiff has discharged the burden of proof in this regard. I appreciate that the plaintiff himself agreed that he may have the capacity for certain theoretical positions.

53 Mr Scanlon placed great emphasis upon the plaintiff's own evidence that he had a capacity for light work. His submission, in essence, was that the plaintiff knew best. However, I tend to agree with the submission of Mr Jewell in this regard. The whole of the evidence must be assessed. If the situation were the other way around and the plaintiff was denying that he had a capacity for work whilst the doctors were stating that he had such a capacity, I find it difficult to believe that the defendant would be advancing the line that the plaintiff knew best. In every case it is a matter of looking at not just what the particular plaintiff believes his or her work capacity might be, but also of taking into account medical and other expert evidence.

54 It is also to be recalled that the plaintiff gave evidence that he had made phone calls asking people to "give him a go", they would "give him a go", and then he would find out that "it was just too much". When asked whether he could do a theoretical job as a gatekeeper copying down the registration numbers of vehicles, the plaintiff stated that he could definitely "have a go". As he stated in answer to a similar question "...you don't know until you have a go sort of thing". The plaintiff's preparedness to "have a go" is admirable, and he has already "had a go" on a number of occasions and in a number of positions, but unsuccessfully.

55 Whilst the plaintiff's frankness and optimism is laudable, the fact remains that not only has he been unable to cope with the light work positions which he has tried, but the expert medical evidence would indicate that he is, realistically, excluded from the workforce by reason of the compensable injury. This is particularly so when his background, training and education are borne in mind.

I would refer to the following observations of the medical examiners –

- (a) Mr Drdna: "In my opinion, Mr Hewitt will be incapable of returning to his pre-injury occupation as a roof tiler. He cannot perform any work that is physically demanding...His possible future employment should be only in a part-time setting in work which alternates sitting and walking. In his work he should not sit for more than 20 minutes to half an hour. He should not lift any object heavier than 5 kilograms and he should avoid repetitive bending and twisting his lower back. However, given his education, training and skills, it will be highly unlikely to expect Mr Hewitt to obtain any type of work. He would require significant retraining and education."
- (b) Dr Bittar: "He is permanently incapacitated for pre-injury duties as a roof tiler. He does have the capacity to work part-time in modified duties, he could work 2 or 3 hours per day, 4 or 5 days per week. He would not be able to engage in the bending, twisting or the lifting of objects weighing more than 8 or 10 kgs, and should not sit or stand for more than 30 minutes continuously. Taking into account his age, training and education, and experience as well as the severity of his lumbar spine condition, it is extremely unlikely that he will be able to find suitable employment."
- (c) Mr Simm: "He will be permanently incapable of returning to pre-injury employment or any other employment for which he is suited by reason of his age, training, skills and experience. He has a theoretical capacity for employment of a non-physical nature that allows flexibility with static postures. However, he has no previous training or experience to enable him to find such employment without further retraining. Considering his limited education, his age and the nature of his previous work, I doubt that meaningful retraining leading to a return to work will be achieved."

57 Those are three comparatively current views expressed by the treating neurosurgeon, a consultant neurosurgeon and a consultant orthopaedic surgeon. They seem to me to represent a very accurate summation of the situation. Indeed, some five years ago Mr Nye, examining on behalf of the defendant, expressed the view that "...this individual will not work in a situation which requires repeated bending or twisting movements of the spine, unrelieved periods of either standing or sitting, and lifting limited of 10kg will be required at least in the short term". Whilst that assessment is now considerably out of date, it foreshadowed what was to come. Indeed, whilst not a specialist in the true sense, Dr Davison, examining on behalf of the defendant in December 2008, stated that the plaintiff has a capacity for suitable duties of a part-time and sedentary nature with restrictions listed as being the avoidance of prolonged spinal postures by varying regularly and at will; the avoidance of frequent and/or repetitive bending or twisting; the avoidance of manual handling in excess of 4.5kg in force or weight at bench height; and self-paced duties.

58 When the physical restrictions placed upon him by the experts are considered along with the plaintiff's education, skills and work experience, it seems to me to be apparent that the plaintiff has no capacity for suitable employment. Another way of expressing that would be, realistically, there is no suitable employment available for him. In previous decisions I have referred to the fact that, arguably, every person, unless comatose, has a theoretical capacity for some employment, and I have referred to the example of Professor Stephen Hawking. Alternatively, a person very seriously injured and confined to a wheelchair might have the theoretical physical capacity to earn a small fortune painting masterpieces or singing opera songs. However, the definition of "suitable employment" must be remembered and some realism introduced. I am reinforced in this view by the observations of Buchanan JA in *Smorgons Steel Tube Mills*. In that decision his Honour said:

"I consider that the legislature intended that the worker's loss of capacity was to be determined having regard to work that is generally available in the employment market, rather than a position tailored to meet the peculiar needs of an individual worker, who is incapable of performing his normal work."

That statement, with which I respectfully agree, is applicable in the present situation.

59 If the plaintiff were fit for suitable employment, clearly it would be of a part-time nature. Dr Bittar, who has described the range of hours that might be involved, places them as being between eight and 15 hours per week. Even if this were adopted, on the basis of the figures that have been provided the plaintiff would comfortably exceed the financial loss of 40 per centum required by the Act. However, as stated, I find that he has no capacity for suitable employment and accordingly has discharged the burden in relation to loss of earning capacity.

60 There have been a number of decisions of this Court to the effect that, leave having been given in relation to loss of earning capacity and a certificate granted accordingly, it is unnecessary to consider whether leave should also be granted in relation to pain and suffering damages. In accordance with the principles of comity between co-ordinate divisions of the same jurisdiction, I should follow the same practice unless I am convinced that it is wrong. I am not so convinced, although it must be said that, whilst this proposition was advanced by Mr Jewell, the contrary was not put with any force, or at all, by Mr Scanlon. In any event, the plaintiff would clearly discharge the burden of proof in relation to pain and suffering. He has already endured a great deal; as outlined in his evidence as contained in the affidavit material, in addition to his oral evidence, there are quite gross restrictions which interfere with his everyday life; and the pain and restrictions from which he suffers will persist for the foreseeable future.

61 In summary, the plaintiff is successful. Leave is given to him to commence proceedings for damages for loss of earning capacity, and, should it be necessary, leave is also granted to him in respect of pain and suffering damages. I shall hear the parties as to any ancillary orders that may be required.