

DEF

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
DAMAGES LIST
SERIOUS INJURY DIVISION

Not Restricted

Case No. CI-0502215

JOHN DENTON

Plaintiff

v

MODULINE PTY. LTD.

First Defendant

MODULINE (MANUFACTURING) PTY. LTD.

Second Defendant

JUDGE: HER HONOUR JUDGE KENNEDY
WHERE HELD: Melbourne
DATE OF HEARING: 30 May 2007
DATE OF JUDGMENT: 6 June 2007
CASE MAY BE CITED AS: Denton v Moduline
MEDIUM NEUTRAL CITATION: [2007] VCC 515

REASONS FOR JUDGMENT

Catchwords: Serious injury application - s134AB *Accident Compensation Act 1985*-
impairment to left hip- - whether injury arose in employment on/after 20 October, 1999-
whether serious pain and suffering consequences

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr BW Collis QC with Mr AJ Keogh	Holding Redlich
For the Defendant	Mr BG Anderson	Wisewoulds

Introduction

- 1 This is an application for leave to bring proceedings for the recovery of damages pursuant to s.134AB of the *Accident Compensation Act* 1985 (the Act) in respect of injury to the left hip joint which the plaintiff alleges occurred in the course of his employment during the period from 20 October 1999 until April, 2004, but more particularly until early 2002.
- 2 The plaintiff was born on 16 July 1958 and was raised in an orphanage.
- 3 In about 1975, the plaintiff commenced employment, aged 16 years, as a store person with Target and subsequently worked as a sheet metal worker. In 1987, he commenced employment with the Moduline organisation ("Moduline") as a sheet metal worker.
- 4 The plaintiff stated that he received various knocks on his left hip on various occasions and often put a lot of physical pressure on it. On 28 January 1999, he received one of these knocks on his left hip while handling a piece of sheet metal. The plaintiff took a short time off work and returned to lighter duties in February, 1999. An x-ray report of 9 February, 1999 showed mild to moderate degenerative change to the left hip joint. However, by 16 April 1999 he was certified fit for normal duties and generally continued his duties up until the date he underwent surgery in February, 2002.
- 5 He experienced a recurrence of his hip pain in late December 2000 and again in October, 2001. There were no reported radiological changes on x-ray but an MRI report of 12 November, 2001 showed subtle hip dysplasia and articular cartilage loss associated with antero- superior labral tear.
- 6 On 6 February 2002 the plaintiff underwent an arthroscopy of his left hip. After that procedure he did not engage in guillotine work again for Moduline except for some smaller jobs.

7 The plaintiff claimed that by mid 2002 he realised that he had a serious
problem with his hip which could cause him permanent restrictions.

8 The plaintiff appeared to have issues with his employers and did receive some
formal warnings. He resigned from his employment with Moduline in April,
2004.

9 Between April and October, 2004 the plaintiff obtained some short term work.

10 By October 2004, he had obtained employment with Trent Refrigeration,
performing light metal work. He subsequently ceased this work for
psychological reasons unrelated to his hip complaint in November 2004, but
by early 2006 had resumed employment with Trent Refrigeration which
ceased in July, 2006.

11 Since April, 2007, the plaintiff has been employed by Acton Air-conditioning
and has engaged in light sheet metal work in Thomastown.

12 The plaintiff complains of ongoing pain to his hip.

13 Although the originating motion in this matter includes an application under s
135A, Counsel for the plaintiff, Mr Collis QC, stated that relief was sought
pursuant to s134AB only and on the basis of damages for pain and suffering
alone.

Issues in dispute

14 The defendant submits:

- (a) that there is no compensable injury arising out of or in the
course of employment on/after 20 October, 1999;
- (b) that there was no compensable injury that resulted in or
contributed to consequences that constituted serious injury.

15 It is however conceded that the plaintiff does currently have a permanent
impairment of the function of the left hip.

16 The issues in dispute are therefore two-fold:

(a) whether there is a compensable injury arising out of or in the
course of or due to the nature of employment after 20
October, 1999;

(b) whether there is a compensable injury that resulted in or
contributed to consequences that constituted serious injury.

The evidence

17 The plaintiff gave evidence in the case and was cross-examined.

18 The plaintiff¹ described his employment working for Moduline which made
cable ducting. That ducting was made out of various types of sheet metal
which varied although some of the sheets were very heavy.

19 The plaintiff described the job technique that was adopted to move the sheets
of metal using a guillotine as follows²:

"The metal sheets were stored on racks. A forklift would then be used to deliver
the necessary sheets from the rack to a table which was next to the guillotine
on which I was working. I would then need to drag a sheet at a time off the
table, transferring it across to the guillotine bed. The sheets were heavy and
often awkward to lift and manoeuvre. The table was on the left and the
guillotine bed was on the right. There was no assistance offered to me to lift
the sheets across to the guillotine bed. To move the sheets I would lift one
edge, then drag the sheet from the table towards the guillotine bed, twisting as I
did to slide it across. There was a gap of around 60 centimetres between the
table and the guillotine bed. As I did this, I would balance the sheet on my left
hip, taking the weight of the sheet on my left hip as it went across. I would then
get the sheet into position on the guillotine bed, and proceed to cut the sheet to
the required size. Often I had to move a sheet to different positions on the
guillotine bed. There were also other strenuous aspects of my job. My job was
hard physical work."

20 The plaintiff also gave evidence in terms of his pain and suffering.

"I continue to suffer constant pain in my hip. The pain increases throughout the
day and the hip feels stiff, particularly in the late afternoon. My left leg feels

¹ Plaintiff's affidavit of 31 January, 2005

² Paragraph 7 of Plaintiff's affidavit dated 31 January, 2005

weak and less reliable. As I have said, I have difficulty sitting for lengthy periods, standing for lengthy periods or being on my feet for a long period of time. The symptoms in my hip are gradually increasing over time. As I understand it, I am likely to require further surgery in future, being a hip replacement. I also understand there is little else that can be done to treat me at this stage and that I simply have to put up with the current situation for as long as I can."³

21 The plaintiff was cross examined but no credit issues arose in terms of the plaintiff's evidence. I found him to be a straightforward witness who did not seek to embellish or exaggerate either the conditions of his work or the pain that he suffered.

22 Various doctors were relied on in the case by the plaintiff, but only one of these, Mr Owen Deacon, an orthopaedic surgeon, was cross-examined. On cross examination, an issue arose as to whether Mr Deacon resiled from an important conclusion in his report of 8 May 2006. This will be referred to, below.

23 The plaintiff also relied on an affidavit from the plaintiff's landlady, Ms Ruth Hyman.

24 The defendant placed primary reliance on one doctor, Mr Elsner, an orthopaedic surgeon.

Principles

25 In terms of whether the compensable injury arises from employment on/after 20 October, 1999 a determination must be made of whether there was aggravation of the plaintiff's degenerative condition arising out of or in the course of or due to the nature of employment on/after 20 October, 1999. Further, consideration must be given to the extent of the plaintiff's impairment both before and after 20 October, 1999 to determine if the aggravation is itself a serious injury as defined.⁴

³ Paragraph 23 of his affidavit of 31 January 2005 and confirmed as ongoing in a subsequent affidavit of 27 April 2007

⁴ *Petkovski v Galletti* [1994] 1 VR 436

26 In terms of pain and suffering, the plaintiff must show that the consequences to him of any impairment when judged by comparison with other cases in the range of possible impairments may be fairly described as being more than significant or marked and as being at least "very considerable."⁵

Whether work-related aggravation on/after 20 October, 1999

27 The plaintiff's case was that what began as a minor hip impairment turned into a major impairment by reason that the plaintiff aggravated his condition by continuing to work for the defendant between October 1999 and 2002.

28 In so submitting the plaintiff relied on the following:

(a) that the plaintiff's condition was only "mild" immediately prior to 20 October, 1999 notwithstanding the episode in January, 1999;

(b) that the nature of the job technique suggested an inherent likelihood of aggravation which was supported by Mr Wallin, a consultant in occupational health and safety;

(c) that the weight of the medical evidence suggested that the plaintiff's current condition was work-related;

(d) that Mr Deacon supported a serious work-related aggravation.

29 In relation to (a) Mr Doig- an orthopaedic surgeon- suggested that in March, 1999 he thought the condition "would slowly settle" and that the plaintiff should be left alone; further that the condition was only "mild." Dr Riggall, the general practitioner, certified the plaintiff for normal duties in April 1999.

30 This medical evidence was consistent with the plaintiff's own actions in returning to work. Further the plaintiff's unchallenged evidence was that the problem "did settle down" and he was able to return to normal employment up until October, 2000 (when he suffered a problem with his shoulder) and then

⁵ Section 134AB(38) (c) of the Act; *Barwon Spinners Pty Ltd & Ors v Podolak* [2005] VSCA 33

until late December, 2000.

31 In relation to (b), the plaintiff's description of his job technique did suggest strain on the left hip which he further developed and demonstrated in court.

Dr Wallin, who performed a work-site assessment, stated that "the technique used by [the plaintiff] over the last five plus years had the potential to aggravate and/or accelerate the progression of the degenerative changes which he is now suffering in his left hip joint."

32 In relation to (c), the weight of the medical evidence was that the condition was work related (Dr Riggall, Mr Doig and the treating orthopaedic surgeon, O'Donnell). However, the defendant relied on Dr Elson who suggested that the injury was not work-related.

33 In relation to Dr Elson, in a report of 19 April, 2005 he stated that the nature of the plaintiff's work "has aggravated [his] underlying condition." However, in a subsequent report dated 11 December, 2006 he changed his opinion after viewing a video said to be of the plaintiff's work duties and sated that "on the basis of that video footage...I am now of the opinion that employment has not aggravated his... condition."

34 The plaintiff was shown this video in court and although he suggested there were some similarities he stated that the weights he had worked with were some times twenty times heavier. He also indicated that a suction device used was not in operation when he was working with the guillotine. In the light of the plaintiff's evidence, Mr Collis QC submitted that Dr Elson's changed opinion should be rejected given it was based on a video which did not fairly represent the conditions under which the plaintiff worked.

35 I accept the submissions of the plaintiff that Dr Elson's evidence should not be preferred given its reliance on the video and further given his evidence was against the weight of the medical evidence generally.

36 In relation to (d), the defendant submitted that Mr Deacon had been discredited in the witness box. Again, the defendant also placed emphasis upon the fact that the defendant had worked throughout the relevant period as evidence against any serious aggravation.

37 In relation to Mr Deacon, his report read as follows:

"Therefore, during the above periods mentioned when he was working at his normal job, there was, of course, a continuing 'significantly aggravating' effect by his work on the left hip condition, which was by now well-established and therefore more vulnerable to further aggravating factors. So I think a case could be put up for that period between 20 October 1999 and mid 2002 being just as damaging to the left hip in 12 years leading up to 20 October 1999 had been. That is, 50% of his current left hip impairment relates to the period worked with Moduline from 1987 to 1999 and 50% of it from 20 October 1999 to mid 2002 when he was placed on permanent light duties."

38 Mr Anderson invited the court to disregard this evidence given Mr Deacon's evidence in cross-examination as follows:

"...it does become symptomatic from January 1999?---Well, I think that's right. I think that was an aggravating incident, what we call a significant aggravation of a pre-existing problem that was asymptomatic and unrecognised.

Yes, so in terms of his current presentation, would you apportion a healthy percentage of any current impairment he has to that precipitating incident?---Well, a portion of it, certainly.

What proportion; are we talking 50 per cent or higher?---Well, I don't actually say that in my report because it's pretty difficult to work out an exact figure and pluck it out of the air, but I thought that was a reasonable assessment, that he had 50 per cent of the problem prior to that incident and then that injury added another 50 per cent.

So, that adds up to 100 per cent, being 50 per cent prior to January 1999, and 50 per cent from January 1999?---Yes.

And you maintain that that's the cause of his current impairment?---I think that's a reasonable assessment, yes.

Thank you, Mr Deacon."

39 Although I accept that the evidence in cross-examination appears to contradict his report, the following exchange took place in re-examination after Me Deacon was taken back to the contents of his report:

“ Am I correct in saying that you apportion half of the current impairment of the hip to work after 20 October 1999?---Yes, yes, that's what I mean.

Do you maintain that view now?---Yes, I do. I think that that was a significantly aggravating period of work for him to do for that hip. There was already some problem there and it's difficult to estimate the precise percentage but it seemed reasonable to say half and half.”

40 Given that the report of Mr Deacon is a very thorough report, and that he appears to have been confused as to the “incident” under pressure of cross examination, I accept the evidence of Mr Deacon in his original report which is, in any event, consistent with the weight of the evidence to the effect that the work itself had an aggravating impact.

41 In relation to the fact that the defendant was able to continue to work as evidence of a lack of aggravation I do not accept that, simply because the plaintiff worked for various periods, that this was contrary to the existence of aggravation from work. To the contrary, the plaintiff's complaints and incidents of hip difficulties in December, 2000 and in 2001 are consistent with the aggravation claimed.

42 Further the plaintiff's evidence – which I accept - was that he “did not recover” after the episode in late December, 2000/ early 2001 “and the problems in my left hip continued and gradually worsened. My hip continued to be aggravated by my work.”⁶

43 Accordingly, I find that there was aggravation of the plaintiff's degenerative hip condition by reason of his employment from 20 October, 1999.

44 Further that, having regard to the condition of the plaintiff before and after 20 October, 1999, that the permanent impairment to the hip from which the plaintiff now suffers resulted from that aggravation.

⁶ para 13 Plaintiff's affidavit

45 The question remains as to whether the consequences of that impairment are very considerable.

Pain and suffering consequences

46 The plaintiff gave evidence of his pain as indicated above (paragraph 20).

47 Mr Anderson submitted that the consequences for the plaintiff did not meet the "very considerable" test which was a strict hurdle. He relied, in particular, on the following:

- (a) that the plaintiff had continued to work for the defendant. Further that the plaintiff is working now full-time and with a guillotine;
- (b) that the plaintiff could sit/stand for up to 1.5 hours and was not in demoralising pain;
- (b) that the plaintiff had only been on light medication (often over the counter Panadol) and had little treatment for his condition;
- (c) that there had been infrequent visits to the doctors in relation to the hip complaint with no attendance between February, 2004 and September, 2006 for hip pain;
- (d) that the plaintiff could engage in a wide range of activities, including maintenance tasks, riding a push bike and motor bike all of which suggested a wide range of functionality.

48 In relation to (a), the plaintiff's evidence was that he's "got to work" and that he has to put up with the pain. In any event, I accept his evidence that part of the reason he left employment with Moduline was the pain even though his manager, Mr Cesarin, stated that he "gained the impression" that the plaintiff wished to stop work due to allegations of verbal abuse.⁷

⁷ Affidavit of Mr Cesarin dated 30 May, 2005

49 In terms of his recent employment, I accept that this work is different to that he was undertaking at Moduline. The plaintiff's evidence was that although he does work on the guillotine, there are two people operating the machine and the work is "light."

50 There was also other evidence supporting his claims in that his landlady, Ms Hyman attested that she was aware that he suffered a hip injury and that "it gives him a lot of trouble because he complains about it regularly and I notice also that he limps around."⁸

51 Therefore, although the plaintiff has continued to work, the evidence is consistent with his complaints of pain. Further, I consider that pain may be very considerable even though a person can tolerate pain and can stand/sit for 1.5 hours.

52 In relation to the infrequent visits to the doctors and the lightness of medication, I further accept counsel for the plaintiff's submission that there was very little more that could be done for the plaintiff in the way of treatment other than the hip replacement surgery which the medical evidence suggested was to be deferred, in all the circumstances, as long as possible.

53 Finally, in terms of the range of activities, the plaintiff should not be criticised for trying to ride his bike daily to keep the muscles strong in his legs or for helping his landlady. Stoicism does not mean an absence of considerable pain.

54 The plaintiff's evidence, which I accept, is that the pain is "constant," and "increasing throughout the day." Further, his symptom have been "gradually increasing over time."

55 I find that the impairment he suffers is very considerable having regard to the consequences to the plaintiff of the impairment to his left hip when judged by

⁸ Affidavit of Ms Hyman, dated 12 May, 2006, para 4

comparison with other cases in the range of possible impairments.

Conclusion

- 56 I find that there is a compensable injury being aggravation of a pre-existing degenerative hip condition arising out of or in the course of, or due to the nature of employment from 20 October, 1999.
- 57 I find that there is permanent impairment to the plaintiff's hip resulting from that compensable injury.
- 58 I find that the consequences of that impairment are serious in that the consequences for the plaintiff in terms of pain and suffering are very considerable.
- 59 Accordingly, I find that the plaintiff has suffered a serious injury as defined with respect to pain and suffering.
- 60 There will be leave to bring proceedings pursuant to Section 134AB for the recovery of damages for pain and suffering only.